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REPUBLIC OF KENYA

HARAMBEE

Paper laid by Hon. Adan Keynan, MP, Chairperson, Public Investments Committee on 14/6/2017 (pm)

THE NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT– FIFTH SESSION

Directorate of Committee Services

THE PUBLIC INVESTMENTS COMMITTEE

SPECIAL REPORT ON THE INQUIRY INTO THE COMPLETION OF THE NATIONAL SOCIAL SECURITY FUND'S HAZINA TRADE CENTRE OFFICE TOWERS PROJECT AND IMPLEMENTATION OF THE PROPOSED JOINT VENTURE PROPERTY DEVELOPMENT ON KENYATTA AVENUE IN THE NAIROBI CENTRAL BUSINESS DISTRICT AND MAVOKO SUB COUNTY IN MACHAKOS COUNTY

JUNE, 2017

Table of Contents

LIST OF ABBREVIATIONS AND ACRONYMS

AIA	-	Adventis Inhouse Africa Limited
BQ	-	Bills of Quantity
Cap.	-	Chapter
CBD	-	Central Business District
CS	-	Cabinet Secretary
CO. LTD.	-	Company Limited
COTU	-	Central Organisation of Trade Unions
EIA	-	Environmental Impact Assessment
EOI	-	Expression of Interest
KES	-	Kenya Shillings
MLSSS	-	Ministry of Labour, Social Security & Services
MD	-	Managing Director
MT	-	Managing Trustee
NCC	-	Nairobi City Council
NCCG	-	Nairobi City County Government
NEMA	-	National Environmental Management Authority
NSSF	-	National Social Security Fund
PPARB	-	Public Procurement Administrative Review Board
PPD Act	-	Public Procurement and Disposal Act
PPOA	-	Public Procurement Oversight Authority
PPP	-	Public Private Partnership
PPPU	-	Public Private Partnership Unit
PS	-	Principal Secretary
RBA	-	Retirement Benefits Authority
RFP	-	Request for Proposals
SDPW	-	State Department of Public Works
T & A	-	Tana & Associates

1.0 CHAIRMAN'S FOREWORD

The Public Investments Committee is established pursuant to Standing Order No. 206 and is responsible for the examination of the working of public investments.

Committee Mandate

The Committee is mandated to: -

(a) Examine the reports and accounts of the public investments;

(b) Examine the reports, if any, of the Auditor-General on the public investment;

(c) Examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices.

The procedure of a Select Committee and other related matters thereto is covered under Standing Order No. 173–203. The Committee has powers, under Article 125 of the Constitution, National Assembly Powers and Privileges Act (Cap. 6), the State Corporations Act (Cap. 446) and the Public Audit Act, 2003, to summon witnesses, examine them on oath and receive evidence.

Committee Membership

The Committee comprises the following Members: -

1. Hon. Adan Wehliye Keynan, CBS, MP - **Chairperson**
2. Hon. Anthony Kimani Ichung'wah, MP - **Vice Chairperson**
3. Hon. Francis Mwanzia Nyenze, EGH, MP
4. Hon. (Dr.) Oburu Oginga, MGH, MP
5. Hon. (CPA) Thomas Ludindi Mwadeghu, CBS, MP
6. Hon. Adan Mohammed Nooru, MP
7. Hon. Franklin Mithika Linturi, MP
8. Hon. Wafula Wamunyinyi, MP
9. Hon. Elias Bare Shill, MP
10. Hon. Sammy Silas Komen Mwaita, MP
11. Hon. (Dr.) Paul Otuoma Nyongesa, EGH, MP
12. Hon. John Olago Aluoch, MP
13. Hon. (Eng.) John Kiragu, MP
14. Hon. Dorcas Kedogo, MP
15. Hon. Abdullswamad Sheriff Nassir, MP
16. Hon. Beatrice Nkatha Nyaga, HSC, MP
17. Hon. Bernard Munywoki Kitungi, MP

18. Hon. (Dr.) Chrisanthus Wamalwa Wakhungu, CBS, MP
19. Hon. Cornelly Serem, MP
20. Hon. Eng. Stephen Ngare, MP
21. Hon. Irungu Kang'ata, MP
22. Hon. Johana Kipyegon Ng'eno, MP
23. Hon. John Muchiri Nyaga, MP
24. Hon. John Ogutu Omondi, MP
25. Hon. Korei Ole Lemein, MP
26. Hon. Mary Sally Keraa, MP
27. Hon. Onesmus Muthomi Njuki, MP

Committee Secretariat

The Committee Secretariat is comprised of the following officers: -

1.	Ms. Susan Maritim	-	First Clerk Assistant
2.	Mr. Philip Lekarkar	-	Third Clerk Assistant
3.	Mr. Mohamed Boru	-	Third Clerk Assistant
4.	Ms. Clarah Kimeli	-	Legal Counsel II
5.	Mr. Charles Atamba	-	Research Officer III

Justification for the Inquiry

This Special Report was prepared pursuant to Standing Order No. 206 which mandates the Public Investments Committee to "examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices."

The main objective of the Inquiry was to establish whether or not the National Social Security Fund managed the following capital projects in accordance with sound business principles, prudent commercial practices and public procurement laws:

i. Hazina Trade Centre Office Towers;
ii. Joint Venture Property Development on Kenyatta Avenue in Nairobi CBD and Mavoko Sub-County in Machakos County.

In preparation of the Report, the Committee heard and received both oral and written evidence from various witnesses, as indicated in Section 2.0 of this Report.

Acknowledgement

The Committee wishes to record its appreciation to the Office of the Speaker and the Clerk of the National Assembly for facilitating the work of the Committee in fulfilment of its mandate. The

Committee is also grateful to all the witnesses who appeared and adduced evidence before it. Further, the Committee is grateful to the staff of the Office of the Auditor-General, the Inspectorate of State Corporations and the National Treasury for the services they rendered to the Committee. It is their commitment and dedication to duty that made the production of this Report possible.

On behalf of the Members of the Public Investments Committee, I beg to table the Special Report on the Completion of NSSF Hazina Trade Centre Office Towers and Implementation of Proposed Joint Venture Property Development in Mavoko Sub County and Kenyatta Avenue in Nairobi CBD, pursuant to Standing Order 199.

Sign: .... **Date:** ....4-5-2016....

HON. ADAN W. KEYNAN, CBS, MP
CHAIRPERSON, PUBLIC INVESTMENTS COMMITTEE

PUBLIC INVESTMENTS COMMITTEE

ADOPTION LIST

SPECIAL REPORT ON THE COMPLETION OF THE NATIONAL SOCIAL SECURITY FUND'S HAZINA TOWERS IN NAIROBI CBD, JOINT VENTURE PROPERTY DEVELOPMENT ON KENYATTA AVENUE IN NAIROBI COUNTY AND MAVOKO SUB-COUNTY

We, the undersigned, hereby affix our signatures to this Report to affirm our approval:

DATE: 4TH MAY, 2017

	NAME	SIGNATURE
1.	Hon. Adan Wehliye Keynan, CBS, MP	
2.	Hon. Anthony Kimani Ichung'wah, MP	
3.	Hon. Francis Mwanzia Nyenze, EGH, MP	
4.	Hon. (Dr.) Oburu Oginga, MGH, MP	
5.	Hon. (CPA) Thomas Ludindi Mwadeghu, CBS, MP	
6.	Hon. Adan Mohammed Nooru, MP	
7.	Hon. Franklin Linturi Mithika, MP	
8.	Hon. Athanas Wafula Wamunyinyi, MP	
9.	Hon. Elias Bare Shill, MP	
10.	Hon. Sammy Silas Komen Mwaita, MP	
11.	Hon. John Olago Aluoch, MP	
12.	Hon. (Dr.) Paul Nyongesa Otuoma, EGH, MP	
13.	Hon. (Eng.) John Kiragu, MP	

	NAME	SIGNATURE
14.	Hon. (Eng.) Stephen Ngare, MP	
15.	Hon. Abdullswamad Sheriff Nassir, MP	
16.	Hon. Beatrice Nkatha Nyaga, HSC, MP	
17.	Hon. Bernard Munywoki Kitungi, MP	
18.	Hon. Chrisanthus Wamalwa, CBS, MP	
19.	Hon. Cornelly Serem, MP	
20.	Hon. Dorcas Kedogo, MP	
21.	Hon. Irungu Kang'ata, MP	
22.	Hon. Johana Kipyegon Ng'eno, MP	
23.	Hon. John Muchiri Nyaga, HSC, MP	
24.	Hon. John Ogutu Omondi, MP	
25.	Hon. Korei Ole Lemein, MP	
26.	Hon. Mary Sally Keraa, MP	
27.	Hon. Onesmus Muthomi Njuki, MP	

2.0 EXECUTIVE SUMMARY

The main objective of the Inquiry was to establish whether or not the implementation of Hazina Trade Centre Office Towers and Proposed Joint Venture Property Development in Mavoko Sub County and Kenyatta Avenue in the Nairobi CBD were managed in accordance with sound business principles, prudent commercial practices and public procurement laws.

The Committee held several sittings in which it closely received and examined evidence from the following witnesses: -

(i) *Amb. Raychelle Omamo – former Ag. Cabinet Secretary, Ministry of Labour, Social Security and Services;*

(ii) *Hon. Kazungu Kambi- Former Cabinet Secretary, Ministry of Labour, Social Security and Services;*

(iii) *Mr. Ali Noor Ismail – former Principal Secretary, MLSSS;*

(iv) *Mr. Alex Kazongo, former NSSF Managing Trustee;*

(v) *Mr. Tom Odongo, former NSSF Managing Trustee;*

(vi) *Mr. Richard Lang'at, former NSSF Managing Trustee;*

(vii) *Current NSSF Management led by Dr. Anthony Omerikwa, Acting Managing Trustee;*

(viii) *Hon. Daniel Ndambuki - current NSSF Board of Trustee Chairman;*

(ix) *Mr. Adan Daud Mohammed - former NSSF Board of Trustee Chairman;*

(x) *Mr. Francis Atwoli – NSSF Trustee;*

(xi) *Mr. Salmann Hameed - Partner, Salmann Mruttu*

(xii) *Hazina Project Consultants: Mr. Patrick Tana Mutisya, Eng. David Maganda and Mr. James Kisa;*

(xiii) *Mr. Maurice Juma – Director General, Public Procurement Regulatory Authority;*

(xiv) *Hazina Trade Centre Office Towers Project Bidders: Cementers Ltd., FUBECO Ltd., N.K Brothers Ltd., China Wu Yi Co. Ltd., Parbat Siyani Construction Co. Ltd.;*

(xv) *China Jiangxi Ltd. – Contractor, Hazina Trade Centre Office Towers Project;*

(xvi) *Mr. Atul Shah - Nakumatt Holdings Ltd.;*

(xvii) *Nairobi County Government;*

(xviii) *Prof. Geoffrey Wahungu – Director-General, NEMA;*

(xix) *Adventis Inhouse Ltd. – Consultant for Mavoko and Kenyatta Avenue Joint Venture Projects; and*

(xx) *Sinohydro Tianjin Ltd. and Reverof Consult - Mavoko & Kenyatta Avenue Project bidders.*

The Committee also conducted a site visit to Hazina Trade Centre Office Towers Project in the Nairobi Central Business District, currently under development.

The records of evidence adduced, documents and notes received by the Committee form the basis of the Committee's General Observations and Recommendations as outlined in this section and Section 5.0 of this Report. These observations and recommendations, if taken into account and implemented, will enhance accountability, effectiveness, transparency, efficiency, prudent investment and financial management in state corporations.

GENERAL OBSERVATIONS ON THE NSSF HAZINA TRADE CENTRE OFFICE TOWERS PROJECT IN THE NAIROBI CENTRAL BUSINESS DISTRICT

The Committee made the following General Observations: -

(i) **THAT,** the procurement process for the completion of the NSSF Hazina Trade Centre Office Towers in Nairobi Central Business District was shrouded in opaqueness and as such, the process lacked fairness, equity, transparency and competitiveness.

(ii) **THAT,** approval for the project from the then Nairobi City Council was conducted before the full scope of the project was determined to establish traffic management master plan, public safety environmental and social risks the project poses to businesses operating within the vicinity, neighbouring buildings and streets due the nature of the site.

(iii) **THAT,** there was an oversight in renewal of the building plan approvals and extension of the National Environment Management Assessment Authority (NEMA) licence, in that, renewals were undertaken without appropriate validation of the Environmental Impact Assessment and traffic study report. This means that urban development changes that have taken place over the period which have a bearing on the proposed development in as far as planning and environmental acceptability is concerned, were not reviewed and taken into consideration.

(iv) **THAT,** Mr. Alex Kazongo, the former Managing Trustee reappointed the consultants on 1st December, 2010 without subjecting them to a competitive procurement process. The reappointment letters referred to a project which had commenced but stalled twelve years earlier. This was in total disregard of Articles 3 and 227 of the Constitution and the Public Procurement and Disposal Act 2005.

(v) **THAT,** the revival and the enhancement of the Hazina Trade Centre Office Towers Project in the year 2013 should have been treated as a new contract and thus subject to the Public Procurement and Disposal Act, 2005. The re-engagement of the Project Consultants from the original project to oversee the enhanced Hazina Tower Project, therefore, was in breach of the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006.

(vi) **THAT,** China Jiangxi International Ltd. was found to have made an arithmetic error of KES 115,329,300 in its financial bid. The Company accepted the arithmetic error and consequently adjusted their tender sum upwards from KES 6,599,888,888 to KES 6,715,218,188. NSSF informed China Jiangxi about the arithmetic error after the evaluation process and not before, contrary to Section 63 of the PPDA 2005 and clause 5.7, Instruction to Bidders, in the bid document.

(vii) **THAT,** the financial evaluation of the tender for the completion of the NSSF Hazina Trade Centre Office Towers was not carried out by an Evaluation Committee established in accordance with Regulation 16(7) of the Public Procurement and Disposal Regulations, 2006. This is evidenced by a letter Ref. No. TA/454/13 from Tana & Associates dated 7th February, 2013 forwarding the financial evaluation report. In addition, the unsigned report did not recommend which firm was to be awarded the tender although from the Report, China Jiangxi International (K) Ltd. was the lowest evaluated bidder even after correcting the arithmetic error of KES 115,329,300.

(viii) **THAT,** the successful bidder repeated provisional sums for some un-quantified works in the Bill of Quantities (BQ) in its financial bid documents. For example, in the BQ for sub contract for mechanical ventilation and air conditioning installation, which tellingly the Fund failed to subcontract against the mandatory tender requirements, the following provisional sums were provided:

(a) PC for Plenum Chamber and associated works = KES 5,000,000

(b) PC for basement fans automation = KES 5,000,000

(c) Provisional Sum for contingency sum = KES 2,000,000

Still in the same BQ the Company included the following provisional sums: -

(a) *Provided the sum of KES 80,000,000 to cover the cost of mechanical builders in plenum chambers, fans in basement and services refurbishment and interconnection.*

(b) *Under the subcontract for mechanical ventilation and air conditioning, China Jiangxi International (K) Ltd. was the sub-contractor at KES 33,973,867 which included provisional sums of KES 5,000,000; KES 5,000,000; and KES 2,000,000*

(c) *The total tender sum of KES 6,715,218,488 awarded to China Jiangxi International (K) Ltd. included all these provisional sums listed above that is KES 80,000,000; and KES 2,000,000.*

This double provision may have significantly escalated the cost of the project and loss of funds, and the Fund, therefore, stands to lose funds through double counting.

(ix) **THAT,** China Railways No. 5 Engineering Group Co. Ltd. and China Wu Yi Ltd. did not provide Certificate of Incorporation which was a mandatory requirement, but were considered responsive during preliminary evaluation against the provisions of Section 64(1) of the Act. The failure to disqualify the two firms was inconsistent with Regulation 48(1) of the PPDR 2006 and this may have been done to make the process appear competitive. The procuring entity did not correct errors noted in the financial bid of the successful bidder in accordance with Section 63 of the Act and clause 5.7, Instruction to Bidders, in the bid document.

(x) **THAT,** the Evaluation Committee failed to adhere to the provisions of Section 64(1) of the Act by not considering the audited accounts of the joint venture partners (sub-contractors) of the winning bid and in consequence made the Company responsive.

(xi) **THAT,** the Fund failed to put in place satisfactory mitigation measures during the construction of the Hazina Office Towers and as a result the Nairobi City County issued an order putting in abeyance the proposed development of the office towers from July 2013 to December 2013.

(xii) **THAT,** the Nairobi City County Government approved the building plan for the enhanced project subject to vacation by all existing tenants including the main tenant Nakumatt Holdings Ltd. This is bound to attract compensation claims for loss of business and breach of an existing 20-year lease tenancy agreement entered into by the Fund (lessor) and Nakumatt Holdings Ltd. (lessee).

(xiii) **THAT,** Nakumatt Holdings Ltd has sued the Fund vide Milimani Land Case No. 1170 of 2014 for among others, seeking to restrain NSSF from continuing with construction of Hazina Trade Centre Office Towers until all the contentious issues are settled including compensation for loss of business amounting to KES1.6 billion. This negates the very objective for which the project was conceived, which is, return on investments for its members.

(xiv) **THAT,** the NSSF may not realize value for money owing to the delay in completing the Project, which will likely attract claims from the Contractor. Further, should the Fund abandon strengthening of the columns as per State Department of Public Works' advice, the Fund will have made a loss of KES 244,728,603, which is 3.6% of the tender figure of KES 6,715,218,488. The amount already spent on column strengthening is KES 192, 925,750.00. The remaining column strengthening works amounts to KES 51,802,853.

(xv) **THAT,** on governance matters, the Fund has had a high turnover of Managing Trustees. For instance, between the years 2010 and 2017, the Fund has had five (5) Managing Trustees managing the Fund. This high turnover affected the effective implementation of various projects including the Hazina project.

GENERAL OBSERVATIONS ON THE JOINT VENTURE PROPERTY DEVELOPMENT IN MAVOKO SUB-COUNTY AND KENYATTA AVENUE (NAIROBI CBD)

a) The Joint Venture Property Development in Mavoko Sub-County

The Committee made the following general observations:

(i) **THAT**, there is disparity in acreage of land for the proposed project development. According to PPOA, 960 acres are available while NSSF informed the Committee that 1,010 acres are available. It's not clear what the true position is and this also has a bearing on the value of the exact land available for development.

(ii) **THAT**, the Fund's Mavoko land is an expansive parcel of land which has been lying idle since 1993 when it was acquired and there are fears of encroachment by squatters. In 2010, the Board, while reviewing its idle assets and upon the recommendation of management, decided to tender for Expression of Interest from international bidders seeking optimal use of the land.

(iii) **THAT**, the Board of Trustees approved the development of the land through a joint venture scheme, whereby NSSF was to contribute land (10%) while the winning bidder would inject cash (90 %) necessary to build 20,000-30,000 houses with amenities targeting (lower) middle class owners. The profit from this development would be shared proportionately to capital contribution.

(iv) **THAT,** the procuring entity was advised by PPOA that the original tender was invalidated by enactment and implementation of the Public Private Partnership (PPP) Act, 2013, and the law cannot, therefore, be applied retrogressively. Despite the advice, the Fund proceeded to invite for new tenders through restricted tendering method using the list of the bidders of the lapsed tender. It was improper for the Fund's Tendering Committee to use a list of bidders who responded to a terminated tender. The Fund should have instead conducted the re-tendering process through open tendering.

(v) **THAT,** further, the Cabinet approval on the project was a policy decision, but not necessarily an approval of procurement and compliance to procurement regulations by the contracting entity.

(vi) **THAT,** the tender was terminated on 13th May, 2015 owing to negative publicity surrounding it. The termination was done in accordance with section 36(1) of the Public Procurement and Disposal Act, 2005 on recommendation of the Tender Processing Committee.

(vii) **THAT,** although the tender was cancelled, public funds were spent in the procurement process of the joint ventures as well as in advertisements to cancel the tender.

(b) Kenyatta Avenue (Nairobi CBD)

The Committee made the following observations:

(i) **THAT**, the Fund planned to undertake a development on 3.6 acres of land it owns along Kenyatta Avenue in Nairobi Central Business District in order to improve returns on investment. Currently, the piece of land is not optimally utilized other than capital appreciation.

(ii) **THAT,** the development was approved by the Board's Operation and Investment Committee in its 13th meeting held on 31st August, 2010.

(iii) **THAT,** International Request for Proposals (IRFP's) No. 8/2013 – 2014 for Joint Venture Property Development in CBD was advertised on 22nd October, 2013.

(iv) **THAT**, the closing and opening of the IRFPs for the project was successfully concluded on 22nd April, 2014, two firms responded. Following the implementation of the PPP Act, 2013, the Fund sought clarification from the Public Private Partnership (PPP) Unit on whether the Kenyatta Avenue project as originally conceptualized fell under the PPP arrangement.

(v) **THAT,** the tender was terminated on 13th May, 2015 owing to negative publicity surrounding it. The termination was done in accordance with section 36(1) of the Public Procurement and Disposal Act, 2005 on recommendation of the Tender Processing Committee.

(vi) **THAT,** the Cabinet approval on the project was a policy decision, but not necessarily an approval of procurement and compliance to procurement regulations by the contracting entity.

(vii) **THAT,** although the tender Kenyatta Avenue was cancelled, public funds were spent in the procurement process of the project as well as in advertisements to cancel the tender.

COMMITTEE GENERAL RECOMMENDATIONS

From the evidence adduced (oral and written) and the observations made, the Committee makes the following recommendations:

(i) **THAT,** the Ethics and Anti-Corruption Commission investigates the conduct of Mr. Alex Kazongo, the former Managing Trustee for contravention of Section 74 of the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006 in the re-appointment of the Project Consultants for the revived Hazina Trade Centre Office Towers project. This re-appointment of consultants is tantamount to direct procurement.

The Ethics and Anti-Corruption Commission to report to the National Assembly, the implementation status of this recommendation, not later than six (6) months after the adoption of this Report;

(ii) **THAT,** the Fund and all State Corporations in general, must strictly adhere to the requirements of the Constitution of Kenya, the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act, 2012 in the implementation of projects. Sufficient due diligence should be carried out prior to project implementation to avoid claims and losses that may accrue from interrupted implementation, similar to the

Hazina Trade Centre Office Towers Project, for which Nakumatt Holdings Ltd. is claiming KES 1.6 billion for losses incurred through breach of contract;

(iii) **THAT,** the Cabinet Secretary, Ministry of Transport, Infrastructure, Housing and Urban Development should urgently convene a meeting of all relevant stakeholders to agree on the structural viability of the Hazina Trade Centre project and its completion at minimum cost within the stipulated timelines.

The Cabinet Secretary, Ministry of Transport, Infrastructure, Housing and Urban Development to report to the National Assembly, the implementation status of this recommendation, not later than three (3) months after the adoption of this Report;

(iv) **THAT,** the impasse between NSSF and Nakumatt Limited ought to be urgently resolved in the interest of the public, to allow for completion of the project.

The Managing Trustee, NSSF to report to the National Assembly, the implementation status of this recommendation, not later than three (3) months after the adoption of this Report;

(v) **THAT,** in future, the Fund should conduct a feasibility study on capital projects to determine the viability of the investments before commencement of the projects;

(vi) **THAT,** the Fund should urgently secure its property in Mavoko to avoid encroachment by private developers;

(vii) **THAT,** to mitigate against the high turnover of Managing Trustees, the NSSF Act should be amended with a view to improving the governance structure of the Fund and provide for security of tenure for the Managing Trustee.

Conclusion and Way Forward

Taking into account the inordinate delay to complete the Hazina Trade Centre Office Towers project, the opportunity cost, contractual obligations and the colossal amount of funds already spent on the Project, **the most prudent and reasonable way-forward for the project is for all the concerned parties including the National Social Security Fund, the Ministry of EAC, Labour and State Protection, the Ministry of Transport, Infrastructure, Housing and Urban Development, the Nairobi City County Government, the Project Consultants and Nakumatt Holdings Limited, to urgently address the contentious issues hindering completion of the Project. This will create a conducive environment for the contractor to**

meet his contractual obligations as per the contract and ensure that the Project is completed as envisaged and pensioners obtain value for their money.

3.0 INTRODUCTION

Background of NSSF

The National Social Security Fund (NSSF) was established in 1965 through an Act of Parliament Cap 258 of the Laws of Kenya. The Fund initially operated as a Department of the Ministry of Labour until 1987 when the NSSF Act was amended, transforming the Fund into a State Corporation under the Management of Board of Trustees.

The Fund was established as a mandatory national scheme, whose main objective was to register members, receive their contributions, manage the funds prudently and provide basic financial security benefits to members upon retirement or pay out benefits to eligible members. The Fund was set up as a Provident Fund providing benefits in the form of a lump sum.

At inception, the Fund operated as a government department under the Ministry of Labour. However, as its membership grew and the operations became complex, the NSSF Act was amended in 1987 to transform NSSF into a State Corporation under a Board of Trustees who provide policy and oversight role while and a Managing Trustee.

The National Social Security Fund Act No. 45 of 2013 was assented by the President of the Republic of Kenya on 24 December 2013 and came into force on 10th January 2014. The Act is meant to provide social security for workers and self-employed persons and their dependents.

The Act establishes two Funds, namely, the Pension Fund and the Provident Fund, to provide for contributions to and payment of benefits out of the Funds.

The Fund operates under a Board of Trustees comprising of the following:

a) *The Chairperson appointed by the Cabinet Secretary, Ministry of Labour, Social Services and Security from amongst the Trustees;*
b) *The Principal Secretary responsible for matters relating to finance;*
c) *The Principal Secretary in the Ministry for the time being responsible for matters relating to social security;*
d) *Seven (7) persons appointed by the Cabinet Secretary as follows:*
(i) *Two persons, one of whom shall be of opposite gender, nominated by the most representative employers' organization with knowledge and experience in matters relating to employers to represent employers in Kenya;*

(ii) Two persons, one of whom shall be of opposite gender, nominated by the most representative workers' organization by virtue of their knowledge and experience in matters relating to employees to represent employees in Kenya

(iii) Three persons, one of whom shall be of opposite gender, not being public officers nor employees or directors of any public company, appointed by the Cabinet Secretary by virtue of their knowledge and experience in matters relating to administration of scheme funds, actuarial science, insurance, accounting and auditing or law;

(iv) The Managing Trustee is an ex-officio member.

4.0 EVIDENCE AND SUBMISSION BY WITNESSES

4.1 SUBMISSION BY MR. ALEX KAZONGO, FORMER MANAGING TRUSTEE (2009-2012)

Mr. Alex Kazongo, former NSSF Managing Trustee, appeared before the Committee on 2nd September, 2015 to adduce evidence on his role as Managing Trustee in implementation of NSSF development projects namely Hazina Trade Centre Office Towers, Mavoko and Kenyatta Avenue Joint Venture Projects.

He informed the Committee THAT –

1. He was the Fund's Managing Trustee between May 2009 and February 2012.
2. When he joined the Fund in 2009, the Fund was already in the process of re-evaluating its idle assets and stalled projects among them, Mavoko, Kenyatta Avenue and Hazina Trade Centre Office Towers. He was appointed against a backdrop of the Fund's reforms agenda intended to enhance its productivity and public stature. The reviews and activities were deemed necessary to enhance cash flow and return on investment of the Fund.
3. Mr. Kazongo left the Fund after he failed to attain the requisite seventy (70%) pass mark in a performance appraisal conducted by the Board. His contract was not renewed.

4.1.1 Hazina Trade Centre Office Towers Project

4. The Hazina Trade Centre Office Towers originally designed in 1994 to reach twenty-four (24) storeys on plot no. 209/6708, was restructured in 1998 to only eight (8) floors (4 basements, 2 mezzanines, ground and 1st floor) due to cash flow constraints then facing NSSF.

5. The construction was undertaken by Mavji Construction Co. Ltd. under Salmann Mruttu & Associates as the Project Architects. Upon completion in 2003, the building was leased to Nakumatt Holdings Ltd. for twenty (20) years.

6. When the Fund's liquidity improved in 2009, the Board, upon the recommendation of consultants and management, decided to revive the project in order to enhance its return on investment.

7. It was the Board's decision to re-appoint the Consultants in 2010, having been prequalified by the Fund in 1998. Management only implemented the decision after consulting Public Procurement Oversight Authority on the matter. *(Mr. Kazongo however did not present any evidence to support this position.)*

8. In the re-evaluation process, it transpired that the Project could be elevated by several floors to thirty (34) storeys with twin towers to achieve its peak design, giving fourteen (14%) return on investment and payback period of thirteen (13) years as detailed in the feasibility report by the Consultants. Necessary approvals from relevant authorities, including City Hall and NEMA were then sought. Specifically, NEMA license No. 009531 dated 20th September, 2011 and Building Plan Renewal by City Hall dated 9th March, 2011, were obtained.

9. Nakumatt Holdings Ltd. was consulted from the beginning in 2011, when the completion of Hazina Trade Centre Office Towers was decided upon. Initially, Nakumatt Holdings Ltd. had no objections, with their main condition being that the project could proceed as long their business is not interrupted. It however appears they changed their mind and have hardened their stand, resulting in a court case.

10. After factoring adequate budgetary allocations for the project in 2010/2011, the Fund proceeded to tender for the Project, under competitive bidding. The tender (No. 14/2010-11) was evaluated and awarded to Cementers Ltd., being the lowest evaluated bidder at KES 5.99 billion. Total cost estimate for the project was KES 6.5 billion.

11. The award was, however, challenged by two bidders, namely China Jiangxi Ltd. and China Wu Yi Ltd., citing mainly the technicality in the registration and evaluation of their sub-contractors (under self-nomination).

12. Mr. Kazongo left NSSF in February 2012 before the appeal was concluded. He later learnt that the Public Procurement Appeals & Review Board ruled that the tender be re-

advertised. He further gathered that Cementers Ltd. went to court but lost. The tender was eventually awarded to China Jiangxi Ltd. on 26th February, 2013.

13. Prior to the Hazina Project, the Company had earlier been commissioned to undertake Nyayo Estate Embakasi Phase 4 & 5 in 2010 through competitive bidding.

4.1.2 Mavoko Joint Venture Property Development

1. The Fund's Mavoko land is an expansive parcel of land of approximately 1,100 acres. The land had been lying idle since 1993 when it was acquired and there were real fears of encroachment by squatters as at 2009.
2. In 2010, the Board, while reviewing its idle assets and upon the recommendation of Management, decided to tender for Expression of Interest from international bidders seeking optimal use of the land.
3. Nine (9) bids under Tender No. 5/2010-11 were obtained and the Fund settled on Ms. Adventis Inhouse Africa Ltd., proposing to develop the land through a joint venture scheme, whereby NSSF was to contribute land (10%) while the winning bidder would inject cash (90 %) necessary to build 20,000-30,000 houses with amenities targeting (lower) middle class owners. The profit from this development would be shared proportionately to capital contribution.
4. While evaluating the concepts, the Board was cognizant of restrictions placed by the Retirement Benefits Authority rules, whereby the maximum investment in real estate was limited to 30% of the Fund's total investments. This meant that the Fund could hardly contribute more than the value of Mavoko land; then estimated at KES 3 billion, as the Fund was already fast approaching the RBA limit.
5. The ratio of its property assets to total assets was 29% as at June 2010. This ratio would ease once the houses were sold as intended.
6. Since the Project was estimated to cost more than US$10 million and fell under the definition of Public Private Partnerships (PPP), the Board directed that a suitable Cabinet Paper be prepared for onward presentation to the Cabinet for their approval.
7. Mr. Kazongo exited NSSF in February 2012 before the Cabinet Paper was finalised and tabled before Cabinet for approval. He later learnt that the Cabinet approval was obtained on 26th August, 2013, which increased the units to 60,000.

4.1.3 Kenyatta Avenue (Nairobi CBD) Joint Venture Property Development

On Kenyatta Avenue Joint Venture Property Development, Mr. Kazongo informed the Committee THAT –

8. The Kenyatta Avenue plot measuring 3.6 acres (1.4 ha) was sold and transferred to Delta Square Ltd. whose sister company, Delta Resources Ltd., paid 10% of total sale amounting to KES 1.375 billion in January, 2008. The balance (90%) was deposited at CFC's Escrow Account maintained by the Fund's lawyers.
9. The buyers later disputed the sale and wanted price reduction arguing that the actual size on the ground was smaller than shown in the Title Deed. The Fund declined their request, citing exhaustive due diligence and took the matter to court. The Fund won the case in 2010 and the Title duly reverted to it.
10. Upon the recommendation of the Management, the Board resolved to put the plot to its optimal use by inviting suitable development concepts from international bidders under tender No. 5/2010-11.
11. Seven (7) bidders submitted their Expressions of Interest which were evaluated by the Fund. The Board settled on high-end mixed urban commercial development with a conventional centre proposed by Adventis Inhouse Africa Ltd.
12. The Project was, however, subject to the provisions of PPP which requires Cabinet approval, and RBA 30% limitation on property investment.
13. On RBA limitation, the Board ear-marked View Park Towers and Hazina Plaza along Uhuru Highway for disposal. It will be recalled that NSSF was already nearing the Retirements Benefits Authority limit and any significant additional investment in property would definitely upset the limit, if the two properties were not sold to pave way for new construction. Moreover, the new Hazina Trade Centre Office Towers would add another KES 6 billion to the property portfolio upon completion.
14. The Fund's Management, together with a consultant, prepared the Concept Paper on Mavoko Joint Venture Project, which was tabled before the Board, who then approved a feasibility study to be done. The Mavoko land was valued at 10% of the entire estimated project amount of KES 30 billion. It was the Board's decision for NSSF to contribute the land, while the developer contributes 90% of the project cost.

15. Mr. Kazongo exited NSSF in February 2012, before the Cabinet Paper was finalised and submitted for approval. Also, the two properties along Uhuru Highway earmarked for disposal, were still awaiting the conclusion of documentation for open tender.

Specific Observations

The Committee made the following Observations: - THAT

(i) NSSF, during Mr. Kazongo's tenure as Managing Trustee re-appointed Consultants who had been prequalified ten (10) years earlier for completion of Hazina Trade Centre Towers, without subjecting them to an open tendering process as the procurement law requires.

(ii) Article 226(5) of the Constitution is explicit on personal liability for any loss(es) occasioned by a public officer, whether the person remains the holder of the office or not. Mr. Kazongo should therefore be held responsible for the loss occasioned to the Fund through flouting of the procurement law and Art. 226(5) of the Constitution.

4.2 SUBMISSION BY MR. TOM ODONGO, FORMER MANAGING TRUSTEE (2012-2013)

Mr. Tom Odongo, former NSSF Managing Trustee appeared before the Committee on 21st May, 2015 to adduce evidence on his role as Managing Trustee in implementation of NSSF development projects namely Hazina Trade Centre Office Towers, Mavoko and Kenyatta Avenue Joint Venture Projects.

He informed the Committee THAT –

1. He joined NSSF in October 2009 as Investments General Manager, following a competitive interview conducted by PricewaterhouseCoopers (now trading as pwc).

2. He was appointed to the position of Managing Trustee in November, 2012 after a competitive interview process conducted by the Board of Trustees, following the sacking of the former Managing Trustee Mr. Alex Kazongo.

3. He served as the Managing Trustee for a period of nine (9) months until 22nd July 2013 when he was dismissed from service vide letter Ref: ML/20/3A/Vol. III by the Cabinet Secretary (CS) for Ministry of Labour, Social Security and Services, Hon. Kazungu Kambi. He was neither given a show cause letter nor offered any reasons for termination of his services by the CS.

4. Following his dismissal for unexplained reasons, he moved to court seeking to stop the recruitment of his replacement and to be reinstated by the Board, stating that the decision by the CS was arbitrary and did not involve the Board of Trustees, to whom he was answerable to as the Managing Trustee.

5. By the time of going to court, the Board had already appointed his successor. The Cabinet Secretary's lawyers approached him and requested for an out of court settlement, to which he agreed to. He was paid a year's salary for wrongful dismissal.

4.2.1 Hazina Trade Centre Office Towers Project

6. The Project was conceived in 1994 before he joined the Fund and was abandoned in 1998 due to financial challenges.

7. In 2010, the Board of Trustees directed that the office tower should be completed in order to enhance the viability of the building. A team of Project Consultants, led by Mruttu Salman & Associates, were re-commissioned with instructions that they should explore possibilities of improving the building designs in order to maximize the projects viability. **(Annex 1)**

8. The following were the appointed Project Consultants: -

(i)	Mruttu Salmann	- Project Architects
(ii)	Tana& Associates	- Project Quantity Surveyors
(iii)	Abdul Mullick & Associates	- Structural/Civil Engineers
(iv)	Kisa & Partners	- Electrical & Mechanical Engineers

9. The Consultants designed a twin tower office block comprising of 34 floors and 40 metres communication mast, with a total area 41,800 square metres or 418,000 square feet and height of 200 metres. This makes it the highest building in East and Central Africa and the 3rd highest in Africa. In order to enhance the structural stability for the building the existing columns will be strengthened with carbon fibre wrap.

10. A detailed feasibility study report was submitted by the consultants to the Board in 2011 with the following estimates **(Annex 2)**:

(i)	Cost estimate	- KES 6.63 billion
(ii)	Returns on investment per annum	- 14 %
(iii)	Payback period	- 13 years

11. The Board of Trustees approved the project to be implemented, based on the feasibility study viability. Management implemented the decision by advertising for Tender No. 14/2010-2011.

12. The following firms submitted their tenders with details as follows: -

Bidder No.	Bidder's Name	Bid Sum (KES)	Delivery Period
1	China Jiangxi Int. Ltd.	6,236,557,784	156 weeks
2	EPCO Builders	6,497,116,084	160 weeks
3	FUBECO (China Fushun)	6,354,016,059	140 weeks
4	Cementers Ltd.	5,997,711,380	170 weeks
5	Sichuan Huashi Enterprises	6,439,171,049	139 weeks
6	Tulsi Construction Co.	6,720,527,089	190 weeks
7	Seyani Brothers Co. Ltd.	6,731,607,984	212 weeks
8	N. K Brothers	6,313,909,101	199 weeks
9	China Wu Yi Co. Ltd.	5,715,752,876.73	130 weeks
10	Parbat Siyani Construction Co. Ltd.	5,951,291,730	159 weeks

13. After evaluation of the bids, the tender was awarded to **M/s. Cementers Ltd.,** who was the lowest evaluated bidder at **KES 5,997,711,380** and a contract period of **170 weeks**. However, 2 bidders appealed at the Public Procurement Appeals and Review Board (PPARB), who directed that the tender should be repeated.

14. The bidder who had won the tender, M/s. Cementers Ltd., was not satisfied with the judgment and proceeded to court to appeal against the judgment by PPARB. The case took more than one year to conclude and in December, 2012 the court upheld the decision of the Appeals Board and the Fund complied with the directive.

Re-tendering

15. Immediately after the judgment the Fund instructed the consultant to confirm the validity of cost estimate. The consultant revised the cost to be KES 7.3 billion. The Fund then proceeded to retender the Project and the opening results of the tender were as follows:

16. The procurement was an open tender that was advertised in the dailies, Nation and Standard on 9th January 2013 **(Annex 3)** and closed on 30th January 2013 at 11:00am. NSSF used a two-envelope system in which the technical documents were opened on the materials date.

The following six firms responded to the tender: -

Bidder No.	Bidder's Name
1	Sinohydro Corporation Ltd.
2	China National AERO Technology
3	China Railway No. Engineering Group Co. Ltd.
4	China Jiangxi Int. Ltd.
5	EPCO Builders Ltd.
6	Parbat Siyani Construction Co. Ltd.
7	China Wu Yi Co. Ltd.

17. According to the Evaluation Report, the tender evaluation was done in three stages, preliminary, technical and financial, by a committee of four evaluators. Preliminary evaluation of the tender was based on the conditions stated in the advertisement notice and the bid documents issued to the bidder. Three firms, China National Aero-Technology International Corporation; China Jiangxi International (K) Limited and China Wu Yi Ltd. met all the conditions.

18. Technical evaluation was carried out using the criteria stipulated in the bid documents. The cut off mark for the bidder to move to the financial evaluation, the next stage, it must score at least 80%. Only two bidders, China National Aero – Technology International Corporation, and China Jiangxi International (K) Limited, qualified.

19. The financial bids were opened on 5th February, 2013 by a committee of five officers and witnessed by the two bidders' representatives. The financial bids were as follows:

   (i) China National Aero–Technology International Corporation KES 6,741,174,428

   (ii) China Jiangxi International (K) Limited – KES 6,599,888,888.

20. It was noted that the financial evaluation of the tender was not carried out by an evaluation committee established in accordance with Regulation 16 (7) of the Public Procurement and Disposal Regulations, 2006.

21. A letter Ref. No. TA/454/13 from Tana & Associates dated 7th February, 2013 forwarding the financial evaluation report was evidence that the evaluation was done by Tana & Associates **(Annex 5)**. In addition, the unsigned report did not recommend which firm was to be awarded the tender although from the report, **China Jiangxi International (K) Ltd. was the lowest evaluated bidder even after correcting arithmetic error of KES 115, 329, 300.**

22. NSSF's Tender Committee awarded the subject tender in its meeting held on 11th February, 2013 to China Jiangxi International (K) Ltd., at a tender price of KES 6,599,888,888 subject to the bidder's confirmation of tender arithmetic error of KES 115,329,300.

23. China Jiangxi International (K) was notified of the tender award on 11th February, 2013 vide the NSSF's letter Ref. No. SF/A/10/16/VOLXX111 **(Annex 6)** and accepted the offer vide their letter Ref. No. CJIC/003/2013 dated 12th February, 2013 **(Annex 7)** and accepted the arithmetic error and consequently adjusted their tender sum upwards from 6, 599,888,888 to KES 6,715,218,188. This was an increment of KES 115,329,300 being the arithmetic error.

24. NSSF subsequently signed a contract dated 26th February, 2013 with China Jiangxi International (K) Ltd. at the corrected tender sum of KES 6,715,218,188 with a completion period of 155 weeks **(Annex 8)**. None of the bidders objected to the second tender.

25. The existing tenant, M/s Nakumatt Holdings Ltd., was consulted and several consultative meetings held between the Fund and themselves and it was agreed that the project proceed with minimal interruptions to the tenant.

26. The ground breaking for the Project took place on 12th July 2013 and was presided over by the CS, Ministry of Labour, Social Security and Services, Hon. Kazungu Kambi.

Committee Observations on Hazina Trade Centre Office Towers Project

The Committee observed that:

(i) Mr. Tom Odongo oversaw the procurement of the NSSF Hazina Trade Centre Office Towers Project after it was re-tendered. Appointment of the Project Consultants was done by his predecessor, Mr. Alex Kazongo.

(ii) The procurement process for the completion of the Project was fraudulent, inconsistent and in breach of the procurement laws as evidenced by the following examples:-

a. The Project Consultants were all single-sourced without justifiable reasons in contravention of Section 29 (1) of PPDA, 2005 which obligates the procuring entity to advertise tenders.

b. China Railways No.5 Engineering Group and China Wu Yi did not provide Certificate of Incorporation, which was a mandatory requirement and were responsive during preliminary evaluation against the provisions of Section 64 (1) of the Act.

c. The Company awarded the contract to China Jiangxi Int. Ltd., but did not sub-contract works as indicated in the bid document as a mandatory requirement. The Company should therefore have been disqualified at the preliminary stage.

(iii) It was illegal for the procuring entity to have signed the contract with the successful bidder China Jiangxi Int. Ltd. without having corrected the errors in accordance with Section 63 of the PPDA, 2005.

(iv) The Fund stands to lose KES 1,620,148,507.00 as compensation claim for loss of business and damages during construction as claimed by the current tenant M/s Nakumatt Holdings Ltd.

(v) If M/s Nakumatt Holdings Ltd. does not review its position on continuation of the Office Towers, development of the Project will be at stake and may lead to sinking of the pensioners' deposits worth over more than KES 6 billion.

4.2.2 Mavoko and Kenyatta Avenue Joint Venture Development Projects

Mr. Odongo informed the Committee that:

1. The Board Committee for Operations and Investments at its meeting on 31st August 2010 directed the Management to advertise international Expression of Interest (EOI) by 30th September 2010 for the proposed development of Mavoko, Kenyatta Avenue and State House/Milimani plots. The EOI 05/2010-2011 advertisements were subsequently placed in

The Daily Nation, The Standard and The Economist in October 2010, for the purposes of identifying Joint Venture Partners.

2. The EOI was then evaluated by M/s. Adventis Inhouse Africa (AIA), who was the Project Consultant, because the Fund lacked capacity to evaluate and manage projects of such magnitude.

3. Subsequently, the Fund Tender Committee (FTC) sitting on 26th May, 2011, adopted a report by AIA and approved the following firms for invitation to submit Request for Proposals (RFP):

Mavoko Project

(i) China CAMC Engineering Co. Ltd.
(ii) Housing Finance
(iii) Joel E. D Nyaseme & Associates
(iv) Africa Legend
(v) Spencon Development Co. Ltd.

Kenyatta Avenue Project

(i) China CAMC Engineering Co. Ltd.
(ii) Africa Legend
(iii) Sichuan Huashi Enterprise Corporation East Africa Ltd.
(iv) Spencon Development Co. Ltd.
(v) SIECO Ltd.

4. The Management briefed the Board of Trustees on the outcome of EOI tender and invited the consultants, M/s Adventis Inhouse Africa Ltd. to make a presentation to the Board. The Concepts were summarized and presented to the Board at a Special Board Meeting held on 10th May, 2011.

5. Approval was granted for a mixed development project for a self-sufficient independent township comprising of up to up to 30,000 housing units, inclusive of all amenities.

6. Owing to the magnitude of the Project, he as the CEO consulted widely with the National Treasury and the Fund was advised to generate a Memo for Cabinet Approval.

7. A Cabinet Memo was subsequently generated and signed by the then Minister for Labour, Hon. John Munyes on 28th January, 2013.

8. Mr. Francis Kimemia, Permanent Secretary and Secretary to the Cabinet, responded vide letter Ref: OP/CAB dated 20th May, 2013 to the Principal Secretary, Ministry of Labour. The PS forwarded the said letter to the Fund through a letter Ref: ML/HRD 2/1/A Vol. III (67) dated 3rd June, 2013. The letters informed NSSF that the approval for the projects had been deferred and since there was a new minister, the Memo was to be re-submitted for consideration by the Cabinet.

9. The tenders for Mavoko and Kenyatta Avenue Joint Venture projects were suspended on 13th May, 2014.

Specific Observations by Mr. Odongo on Mavoko and Kenyatta Avenue Projects

The Committee observed that: -

(i) Mr. Odongo conducted due diligence on the Project as evidenced by his consultations with the National Treasury and the Ministry of Labour. A Cabinet Memorandum was subsequently prepared, but the Board was advised to await a new Cabinet Secretary to re-submit the Memorandum to the Cabinet for approval.

(ii) The two tenders for Mavoko and Kenyatta Avenue Joint Venture Projects were subsequently suspended.

4.3 SUBMISSION BY MR. RICHARD LANG'AT, FORMER MANAGING TRUSTEE (2013 –2015)

Mr. Richard Lang'at, the suspended Managing Trustee National Social Security Fund appeared before the Committee on 21st July 2015 to adduce evidence on his role as the Managing Trustee in the implementation of NSSF development projects namely Hazina Trade Centre Office Towers, Mavoko and Kenyatta Avenue Joint Venture Projects.

Mr. Lang'at informed the Committee that being the then Managing Trustee, although on suspension, he was constrained to submit the same information that had been submitted by the Ag. Managing Trustee, because the same was prepared using available records at the Fund. Mr. Lang'at further informed the Committee that he acted as the Managing Trustee from 1st November 2013 until April 2014 when he was confirmed as the substantive MT.

The Committee observed that Mr. Lang'at ought to have prepared his own submission as a substantive witness.

He, however, made the following oral submission: -

1. **External interference from the parent Ministry:** Mr. Lang'at refuted claims of external interference from the Parent Ministry in the management of NSSF.
2. **The circumstances surrounding his suspension:** Mr. Lang'at informed the Committee that he was forced to step aside following the Presidential directive that anyone mentioned in the EACC Report on allegations of corruption, steps aside. He was mentioned in the report for his role in the Tassia Project.
3. **Appointment of Dr. Omerikwa as Acting Managing Trustee**: Mr. Lang'at informed the Committee that following the directive to step aside, he made arrangements for smooth handing over. Without a functioning Board in place, he wrote to the Ministry of Labour, Social Security & Services asking for a nominee to handover to, but by 30th March 2015, which was the deadline to handover, he had not received instructions from the Principal Secretary, as to whom to handover to. On 1st April 2015, Dr. Omerikwa was appointed by the Cabinet Secretary and Mr. Lang'at handed over to him.
4. **Other Projects Contracted to China Jiangxi Ltd. by NSSF:** He informed the Committee that the company has undertaken the following projects for NSSF: two Phases of Nyayo Embakasi Estate, Tassia Estate and Hazina Trade Centre Office Towers.

On Hazina Trade Centre Office Towers Project, he informed the Committee THAT –

5. The decision to revive Hazina Trade Centre Office Towers Project was made in 2010, before he took office as Managing Trustee. The Board made the decision to treat it as a continuing project although with a different contactor who was identified through a competitive tendering process.
6. The Contract for completion and increase in the number of floors at the Trade Centre was signed in early 2013, but the works on the building began in 2014. The Project temporarily stalled at 15th Floor out of 40 floors.
7. The Consultants recommended strengthening of columns to support the additional floors, some of which are inside Nakumatt premises. Nakumatt has, however, sued NSSF for damages and the matter is currently pending determination in court.
8. Nakumatt Holdings Ltd. were well informed about plans for completion of the building and several meetings held on the same. What was not made clear to them was whether their request for an extension of their lease of 20 years by a further 3 years was acceptable, as well

as rent rebates NSSF would grant them, for disrupting their operations in the period they were required to move out.

9. The draft Consent Agreement was forwarded to NSSF, but without a functioning Board, it could not be effected. Nakumatt Holdings Ltd.is claiming KES 1.6 billion in compensation for disruption of business.
10. NSSF may also be forced to compensate the Contractor for extension of contract period arising out of the delay in completing the Project.

Committee Specific Observations

The Committee made the following Observations: - THAT

- **(i)** No written evidence was adduced to prove that adequate consultations was conducted between NSSF and Nakumatt Holdings Ltd. before commencement of the current Project.
- **(ii)** The uncertainty of the outcome of the court case may result in variation of the project costs for Hazina Trade Centre Office Towers Project.
- **(iii)** NSSF may also be forced to compensate the Contractor for extension of contract period arising out of the delay in completing the Project.

4.4 SUBMISSION BY DR. ANTHONY OMERIKWA, ACTING MANAGING TRUSTEE (2015 TO DATE)

Dr. Antony Omerikwa, Acting Managing Trustee accompanied by Mr. Austin Ouko, Acting General Manager (Corporate Affairs/Company Secretary); Mr. Evans Moturi, Acting Finance Manager); Mr. George Mwandembo (Acting Procurement Manager); Ms. Josephine Mutiso, Acting Manager, Property Development; Ms. Hellen Koech, Acting Manager, Legal and Mr. Moses Cheseto (Manager, Property Development) appeared before the Committee on 22nd April and 6th May 2015 to adduce evidence on NSSF Hazina Trade Centre Office Towers, NSSF Joint Venture Property Development in Mavoko Sub County and NSSF Kenyatta Avenue Joint Venture Project.

The Acting Managing Trustee informed the Committee that the substantive Managing Trustee, Mr. Richard Lang'at stepped aside following the Executive Order issued by the President on public officers named by Ethics and Anti-Corruption Commission on allegations of corruption. Section 15 (1) of the NSSF Act No. 45 of 2013 gives the Board of Trustees powers to appoint a Managing Trustee of the Fund. The NSSF Board of Trustees, as was constituted then, lacked the requisite quorum and was unable to exercise its powers and responsibilities as per the Act. With the foregoing state of affairs, Dr. Omerikwa was appointed in an acting capacity as CEO/Managing Trustee on 10th April 2015 by the acting Cabinet Secretary, Ministry of Labour, Social Security & Services to safeguard public interest in the Fund.

Committee Observations on Management of NSSF

The Committee observed that most of the officers in the senior Management level are serving in acting capacities and recommends that the Board of Trustees should move with speed to substantively fill the vacant positions.

4.4.1 Hazina Trade Centre Office Towers

Dr. Omerikwa informed the Committee THAT –

Project Background

1. The Fund conceived the construction of a multi-storey commercial building named Hazina Trade Centre Office Towers in 1994 on a plot of land measuring 1.121 acres located within Nairobi City Centre between Monrovia and Moktar Daddah Streets. The development was designed to have an office tower comprising of 24 floors, parking in 4 basements and shops on ground and 2 mezzanine floors.

2. After going through a tender process, M/s Mavji Construction Co. Ltd. was awarded the tender to carry out the works at a contract sum of KES 3,181,468,427.10 and contract period of 160 weeks.

3. Owing to financial constraints, the Board of Trustees in its 103rd meeting dated 25th November 1999, the Fund restructured the project by omitting the 24-floor tower. The contractor then proceeded and completed 4 basements, ground floor, 2 mezzanines and 1 podium floor in 2003. After completion, the building was leased to Nakumatt Holdings Ltd. for a period of 20 years.

Completion of the Office Tower

4. On 31st August, 2010, the Fund's Operations and Investments Committee recommended the completion of the Office Tower with a budget of KES 2.19 Billion. The commencement date was projected to be 3rd February, 2011.

5. The Operations and Investments Committee recommended that the original Project Consultants comprising of Mruttu Salmann and Associates (Project Architects), Tana and

Associates (Quantity Surveyors), Abdul Mullick & Associates (Structural/Civil Engineers) and Kisa & Partners (M&E Consulting Engineers) be retained, as they would ensure continuity and faster implementation of the Project.

6. The NSSF Management, then headed by Mr. Alex Kazongo was directed to: -

(i) Confirm whether the retention of the previous Project Consultants would be in accordance with the Procurement Act;

(ii) Consider developing and selling the office space;

(iii) Advertises for contractors for the completion of the Tower and a report be issued during the October 2010 meeting.

(iv) Formally inform the existing tenant of the Fund's intention to complete the Tower.

7. The Board of Trustees, in its 151st meeting held on 9th December 2010, approved the completion of the Hazina Centre and directed that the contractor moves to site by 1st March 2011.

8. The Consultants designed a twin tower office block, comprising of 34 floors and 40 metres communication mast with a total area 418,000 square feet and height of 200 metres. In order to enhance the structural stability for the building, the existing columns will be strengthened with carbon fibre wrap, a process which will lead to demolition and re-instatement of the partitions next to the columns within Nakumatt Lifestyle Supermarket (the tenant).

9. In 2011, the consultants worked out and submitted cost estimates and the feasibility study of the new project as follows:

Cost estimates	-	*KES 6.63 billion*
Returns on investment per annum	-	*14 %*
Pay-back period	-	*13 years.*

10. The Fund found the project to be viable and proceeded to tender under no. 14/2010–2011 with the following results:

Bidder No.	Bidder's Name	Bid Sum (KES)	Delivery Period
1	China Jiangxi Int. Ltd.	6,236,557,784	156 weeks
2	EPCO Builders	6,497,116,084	160 weeks

3	FUBECO (China Fushun)	6,354,016,059	140 weeks
4	Cementers Ltd.	5,997,711,380	170 weeks
5	Sichuan Huashi Enterprises	6,439,171,049	139 weeks
6	Tulsi Construction Co.	6,720,527,089	190 weeks
7	Seyani Brothers Co. Ltd.	6,731,607,984	212 weeks
8	N. K Brothers	6,313,909,101	199 weeks
9	China Wu Yi Co. Ltd.	5,715,752,876.73	130 weeks
10	Parbat Siyani Construction Co. Ltd.	5,951,291,730	159 weeks

11. After evaluation of the bids the tender was awarded to M/s. Cementers Ltd., who was the lowest evaluated bidder at KES **5,997,711,380** and a contract period of **170 weeks**. However, two (2) bidders appealed to the Public Procurement Appeals and Review Board (PPARB) who directed that the tender should be repeated. The bidder who had won the tender, M/s. Cementers Ltd., was not satisfied with the judgement and proceeded to court to appeal against the judgment by PPARB. The case took more than 1 year to conclude and in December, 2012 the Court upheld the decision of the Appeals Board and the Fund complied with the directive.

12. Immediately after the judgement, the Fund instructed the consultant to confirm the validity of the cost estimate. The consultant revised the cost to be KES 7.3 billion.

13. The Fund then proceeded to re-tender the project and the opening results of the tender were as follows:

Bidder No.	Bidder's Name
1	Sinohydro Corporation Ltd.
2	China National AERO Technology
3	China Railway No. Engineering Group Co. Ltd.
4	China Jiangxi Int. Ltd.
5	EPCO Builders Ltd.
6	Parbat Siyani Construction Co. Ltd.
7	China Wu Yi Co. Ltd.

14. Only two (2) bidders proceeded to the **financial evaluation** stage as follows:

Bidder No.	Bidder's Name	Bid Sum (KES)
2	China National AERO Technology	6,741,174,428
4	China Jiangxi Int. Ltd.	6,599,888,888

15. After evaluation, it was found that China Jiangxi Int. Ltd. had made an error of KES 115,329.300.00, which was notified to them by the Tender Committee before the award. However, the Company declined to absorb the error hence their bid sum changed to KES **6,715,218,188.00** which was still lower than the bid sum of China National AERO Technology. Subsequently the tender was awarded to China Jiangxi Int. Ltd. at a contract sum of **6,715,218,188.00** for a contract period of **155 weeks.**

Impasse with Nakumatt Holdings Ltd.

16. The Project commenced on 2nd January, 2014, a year later than scheduled, because of the fears raised by Nakumatt Holdings Ltd. and cancellation of drawing approvals by the Nairobi City County Government.

17. The existing tenant, M/s Nakumatt Holdings Ltd., was consulted and it was agreed that the project should proceed with minimal interruptions to the tenant. As proof of consultations with the tenant, the Fund produced copies of two (2) sets of Minutes held on 28th May, 2013 and 11th June 2013 as proof that Nakumatt Holdings Ltd. was represented in the consultative meetings held to discuss project implementation.

18. MetroEng Consultants also called for a joint site inspection, which was held on 29th May, 2013, with the view of assessing the scope of mechanical and electrical services that required re-routing, to pave way for enlargement of selected structural columns for B1-B1, ground floor, mezzanine floor and podium level.

19. In a letter to Mr. Atul Shah, Managing Director, Nakumatt Holdings Ltd., Ref. SF/A/10/43/1 VOL.XXXV(96) dated 20th June, 2013, the then Managing Trustee Mr. Tom Odongo assured Nakumatt Holdings Ltd. that there would be minimal inconveniences during the construction process, to mitigate against loss of business. The Fund also worked out rebate of KES 17 million on rent, based on the area/parking and time the contractor will take when working on the spaces held by Nakumatt.

20. On 25th June, 2014, M/s Nakumatt Holdings Ltd. had a change of mind and wrote to the Fund claiming KES 1,620,148,507.00 as compensation for loss of business and damages during the construction. **(Annex 12)**

21. On 1st September 2014, the court issued orders restraining further construction. On 10th September 2014, the Court lifted the orders, pending the full hearing of the case.

22. The Fund engaged Wetangula, Adan, Makokha and Co. Advocates to represent it in the matter at a cost of Kenya Shillings three million (KES 3,000,000/=).

Requisite Approvals

23. The Fund obtained all requisite approvals as follows: -

(i) Nairobi City County approval dated 9th March, 2011 and renewed twice on 15th March, 2013 and 14th May, 2015;

(ii) Environmental Impact Assessment Licence No. 9531 dated 20th September, 2011 and renewed for an additional twenty-four (24) months vide Licence No. 326 effective 6th June, 2013. (**Annex 9)**

Project Status as at February 2017

24. The court case HCC ELC No. 1170 of 2014 is still pending determination in court. **(Annex 13)**

25. As at May 2015, the project was ongoing and the contractor had cast the 12th floor. Strengthening of columns has been done in basements 3, 4 and podium floor.

Committee Specific Observations

The Committee made the following Observations: - THAT

(i) There is no evidence of a feasibility study undertaken on the commercial viability of the project prior to its commencement;

(ii) That Cementers Ltd. did not re-tender for the Project after nullification of the first tender, following a ruling by the Public Procurement Appeals and Review Board, despite having won the first tender as the lowest bidder. NSSF was not able to adequately respond to the reasons why the Company did not bid in the second round.

(iii) EPCO Builders Ltd. and Parbat Siyani Construction Co. Ltd. both of whom had responsive bids during the first tendering, were disqualified at technical evaluation stage during the re-tendering process, without any satisfactory reasons given by the procuring entity.

(iv) Out of the nine (9) companies that submitted their tenders, only two companies (China National AERO Technology and China Jiangxi Int. Ltd.) were qualified to proceed to the financial evaluation stage. This prohibited a fair and competitive bidding.

(v) The tender was awarded to China Jiangxi Int. Ltd. which had been disqualified during the first tendering process but successfully appealed against the award of the tender to M/s. Cementers Ltd. at the PPARB.

(vi) The Tender Committee breached Section 44 of the Public Procurement and Disposal Act, 2005 by canvassing and disclosing information relating to bids and error notification to bidders during the tender evaluation process. This is in relation to error of KES 115,329.300.00 in the financial bid submitted by China Jiangxi Int. Ltd., an error which was notified to the Company but declined to correct or absorb.

(vii) The resumption and enhancement of the Hazina Towers Project in 2013 should have been treated as a fresh project in adherence to Public Procurement and Disposal Act and the attendant Regulations. Thus, the re-appointment and re-engagement of the Project Consultants from the original project to oversee the enhanced the Hazina Towers project was contrary to the procurement law.

(viii) There is no evidence that Nakumatt Holdings was adequately consulted before commencement of the Project.

4.4.2 Mavoko Joint Venture Property Development

Project Background

1. The Fund planned to undertake a Joint Venture Property Development Project on 1,010 acres of land it owns in Mavoko Municipality. The objective of the project is to improve returns on the investment. The development was approved by the NSSF Board of Operations and Investment Committee in its 13th Meeting held on 31st August 2010. **(Annex 14)**

2. The tender was advertised as an international tender and Expression of Interest (EOI) No. 5/2010-2011, the advertisement was placed in The Daily Nation newspaper on 18th October, 2010, The Standard newspaper on 19th October, 2010 and The Economist on 23rd October, 2010. **(Annex 15)**

3. The purpose of the tender was to identify a Joint Venture Partner with whom the Fund would develop the project jointly and subsequently sell the development and then share the profits proportionately according to the capital contribution of each of the partner.

4. The Board of Trustees, in a Special Board Meeting held on 10th May, 2011, approved for a mixed development for a self-sufficient township comprising of up to 30,000 housing units plus amenities. **(Annex 16)**

5. Cabinet approval was sought and subsequently granted on 27th August, 2013, in which the housing units were increased to 60,000. **(Annex 17)**

Request for Proposals

6. New International Request for Proposals (IRFP's) No. 09/2013-2014 for Joint Venture Project Development in Mavoko Municipality, comprising of 30,000 units as phase 1 of the project was advertised on 22nd October, 2013. The closing and opening of the IRFP's for the projects was successfully concluded on 24th April, 2014. A total of 4 firms responded. **(Annex 18)**

7. Following the implementation of the Public Private Partnership (PPP) Act, 2013, the Fund sought clarification from the Public Private Partnership Unit **(Annex 19)** who advised that the project does not fall under the PPP but rather, a Joint Venture Project that may be procured under the PPDA, 2005. **(Annex 20)**

8. The Fund wrote to the Public Procurement Oversight Authority (PPOA) on 19th September and 10th December, 2014, requesting for advice on whether it would be appropriate to evaluate the bids outside the stipulated evaluation period, of which the Authority advised against. **(Annex 21 and 22)**

Fresh Bid – February 2015

9. The Fund invited fresh bids through a restricted tender from a total of fifteen (15) firms/consortia, which had responded to EOI and RFPs as per Section 73(2) of the PPDA, 2005. The 15 bidders had a clear understanding of the Project, having participated in the earlier tenders that had been advertised both locally and internationally.

10. The invitation for RFPs for the project was sent out on 15th February, 2015. The RFP No. 15/2014-2015 for Joint Venture Development in Mavoko was due for opening on 17th

March, 2015. However due to requests made by the invited firms during a pre-tender meeting held on 25th February 2015, the opening date was extended to 8th April, 2015 and subsequently extended to 15th April, 2015.

11. To speed up the process and save time, the Fund invited fresh bids through restricted tender from a total of 15 firms/consortia, which had responded to the EOI and RFP's as per Section 73(2) of the PPDA, 2005. The 15 bidders had participated in the earlier tenders that had been advertised.

Project Financing

12. It was envisaged that the joint venture project will be financed through contribution of land by NSSF while the joint venture partner was expected to provide finances for the Project. The value of the Kenyatta Avenue land as at 26th August, 2014 was KES 3.275 billion **(Annex 23)**

13. The design and viability would be based on the proposals to be submitted by the bidders. The cost of the project was, therefore, to be established once the tender process was finalized.

14. The purpose of the tender was to identify a joint venture partner with whom the Fund would develop the project jointly with, and subsequently sell the development and share the profits proportionately according to the capital contribution of each of the partners.

4.4.3 Kenyatta Avenue (Nairobi CBD) Joint Venture Property Development

Project Background

1. The Fund planned to undertake a development on 3.6 acres of land it owns along Kenyatta Avenue in Nairobi Central Business District in order to improve returns on investment. Currently, the piece of land is not optimally utilized other than capital appreciation.

2. The development was approved by the Board's Operation and Investment Committee in the 13th meeting held on 31st August 2010. **(Annex 24)**

Tendering Process

3. The tender was advertised as an international tender and Expression of Interest (EOI) No. 5/2010-2011. The advertisement was placed in The Daily Nation newspaper on 18th

October, 2010, The Standard Newspaper on 19th October, 2010 and The Economist on 23rd October, 2010. A total of 7 firms/consortia responded. **(Annex 25)**

4. In the 153rd Meeting of the Board of Trustees held on 24th May, 2011, approval was granted for a mixed urban commercial complex development with a convention centre. **(Annex 26)**

5. Due to the lapse of time, International Request for Proposals (IRFP's) No. 8/2013 – 2014 for Joint Venture Property Development in CBD was advertised on 22nd October, 2013. **(Annex 27)**

6. The closing and opening of the IRFPs for the project was successfully concluded on 22nd April, 2014, two firms responded. Following the implementation of the PPP Act, 2013 the Fund sought clarification from the Public Private Partnership (PPP) Unit on whether the Kenyatta Avenue project as originally conceptualized fell under the PPP arrangement.

7. The Fund had two options, under the PPP arrangement to co-manage with the private partner after completion of the project or outright sell through a joint venture arrangement. The Fund has since opted for outright sale after completion of the project as a joint venture.

Project Financing

8. It was envisaged that the Joint Venture financing of the project will be the Fund's land contribution and the Joint Venture Partner is expected to finance the project. The design and viability will be based on the proposals to be submitted by the bidders. The cost of the project was to be established once the tender process was finalized. The cost of the Mavoko land as at 26th August, 2014 was KES 3,141,000,000.00.

9. To speed up the process and save time, the Fund invited fresh bids through restricted tender from a total of 15 firms/consortia, which had responded to the EOI and RFP's as per Section 73(2) of the PPDA, 2005. The 15 bidders had participated in the earlier tenders that had been advertised.

10. The invitation for RFPs for the project was sent out on 5th February, 2015. The RFP No. 16/2014-2015 for Joint Venture Property Development along Kenyatta Avenue in Nairobi CBD was due for opening on 19th March, 2015. However, based on the requests made by the invited firms during a pre-tender meeting held on 25th February, 2015, the opening dates were extended to 9th April, 2015 and further extended to 16th April 2015.

11. The purpose of the tender was to identify a Joint Venture Partner with whom the Fund would develop the project jointly and subsequently sell the development and share the profits proportionately according to the capital contribution of each of the partner.

Committee's Specific Observations

The Committee observed that;

(i) The NSSF Management did not carry out any feasibility studies on the project designs and engineer's estimates before tendering. Given the financial magnitude of the Project, the Fund would have lost billions of shillings had the Project commenced. The Management did not adequately respond to the issue of the envisaged/projected returns on the investment after completion;

(ii) It was improper for the Fund's Tender Committee to use a list of bidders who responded to a lapsed tender, which were supposed to be returned unopened;

(iii) The Fund did not advertise for Expression of Interest for consultancy as provided under Section 78 (3) of the Public Procurement and Disposal Act, 2005. It was contrary to the PPDA, 2005 for the Fund's Tender Committee to use a list of bidders who responded to a lapsed tender, which was supposed to be returned unopened.

(iv) The procuring entity used restricted tendering method instead of open tendering, without sufficient reasons for the choice of the method; this was done in contravention of the provisions Section 73 (2) of the PPDA, 2005, which provides for the conditions under which a procuring entity may use restricted tendering method.

(v) The Cabinet approval of the Project was a policy decision on the project, different from the actual tendering process which the procuring entity ought to have fully adhered to.

4.5 SUBMISSION BY MR. ADAN MOHAMMED, FORMER NSSF BOARD CHAIRMAN (2009 –2015)

Mr. Adan Mohammed, former Chairman of NSSF Board of Trustees appeared before the Committee on 7th July 2015 to adduce evidence on his role in the matter of NSSF Hazina Towers, Mavoko and Kenyatta Avenue Joint Venture projects.

He informed the Committee THAT –

1. He served as the Chairman of the NSSF Board of Trustees for two, three-year terms, starting from 1st March, 2009 and the other from 3rd March, 2012. He exited as the Chair on 6th February, 2015, three weeks before the expiry of his second and final term which was due to end on 3rd March, 2015. His term subsequently ended on 3rd March 2015 through a Gazette Notice by the Cabinet Secretary for Labour, Social Security and Services Hon. Kazungu Kambi. His successor was subsequently appointed. He couldn't, however, attribute his exit to either expiry of his tenure in accordance with the NSSF Act or premature termination/revocation by the Cabinet Secretary.
2. On the matter of NSSF Hazina Towers, Mavoko and Kenyatta Avenue Joint Venture projects, he informed the Committee that he did not have access to documentation to support any information he may give to the Committee concerning the projects. He made phone calls to NSSF management requesting for the information on the projects but the management was unwilling to avail the same to him. He was therefore not in a position to prepare any submission with factual and material evidence on the issues raised by the Committee concerning the projects. He was advised by the Committee to put his request to NSSF in writing and inform the Committee of the outcome, which he never did.
3. As to the reason why there has been instability and high turn-over of Managing Trustees at the Fund in the recent past, he informed the Committee that according to the former NSSF Act the Managing Trustee was forced to report to both the appointing authority, i.e., Board of Trustees and the Cabinet Secretary/Minister, who had powers to dismiss the MT. The new NSSF Act, 2013 that came into operation on 10th January, 2014, remedied the situation by clearly spelling out the process of appointment, tenure of office, procedure and grounds for removal of the Managing Trustee by the Board. The Cabinet Secretary no longer has powers to appoint or remove the Managing Trustee from office.
4. On the appointment of the current acting Managing Trustee, Dr. Antony Omerikwa, he informed the Committee he was not in a position to provide an adequate response because the appointment was done by the Cabinet Secretary, after he had left office.

Committee Specific Observation

The Committee observed that Mr. Adan did not make a written submission to the Committee as instructed. The Committee was therefore not in a position to substantially interrogate the witness on his role in the implementation of the three projects.

4.6 SUBMISSION BY HON. GEDION NDAMBUKI, NSSF BOARD CHAIRMAN

Hon. Gideon Ndambuki, the Chairperson of the National Social Security Fund, accompanied by Dr. Anthony Omerikwa, Ag. Managing Trustee; Mr. Austin Ouko, Ag. Company Secretary; Mr. Lwenye Mwandembo, Ag. Procurement Manager; Mr. Moses Cheseto, Ag. General Manager, Finance and Investments and Mr. Evans Moturi, Ag. Finance Manager, appeared before the Committee on 31st January, 2017 to adduce evidence on the implementation status of the Hazina Trade Centre Tower project.

He submitted as follows: –

Implementation Status of Hazina Trade Centre Tower Project as at 31st January, 2017

1. Although there was delay in the commencement of the project due to fears raised by Nakumatt Holdings Limited (the tenant) and Nairobi City County Government cancellation of drawings approval, eventually the project commenced on 2nd January, 2014, a year later than scheduled.
2. The Contractor has cast the 15th floor, and is waiting for Nakumatt Holdings Limited to provide space for column strengthening.
3. The strengthening of column works has been done in basements 3, 4 and podium floors. The State Department of Public Works engineers have been asked to review the column strengthening for structural integrity.
4. On 25th June, 2014, after consideration of the construction mitigation factors and acceptance of the project, the tenant (Nakumatt Ltd.) wrote claiming Kshs. 1,620,148,507 as compensation for likely loss of business.
5. M/S Nakumatt Holdings Ltd. reviewed their position on the continuing project and went to court. On 1st September, 2014, the court issued orders restraining further construction.
6. On 10th September, 2014, the court lifted the order, pending the full hearing of the case. The case was mentioned on 16th June, 2015 for purpose of obtaining a ruling date.

7. Meanwhile, the Project Consultant and Main Contractor, have been instructed to ensure that all mitigating actions have been executed to avoid escalation of claims.

8. An ad hoc committee of the Board of Trustees has been formed to negotiate with Nakumatt Holdings Limited and has already held its first negotiation meeting between NSSF and Nakumatt Holdings.

9. The Project Consultants have been instructed to obtain all statutory approvals and clearance for the project with Nairobi City County to enable project implementation.

10. The Board of Trustees directed that an independent consultant be approached to give guidance on the issue of structural strengthening approval. Subsequently, NSSF management wrote to the State Department of Public Works on 11th March, 2016.

11. The State Department of Public Works (SDPW) officers reviewed the project designs and held a meeting with the Project Consultants. They gave a preliminary recommendation that the higher tower can be constructed up to twenty (20) floor levels above the podium while the lower tower can accommodate fourteen (14) floor levels above the podium.

12. The SDPW instructed the State Department of Infrastructure to perform structural tests for the existing structure, to allay the fears of structural integrity. Based on the Material Testing and Research Division (MTRD) test results, the State Department of Public Works advised that the building structure is adequate to carry the load of 40 suspended floors.

Court Case No. ELC NO. 170 OF 2014

13. After negotiations and consultation with M/S Nakumatt Holdings Limited, it was agreed that the construction would proceed while they were in occupation and the contractor was to put mitigation measures to minimize disruption to their business. Nakumatt Holding Limited was in agreement with the measures put in place and only requested for a reduction of the applicable annual rent by 50%, which the Fund declined, as there was no basis for the reduction and the Fund only gave Nakumatt Holdings Limited justifiable rebates on the rent.

14. Subsequently, after the Contractor had moved to the site and began construction, Nakumatt Holdings Limited went ahead and filed a suit (ELC No. 1170 of 2014) against the Fund, claiming Kshs. 1,620,148,507 for loss of business. On 1st September, 2014, they obtained an

ex-parte interim injunction against the continued construction of the building. However, after inter-parties hearing, the interim injunction was lifted on 10th September, 2014.

15. On 3rd December, 2015, the matter came up for highlighting of submissions on the 2nd interlocutory application being (1) Nakumatt's Notice of Motion dated 28th August, 2014 for injunction and (2) the second defendants (China Jiangxi International) Notice of Motion dated 15th September, 2014, seeking to have the plaintiff's suit struck out as against the second defendant with costs.

16. The matter was scheduled for ruling on the 2nd interlocutory application on Friday 30th July, 2016 before Lady Justice Gacheru, but the same was not ready. The Judge apologized for the delay and said she would deliver the same on notice to be served on all parties.

17. There being no injunction, Nakumatt Holdings Limited has since January, 2015 refused to grant the contractor access to Basement 1, 2 and ground floor, Mezzanine 1 and Mezzanine 2 for the column strengthening works. This is despite the Fund writing to Nakumatt Holdings Limited on 21st January, 2015, notifying them to give the contractor access. **(Annex 11)** The works thereby stalled, a situation which will definitely give rise to contractual claims for the delay.

18. On the 29th September, 2015, the Fund wrote to Nakumatt Holdings Limited, issuing it with a Notice of breach of Clause 5 (a) of the Lease for refusing the Fund's Contractor access to the 3 columns in basements 1 and 3, which lie at the edge of their store for strengthening. The Notice gave Nakumatt Holdings Limited 21 days whereupon if they didn't comply with the Lease dated 12th August 2003, the Fund would be free to re-enter and re-possess the entire premises.

19. The 21-day Notice ran from the day of service and lapsed on the 22nd October, 2015. The letter also put Nakumatt Holdings Limited on notice that the Fund would claim indemnity and damages from them for any financial loss, penalties and interests that may be levied by the contractor on account of their non-compliance with the Fund's earlier notices.

20. The Fund wrote again to Nakumatt Holdings Limited on 9th October, 2015 setting out the facts of the matter and urging Nakumatt Holdings Limited to give access before the notice period lapsed and again reminded them that they risked being charged for costs and damages for the delay occasioned by their refusal to give access.

21. The Fund's Board of Trustees formed an ad-hoc committee of the Board to engage Nakumatt Holdings Limited on an out-of-court settlement. The committee held a meeting with Nakumatt Holdings Limited directors on 7th June, 2016, wherein it was agreed that the Fund should make a counter offer to Nakumatt Holdings Ltd.'s proposal to settle the matter out of court.

22. The NSSF counter-offer was communicated to Nakumatt Holdings Limited but it was rejected. Further consultations are ongoing.

23. On 11th February, 2017, the court declined all the orders sought, key reasons being: -

(ii) Under clause 2(c) of the lease agreement, it is clear that the defendants reserved the right to build or into any wall or roof of the premises; the plaintiff thus willingly entered into the lease agreement knowing that NSSF had a right to build or execute any works;

(iii) Clause 5(h) of the lease agreement gives NSSF the right as it deems reasonable to carry out any alterations, additions or any improvements;

(iv) The court did not find any special circumstances to grant a mandatory injunction on the interlocutory application to restrain the defendants until the suit is heard and determined.

The court therefore found the Motion as being unmerited but ordered the main suit be heard expeditiously.

Committee Specific Observations

The Committee made the following observations. THAT;

(i) The presiding Judge of the High Court has taken inordinately long to deliver a ruling on court case no. ELC No. 1170 of 2014.

(ii) NSSF ought to proceed with construction of the building noting that the High Court has lifted the initial injunction restraining further construction of the building.

4.7 SUBMISSION BY MR. FRANCIS ATWOLI, NSSF BOARD TRUSTEE

Mr. Francis Atwoli, NSSF Board Trustee, accompanied by his Personal Assistant, Mr. Adams Baraza appeared before the Committee on 12th May, 2015 to adduce evidence on the matter of NSSF Hazina Trade Centre Office Towers, Mavoko and Kenyatta Avenue Joint Venture Projects.

He informed the Committee THAT –

4.7.1 Hazina Trade Centre Office Towers

1. In his opinion, the Project is not viable and not good value for money but that his advice was disregarded and the project commenced.
2. The initial project cost was KES 3.2B but now stands at KES 6.7B.

4.7.2 Mavoko and Kenyatta Avenue Joint Venture Projects

Project Background

3. The Board's Committee for Operations and Investments at its meeting on 31st August 2010 directed NSSF management to advertise internationally for Expression of Interest (EOI) by 30th September 2010 for the proposed development of Mavoko, Kenyatta Avenue and State House/Milimani plots. The EOI 05/2010-2011 advertisements were subsequently placed in The Daily Nation, The Standard and The Economist in October 2010 for purposes of identifying Joint Venture Partner(s).
4. The EOI was then evaluated by M/s Adventis Inhouse Africa (AIA) who was the Project Consultant, because the Fund lacked capacity to evaluate and manage projects of this magnitude.
5. Subsequently, the Fund Tender Committee (FTC) sitting on 26th May, 2011, adopted a report by AIA after varying the cut off score from 60% to 50%, to allow for broader participation and approved the following firms for invitation to submit Request for Proposals (RFP).

   Mavoko Property

   a) China CAMC Engineering Co. Ltd.
   b) Housing Finance
   c) Joel E.D Nyaseme& Associates
   d) Africa Legend

e) Spencon Development Co. Ltd.

Kenyatta Avenue Property

a) China CAMC Engineering Co. Ltd.
b) Africa Legend Ltd.
c) Sichuan Huashi Enterprise Corporation (EA) Ltd.
d) Spencon Development Co. Ltd.
e) SIEICO Ltd.

6. The following firms picked Tender Nos 16-17/2011-2012 Joint Property Development for Mavoko and Kenyatta Avenue.

Mavoko Property

a) China CAMC
b) Housing Finance
c) J.E.D Nyaseme & Associates
d) African Legend

Kenyatta Avenue Property

a) African Legend
b) China CAMC
c) Sichuan Huashi

7. The bids lapsed due to sheer passage of time.

8. Another attempt was made through Tender Nos 08/2013-2014: Proposed Joint Venture Property Development, Mavoko Sub County and 09/2013-2014: Proposed Joint Venture Property Development, Nairobi CBD advertised on 23rd October 2013 and opened 24th April 2014 respectively. These, too, lapsed due to passage of time and were subsequently terminated by the Fund Tender Committee on 22nd January 2015.

9. The Fund Tender Committee of 22nd January 2015, chaired by Dr. Anthony Omerikwa recommended termination of tender process and invitation of fresh bids through restricted tendering for Mavoko Project, using a list of firms that had responded to previous invitations.

10. On 26th January, 2015, Mr. George Mwandembo, the Ag. Procurement Manager sent a Memo to the Manager, Property Development, informing her of Termination of Tender No. 9/2013-2014 (IFRP)for Mavoko Joint Property Development, owing to lapse of time. In the

same Memo, he also informed her that the Fund Tender Committee did not approve use of restricted tendering for the project.

11. However, on 28th January 2015, the FTC approved commencement of restricted tendering for Mavoko Joint Property Development and Kenyatta Avenue Joint Property Development, using 15 firms mentioned above. Sinohydro Tianjin Engineering Co Ltd. & Sinohydro Real Estate Co Ltd. were also listed.

12. Prior to this decision, the Fund had requested guidance from Public Private Partnership Unit (PPPU) which opined that Mavoko should be managed under the Public Procurement & Disposal Act 2005 and Kenyatta Avenue under Public Private Partnerships Act 2012 No 15 of 2012.

13. The Fund had further requested Public Procurement Oversight Authority (PPOA) to guide on the circumstances under which time lapsed tenders can be evaluated. PPOA advised that there is no such provision in law.

14. Interestingly, on 28th January 2015, with blatant disregard to relevant statutes, the Fund Tender Committee approved a list of fifteen (15) firms drawn from previous procurements (lapsed and terminated tenders). The firms approved are the following:

(i) Davuruk Builders and Contractors
(ii) Weihai International Economic & Technical Cooperative Company Ltd.
(iii) Sinohydro Tianjin Engineering Co Ltd. and Sinohydro Real Estate Co Ltd.
(iv) Baseline Architects Consortium & Zakhem International Construction Ltd.
(v) Housing Finance Ltd.
(vi) Markem Ltd.
(vii) Epix Investments Ltd.
(viii) Joel E.D. Nyaseme& Associates
(ix) Edermann Properties Ltd.
(x) African Legend Ltd.
(xi) Symbion Kenya Ltd.
(xii) Spencon Development Co. Ltd.
(xiii) China CAMC Engineering Co. Ltd.
(xiv) 20th Century
(xv) Group 5 Structured Ingenuity

15. Restricted Tender Nos 15-16/2014-2015 Joint Property Development - Mavoko Sub County and Nairobi CBD respectively were issued, closing on 17th March 2015 and 19th March but were rescheduled to open on 8th April 2015 and 9th April 2015 respectively.

16. With the foregoing, the following gaps in the procurement proceedings are too glaring and point to fraud, conspiracy to commit economic crimes and high-level malfeasance.

(i) That no request has been submitted to PPOA by the Fund to be allowed to use a specified permitted procurement procedure as per Public Procurement and Disposal Act 2005 Section 92.

(ii) That the Public Partnership Unit was involved in the approvals of the concept and or documentation as required under the Public Private Partnership Act (PPPA).2012

(iii) That no feasibility study was carried out for projects estimated at KES 130 billion of pensioners' savings, is quite telling and point at management interested only in making quick money by letting interested parties carry out skewed feasibility study and issue favourable reports only for individual benefit.

(iv) That the approval by the Cabinet vide reference letter ML/ADM4/128 VOL.V dated 26th August 2013 by Hon. Samwel Kazungu Kambi, Minister for Labour, Social Security and Services, therefore was irregular and may have been based on misinformation, because no feasibility report, project road map or concept has been done.

(v) That if tender lapses by sheer passage of time and/or is terminated, it is illogical to rely on lapsed and terminated information to progress the same.

(vi) That it is irregular to use previous respondents as a basis for restricted tender and yet the proceedings thereto lapsed or were terminated.

(vii) That is there is no evidence that the projects budget of KES 1.8B provided in FY 2012/2013 has been rolled over.

(viii) That a project cannot be undertaken without planning. As per Public Procurement and Disposal Act 2005 Section 26 as amended on 18th June 2013 under Gazette Notice 106, no procurement proceedings can begin without a budget. It appears the new tender advertisements are pegged on the provision for KES 1.6B in the budget estimates for FY 2015/2016, which can only take effect from 1st July, 2015, if approved. This is scandalous!

17. The tender documents go on to suggest that a feasibility study will be done once the joint partners are identified. This means pensioners' money will be spent long before the viability of the projects is established. This is not and cannot be prudent use of public resources. It is pure plunder, as this is meant to align the report to individual interest (subjective not objective). Such a study can only be done by an independent consultant, who should not be part of the project contractors. In this instance, the prospective joint venture partner(s) are being asked to provide feasibility study and on this account alone, they will score a maximum of 20 marks.

18. That these projects estimated value is beyond threshold allowed for restricted tenders under PPD Act 2005 and the Regulations 2007 and no explanation can justify it without an EOI process.

19. That the list approved by FTC has not been subjected to due diligence to establish their legal existence, financial standing and as at now, so it is possible the Fund is dealing with paper tigers.

20. To date, no forensic audit has been done to establish whether the Fund makes any profit for pensioners, with many investments in real estate.

21. In conclusion, the Cabinet Secretary, Management and Trustees involved in this flagrant abuse process should be named, investigated, called to account and be charged for abuse of office, committing public money without planning and conspiracy to commit economic crimes among others. The tenders should be suspended forthwith and the EACC, CID, Ombudsman and DPP move in quickly and carry out multiagency investigation and provide a report in not more than 30 days. In the interim, all those mentioned in this saga must be directed to step aside to allow for impartial investigations.

22. When asked whether he had any interest in the two projects or related contractors, Mr. Atwoli responded that his only interest was to safeguard pensioners' funds from mismanagement.

Committee Specific Observations

The Committee observed THAT –

(i) Dr. Omerikwa did not disclose that he chaired the Fund Tender Committee meetings where key decisions were made regarding Mavoko and Kenyatta Avenue projects.

(ii) The Contract Agreement signed between Sinohydro Tianjin Ltd. and Reverof Consulting Ltd. is not dated and its motive is suspect.

4.8 SUBMISSION BY HON. KAZUNGU KAMBI, FORMER CABINET SECRETARY, MLSSS (2013-2015)

Hon. Kazungu Kambi, former Cabinet Secretary Ministry of Labour, Social Security and Services appeared before the Committee on 12th May, 2015 to adduce evidence his role in the matter of the procurement of Hazina Trade Centre Office Towers Project, Mavoko and Kenyatta Avenue Joint Venture Property Development Projects.

He informed the Committee THAT –

4.8.1 Hazina Trade Centre Office Towers Project

1. Advertisement, tendering, tender evaluation and award of the re-tendered contract for the proposed completion of the NSSF Hazina Trade Centre Office Towers Office Block Tower (Hazina Towers) Project was done between 9th January, 2013 and 11th February, 2013 before he was appointed into office.

2. The Tender was awarded to M/s China Jiangxi International (K) at a contract price of KES 6,715,218,188.00 with a completion period of 155 weeks. Contract was signed on 26th February, 2013 which allowed for an advance payment of up to 10% of the contract sum. The Contractor was therefore paid KES 67,1521,818.80 as 10% of the contract value on 6th March, 2014 to facilitate commencement of the Project. Construction of the Hazina Office Towers is ongoing.

3. According to the Contract Agreement, payments to the contractor are to be made on monthly basis upon submission of the applications, giving sufficient details of works done and materials on site. However, the contracting entity shall make the payment upon certification of the same by the Project Architect.

4.8.2 Mavoko and Kenyatta Avenue Joint Venture Projects

4. Following termination of the contract of the former NSSF Managing Trustee, he issued a press release, cancelling all NSSF projects that were tendered but had not been awarded, including the Mavoko Sub County Joint Venture and Kenyatta Avenue Joint Venture projects.

5. The projects will be re-tendered afresh. Further, all Projects which have been awarded and are ongoing will be subject to a comprehensive audit by the Efficiency Monitoring Unit (EMU).

6. Mr. Kambi was hard-pressed to give actual figures of the total cost of the two Joint Venture Property Development projects. He however indicated that NSSF's contribution in both Kenyatta Avenue and Mavoko Sub County Joint Venture Property Development projects is land.

7. Kenyatta Avenue Joint Venture project is 3.6 acres of land along Kenyatta Venue in Nairobi CBD while Mavoko Sub County Joint Venture Project measures 1,010-acres which he approximated the value to be KES 30 million per acre, which would make it worth at least KES 30 billion.

8. NSSF developed a Concept Note that he used to develop a Cabinet Memorandum, which he forwarded to the Cabinet. The Cabinet's rationale for doubling the number of the proposed low-cost housing units (from 30,000 to 60,000) was because of the rising demand for houses in Nairobi.

Committee Specific Observations

The Committee observed that:

(i) Hon. Kambi interfered with the procurement process of a procuring entity by cancelling the advertised tenders for Mavoko and Kenyatta Avenue Joint Venture Projects.

(ii) Should NSSF Management undertake the proposed development projects without joint venture partner substantial funding, the developments would put a strain on the Fund's financial portfolio.

4.9 SUBMISSION BY AMB. RAYCHELLE OMAMO, FORMER AG. CABINET SECRETARY, MLSSS

Amb. Raychelle Omamo, the then acting Cabinet Secretary for Ministry of Labour, Social Security and Services (MLSSS)accompanied by Mr. Ali Noor Ismail, former Principal Secretary, MLSSS appeared before the Committee on 9th April and 6th May 2015, to adduce evidence on the matter of the procurement process for the Completion of Hazina Trade Centre Office Towers in Nairobi and Joint Venture Property Development Projects at Mavoko and Kenyatta Avenue.

On the matter of contracts for proposed development projects in Mavoko, Hazina Towers and Kenyatta Avenue, Amb. Omamo assured the Committee that she would not sanction any unlawful decision that may lead to loss of members' contributions and that no major investments would be made by the Fund until the Board was properly constituted. She issued a Moratorium to this effect.

Committee Specific Observation

The Ag. Cabinet Secretary safeguarded public funds through issuance of a Moratorium to prevent loss of funds through committal of funds in the absence of a duly constituted Board of Trustees at the time of her appearance.

4.10 SUBMISSION BY MR. MAURICE JUMA, DIRECTOR-GENERAL, PPRA

Mr. Maurice Juma, Director-General, Public Procurement Regulatory Authority accompanied by Mr. Peter K. Ndung'u, Procurement Officer appeared before the Committee on 21st May, 2015 to adduce evidence on the National Social Security Fund's (NSSF) Hazina Trade Centre Office Towers Project in Nairobi County and Joint Venture Property Development Projects in Mavoko Sub County and Kenyatta Avenue in Nairobi in Nairobi City.

The Director General informed the Committee **THAT– (Annex 4)**

4.10.1 Hazina Trade Centre Office Towers Project

1. PPOA noted that the procuring entity had initiated a procurement process, tender No. 14/2010-2011 for Completion of Hazina Trade Centre Office Towers-Nairobi and awarded it to Cementers Ltd. at KES 5,997,771,380.

2. This award was challenged at the Public Procurement Administrative Review Board (PPARD) by China Wu Yi (Kenya) Co. Ltd. and China Jiangxi International Kenya Ltd. under Application Nos. 14/2011 of 20th April 2011 and 15/2011 of 21st April, 2011. The PPARD, upon review of the procurement evidence and testimony from the witnesses, found the tender process was flawed and annulled the award of the tender.

3. The successful bidder, Cementers Ltd. challenged the PPARB decision in the High Court in 2011. The High Court, upon hearing the parties, found the application failed for lack of merit. Upon dismissal of the case by the High Court, NSSF initiated fresh procurement, under tender No. 21/2012-2013 for Completion of Hazina Trade Centre Office Towers-Nairobi.

4. On 26th July 2013, PPOA received an anonymous letter from a concerned NSSF staff, alleging that the processing of the tender No. 21/2012-2013 was not done fairly.

5. Pursuant to section 101 and 102 of the Public Procurement and Disposal Act, 2005, PPOA vide letter Ref. No. PPOA 4/30/100 Vol. 11(35) dated 1st August, 2013 wrote to comprehensively demonstrate that the tendering process adhered to the Act and its attendant Regulations. In the same letter, NSSF was requested to submit all documents which were used in the processing of the subject tender in order to review the conduct of the subject tender. NSSF, vide letter Ref. SF/A/10/16 Vol XXV dated 19th August 2013 NSSF, submitted some of the documents PPOA requested.

Conduct of the Procurement Process

6. The procurement was an open tender that was advertised in the dailies, Nation and Standard on 9th January 2013 and closed on 30th January 2013 at 11:00am. NSSF used a two-envelope system in which the technical documents were opened on the materials date.

7. The following six firms responded to the tender: -

   (i) Sinohydro Corporation
   (ii) China National Aero – Technology International Engineering Corporation
   (iii) China Railways No. 5 Engineering Group Co. Limited
   (iv) China Jiangxi International(K) Limited
   (v) EPCO Builders Limited
   (vi) Parbat Siyani Construction Ltd.
   (vii) China Wu Yi Ltd.

8. According to the Evaluation Report, the tender evaluation was done in three stages, preliminary, technical and financial, by a committee of four evaluators. Preliminary evaluation of the tender was based on the conditions stated in the advertisement notice and the bid documents issued to the bidder. Three firms, China National Aero-Technology International Corporation; China Jiangxi International (K) Limited and China Wu Yi Ltd. met all the conditions.

9. Technical evaluation was carried out using the criteria stipulated in the bid documents. The cut off mark for the bidder to move to the financial evaluation, the next stage, it must score at least 80%. Only two bidders, China National Aero – Technology International Corporation, and China Jiangxi International (K) Limited, qualified.

10. The financial bids were opened on 5th February, 2013 by a committee of five officers and witnessed by the two bidders' representatives. The financial bids were as follows:

    i. China National Aero–Technology International Corporation KES 6,741,174,428;
    ii. China Jiangxi International (K) Limited – KES 6,599,888,888.

11. It was noted that the financial evaluation of the tender was not carried out by an evaluation committee established in accordance with Regulation 16 (7) of the Public Procurement and Disposal Regulations, 2006.

12. A letter Ref. No. TA/454/13 from Tana & Associates dated 7th February, 2013 forwarding the financial evaluation report was evidence that the evaluation was done by Tana & Associates. In addition, the unsigned report did not recommend which firm was to be awarded the tender although from the report, **China Jiangxi International (K) Ltd. was the lowest evaluated bidder even after correcting arithmetic error of KES 115,329,300.**

13. NSSF's Tender Committee awarded the subject tender in its meeting held on 11th February, 2013 to China Jiangxi International (K) Ltd., at a tender price of KES 6,599,888,888 subject to the bidder's confirmation of tender arithmetic error of KES 115,329,300.

14. China Jiangxi International (K) was notified of the tender award on 11th February, 2013 vide the NSSF's letter Ref. No. SF/A/10/16/VOLXX111 and accepted the offer vide their letter Ref. No. CJIC/003/2013 dated 12th February, 2013 and accepted the arithmetic error

and consequently adjusted their tender sum upwards from 6, 599,888,888 to KES 6,715,218,188. This was an increment of KES 115,329,300 being the arithmetic error.

15. NSSF subsequently signed a contract with China Jiangxi International (K) Ltd. at the corrected tender sum of KES 6,715,218,188 with a completion period of 155 weeks.

Observations on the Conduct of the Procurement Process

16. China Railways No. 5 Engineering Group Co. Ltd. and China Wu Yi Ltd. did not provide a Certificate of Incorporation, which was a mandatory requirement, but were considered responsive during preliminary evaluation against the provisions of Section 64(1) of the Act. The failure to disqualify the two firms was inconsistent with Regulation 48(1) of the Regulations.

17. China Jiangxi International did not sub-contract works (b), (c) and (d) (mechanical; plumbing; firefighting and air-conditioning) as indicated in the bid document against the mandatory requirements of the tender but were considered responsive in preliminary evaluation contrary to the requirements of Section 64(1) of the Act;

18. NSSF informed China Jiangxi about the arithmetic error after the evaluation process and not before, contrary to Section 63 of the PPDA 2005 and clause 5.7, Instruction to Bidders, in the bid document

19. The procuring entity did not correct errors noted in the financial bid of the successful bidder in accordance with Section 63 of the Act and clause 5.7, Instruction to Bidders, in the bid document.

20. The Evaluation Committee failed to observe the provisions of Section 64(1) of the Act by not considering the audited accounts of the joint venture partners of the winning bid and in consequence made him responsive.

21. Provisional sums for some un-quantified works were repeated in the BQ which may have escalated the cost of the project and loss of funds through double counting, for example, in the BQ for sub contract for mechanical ventilation and air conditioning installation page No MV/MS provided the following provisional sums:

a) *PC for Plenum Chamber and associated works = KES 5,000,000*
b) *PC for basement fans automation = KES 5,000,000*

c) Provisional Sum for contingency sum = KES 2,000,000

22. Still in the same BQ Section No. 15 titled Prime Cost (PC) and provisional sums, page15/2 provided as follows:

(ii) Provided the sum of KES 80,000,000 to cover the cost of mechanical builders in plenum chambers, fans in basement and services refurbishment and interconnection.

(iii) Under the subcontract for mechanical ventilation and air conditioning, China Jiangxi International (K) Ltd. was the sub-contractor at KES 33,973,867 which included provisional sums of KES 5,000,000; KES 5,000,000; and KES 2,000,000.

(iv) The total tender sum of KES 6,715,218,488 awarded to China Jiangxi International (K) Ltd. included all these provisional sums listed above, that is KES 80,000,000; and KES 2,000,000.

23. PPOA was not aware of the compensation claim of KES 1.6 Billion by Nakumatt Holdings Ltd. for loss of business occasioned by interruptions due to ongoing construction works.

24. PPOA had advised NSSF to consult with their lawyers on the next step because they had signed a contract which is illegal and which if not honoured would occasion loss of public funds.

25. They would also recommend that the person who had signed the contract on behalf of NSSF be held personally responsible for this.

26. PPRA normally advises state corporations to plan their procurement and follow the procurement law to avoid a situation where they commit an illegality and rush to the Authority for advice on the way forward.

Conclusion

27. The Report was brought to the attention of NSSF, whose response did not address the findings contained in the report. As a result of the breaches of the procurement law cited above in the conduct of the procurement process, the process was inconsistent with procurement law.

Committee Specific Observations

The Committee observed that that PPOA found the procurement process for Completion of Hazina Centre Office Towers Project inconsistent with several provisions of the PPDA 2005 as evidenced by the following instances: -

(i) That although the PPDA 2005 is silent on whether Certificate of Incorporation can be an international or local one, both China Railways No. 5 Engineering and China Wu Yi did not provide the certificates, a mandatory requirement and the two were considered responsive and proceeded to the next stage of evaluation contrary to Sec 64(1) of the Act. This failure to disqualify the firms was inconsistent with Regulation 48(1) of the Regulations.

(ii) NSSF informed China Jiangxi International of the arithmetic error and they did not correct the errors noted in financial bid contrary to section 63 of the PPDA 2005 and clause 5.7, Instruction to Bidders, in the bid document.

(iii) China Jiangxi International did not sub contract works of mechanical, firefighting, plumbing and air-conditioning as indicated in the bid document against the mandatory requirements of the tender but were considered responsive contrary to sec 64(1) of the PPDA 2005.

4.10.2 Mavoko and Kenyatta Avenue Joint Venture Development Projects

The Director General informed the Committee THAT –

1. The procurement processes were initiated through Expression of Interest (EOI) which were advertised in the Daily Nation Newspapers of 18th October, 2010, the Standard Newspaper on 19th October, 2010 and The Economist on 23rd October, 2010. The deadline for submission of EOI was 15th December, 2010 at 11.00 a.m.

2. The NSSF invited interested parties to express their interest in partnering with them in the development of:

   (i) 960 acres of land in Mavoko Municipality, Machakos County.

   (ii) 3.6-acre property at the junction of Kenyatta Avenue and Uhuru Highway.

3. Interested companies or consortia were expected to express interest in designing, development, financing and selling or operating the developments on joint venture basis.

4. The EOI documents were opened on 15th December, 2010 by a committee comprising of five (5) officers. According to the tender opening minutes, the EOI were received from the following bidders:

Mavoko Sub County Project

(i) Housing Finance
(ii) Marken Ltd.
(iii) Lordship Group
(iv) Joel Nyaseme
(v) Edermann Property
(vi) Africa Regent Ltd.
(vii) Symbion International
(viii) Spedex (Spencon)
(ix) China CAMC Engineering Co. Ltd.

Kenyatta Avenue (Central Business District) Project

(i) Hewani Consortium
(ii) Sichuan Huashi Corp.
(iii) African Legend
(iv) Symbion International
(v) Spedex (Spencon)
(vi) Sietco Ltd.
(vii) China CAMC Engineering Co. Ltd.

5. Evaluation was conducted by a committee comprising of seven (7) members. The evaluation process was conducted in three (3) stages, based on the requirements provided in the tender notice. The requirements were technical profile evaluation, financial profile evaluation and proposal submission

6. The committee recommended as follows:

Mavoko Project

(i) China CAMC Engineering Co. Ltd.
(ii) Housing Finance
(iii) Joel E. D Nyaseme& Associates

Kenyatta Avenue Project

(i) China CAMC Engineering Co. Ltd.
(ii) African Legend Ltd.
(iii) Sichuan Huashi Enterprise Corporation E. A. Ltd.

7. According to the Tender Committee Minutes dated 26th May, 2011, the Committee lowered the cut-off score from 60% which appeared to have been set by Mr. Tom Odongo, General Manager (Investment) to 50% and as a result two bidders were accommodated in each tender. These were Spencon Development Co. Ltd. for both Mavoko Project and Kenyatta Avenue project and SIECO Ltd. for CBD Project. The firms approved were: -

Mavoko Sub County

(i) China CAMC Engineering Co. Ltd.
(ii) Housing Finance
(iii) Joel E. D Nyaseme& Associates
(iv) African Legend Ltd.
(v) Spencon Development Co. Ltd.

Kenyatta Avenue/CBD Property

(i) China CAMC Engineering Co. Ltd.
(ii) African Legend Ltd.
(iii) Sichuan Huashi Enterprise Corporation E.A Ltd.
(iv) Spencon Development Company Ltd.
(v) SIECO Ltd.

8. The outcome of the EOI was communicated to the bidders, vide letters dated 21st June, 2011. The successful bidders were informed that they will be invited to respond to Request for Proposal later. It is noted that the notification letters for Spencon Development Company Ltd. and SIECO Ltd. were not availed and therefore it could not be ascertained whether they were notified or not, despite having been approved by the tender committee.

9. From the documents submitted by NSSF, it is not clear whether the process went beyond short listing of the firms.

10. NSSF advertised the two (2) Requests for Proposals in The Daily Nation newspaper on 22nd October, 2013. The RFPs were tender No.08/2013-2014 for Proposed Joint Venture Property Development in Nairobi Central Business District and tender No.09/2013-2014 for Proposed Joint Venture Property Development in Mavoko Municipality, Machakos County. The deadline for submission of proposals was 4th December, 2013 and 30th November, 2013 respectively.

11. The tender opening minutes were not availed. However, the process was terminated before the evaluation was conducted. The termination was approved by the tender committee vide minutes of meeting No.17 held 22nd January, 2015. According to NSSF, termination was necessitated by lapsing of the tender evaluation period before it was concluded. Bidders were notified of termination, vide letters dated 4th February, 2015.

12. The Tender Committee approved the use of restricted procurement method for the Mavoko and Kenyatta Avenue (CBD) projects vide its meeting held on 28th January, 2015. The committee also approved the following firms who had participated in the same tenders in the previous procurements that were not finalized.

    (i) Davuruk Builders and Contractors
    (ii) Weihai International Economic and Technical Cooperative Co. Ltd.
    (iii) Sinohydro Tianjin Engineering Co. Ltd. and Sinohydro Real Estate Co. Ltd.
    (iv) Baseline Architects Consortium and Zakhem International Construction Ltd.
    (v) Housing Finance
    (vi) Markem Ltd.
    (vii) Epix Investment Ltd.
    (viii) Joel E. D Nyaseme& Associates
    (ix) Edermann Properties Ltd.
    (x) African Legend Ltd.
    (xi) Symbion Kenya Ltd.
    (xii) Spencon Development Co. Ltd.

13. Invitations were sent out through letters dated 5th February 2015. A review of the invitations shows that four (4) firms namely China CAMC Engineering Co. Ltd., Trans Century Investment in Africa and Group 5 Structured Ingenuity Waterfall Business Estate, were invited but were not in the list approved by the tender committee.

14. According to the tender opening minutes, tender for Mavoko Project closed/opened on 15th April, 2015 and the following bidders responded:

    (i) Zakhem Construction Ltd. and Baseline Architect Construction Ltd.
    (ii) Sinohydro Tianjin Engineering Co. Ltd. and Sinohydro Real Estate Co. Ltd.
    (iii) Edermann Property Ltd. and China Railway No.10 Engineering
    (iv) Weihai International Economic Technical Cooperative Co. Ltd.

15. Tender for Kenyatta Avenue (CBD) Project was opened on 16th April, 2015 and only one bidder, Trans Century Ltd. responded.

16. Evaluation was conducted by a committee comprising of five (5) members and a secretary. The committee was appointed by the Accounting Officer. The Evaluation Committee did not evaluate the tenders but recommended termination of the tenders due to negative publicity surrounding the tenders as per Section 36(1) of the Public Procurement and Disposal Act, 2005. The report was signed by all members.

17. In its meeting held on 13th May, 2015, the Tender Committee concurred with the recommendation of the tender processing committee and terminated the two (2) tenders. NSSF issued termination notices to the bidders vide letters dated 14th May, 2015.

18. The termination reports for the two tenders referred to above are yet to be submitted to the Authority in accordance with Section 36 (8) of the Act and PPOA Circular No. 4/2009 of 24th June, 2009.

19. The procurement process has taken inordinately long to conclude, taking into consideration that the process started through EOI in October, 2010.

Committee Specific Observations

The Committee observed that –

(i) There is disparity in acreage of land for Mavoko Project development. According to PPOA 960 acres are available while NSSF informed the Committee that 1,010 acres are available. It's not clear what the true position is and this also has a bearing on the value of the exact land available for development.

(ii) Although the tenders for Mavoko and Kenyatta Avenue were cancelled, money was spent in the procurement process of the joint venture partners as well as advertisements to cancel the tender.

4.11 SUBMISSION BY HAZINA TRADE CENTRE OFFICE TOWERS PROJECT CONSULTANTS

Hazina Trade Centre Office Towers Project Consultants namely Mr. Salmann Hameed (Partner, Mruttu Salmann & Associates), Mr. James Kisa (Partner, Kisa & Partners Consulting Engineers Ltd.), Mr. Patrick Tana Mutisya (Quantity Surveyor, Tana & Associates) and Eng. David Maganda (Abdul Mullick & Associates) appeared before the Committee on 12th May, 2015 and 7th February, 2017 to adduce evidence on the Hazina Trade Centre Office Towers Project.

4.11.1 Submission by Mr. Salmann Hameed, Partner, Mruttu Salmann & Associates

Mr. Hameed informed the Committee THAT–

1. Mruttu Salmann & Associates were re-appointed by NSSF as the Project Architects for the project namely: Development of Office and Shopping Complex on Monrovia Street, Nairobi-LR. No. 209/6708 - Completion of Tower for Offices via letter dated 1st December 2010.

2. The terms of commission and scale of fees were in accordance with the latest "Conditions of Engagement and Scale of Fees for Professional Services for Building and Civil Engineering Works" issued by Ministry of Public Works (Sec 200 and 300).

3. Vide letter dated 1st December 2010, they informed the client that their original commission was based on Cap 525 of the Laws of Kenya and requested that their current commission be on similar terms.

4.11.2 Submission by Mr. Patrick Tana Mutisya (Quantity Surveyor, Tana & Associates)

Mr. Tana informed the Committee THAT–

4. Vide letter dated 1st December 2010, NSSF re-appointed them as the Quantity Surveyor Consultants for the project namely: Development of office and shopping complex Monrovia Street, Nairobi-LR. No. 209/6708 - Completion of Tower for Offices. The terms of commission and scale of fees were in accordance with the latest "Conditions of Engagement and Scale of Fees for professional services for building and civil engineering works" issued by Ministry of Public Works (sec 200 and 400).

5. Tana & Associates (T & A) prepared the Tender Documents in form of Bills of Quantities, incorporating measured works, specification and the Client's brief. They were requested by the Client to check for errors in the arithmetic calculations of the last two contractors who qualified for financial evaluation.

6. T & A gave factual report dated 7th February to NSSF on the outcome of the arithmetic checking showing the error and the financial effect of the outcome. That brought to an end their engagement with NSSF on the procurement process and they were not part of the evaluation committee and did not therefore participate in the evaluation.

7. They were not aware of the contractors who were invited to tender and learnt of them for the first time at the tender opening session.

4.11.3 Submission by Eng. David Maganda (Director, Abdul Mullick Associates)

Eng. Maganda informed the Committee THAT–

8. Abdul Mullick Associates were called by the Client NSSF as Project Consultants for Phase 1 of the Project and were given the brief and scope of the Project.

9. This was followed with confirmation of engagement by way of appointment letter dated 1st December 2010. The Terms of Reference were to provide Structure and Civil Engineering Services.

10. Commissioning of the Consultants was not competitive but was based on the Consultant's capacity to handle the project and present workload.

11. The Scope of the Works was the construction of Hazina Towers from existing floor for a further 34 floors within specification given by the architects and engineers. The key action areas on the project were to give structural drawings and validate Traffic Study Report on the project area.

12. The Terms of Engagement were as prescribed in the Letter of Appointment, which is the latest "Conditions of Engagement and Scale of Fees for Professional Services for Building and Civil Engineering Works" issued by Ministry of Public Works. In particular Sections 200 and 600 of the said conditions.

13. The estimated cost for the project was KES 6,631,825,234.

Issues Surrounding the Project from Inception

14. **Confined State:** There were difficulties of developing the size of the building in the confined area due to neighbouring developments. This was adequately captured and articulated in the Tender Documents and Contractors were aware of the limitations as they bidded.

    i. **Environmental Impact Assessment Study:** A firm of experts was commissioned and got approval with mitigation measures from NEMA.

    ii. **Sitting Tenants**: The Consultants raised the issue of sitting tenants in particular Nakumatt Holdings. It was made clear that was a matter between the Client and the tenants (Nakumatt) and that the issues would be settled. Abdul Mullick Associates provided the Tender Documents for the construction to proceed when the sitting tenants would be going on with his business but in a controlled safe way.

4.11.4 Submission by Mr. James Kisa (Kisa & Partners)

Mr. James Kisa informed the Committee THAT–

15. **Kisa** & Partners were involved in the earlier scheme to design and supervise the completion of Hazina Towers Project then called Monrovia Street Project on LR No. 209/6708 Nairobi in the late 1990s. It was completed in 2003 and handed over to NSSF.

16. NSSF vide letter dated 1st December 2010, re-appointed them as the Electrical & Mechanical Engineering Consultants for the project namely: Development of Office and Shopping Complex Monrovia Street, Nairobi-LR. No. 209/6708 - Completion of tower for offices. The terms of commission and scale of fees were in accordance with the latest "Conditions of Engagement and Scale of Fees for Professional Services for Building and Civil Engineering Works" issued by Ministry of Public works (sec 200 and 500).

17. The firm carried out design, prepared bills of quantities and gave the estimates and documents for the commission to the client on 14th January 2011.

18. In January 2011, the client directed the consultants to submit prices of bills of quantities for their use before tender.

19. On 3rd February 2011, they advised NSSF that as per the Ministry of Public Works terms of commission, pricing of bills of quantities falls under additional/special services; there is a due process to be followed by the consultant.

20. On 14th Feb 2011, NSSF acknowledged receipt but claimed that the consultant had no intention of complying with their instructions. The consultant wrote back advising them that they required NSSF to confirm the pricing documents as forwarded to them before the consultant could price them.

21. NSSF terminated its contract with Kisa & Associates vide letter dated 14th February 2011.

22. By this period, the client had all the bills of quantities and drawings. Kisa & Associates wrote to them on 10th March 2011, attaching all necessary documents.

4.11.5 Joint Oral Evidence by the Consultants

The Consultants made the following joint presentation: - THAT

1. All the consultants had been involved from the beginning of the project in the 1990s and had a history of the project which led them to be re-appointed. They did not view their re-appointment as an illegality since in their view the project never lapsed.

2. The original design was for 28 floors and the sub structure from which the office towers are being built from are the same ones designed in the 1990s. NSSF did not have funds to complete the superstructure in the 1990s as envisaged but had recommenced and restructured for the work to be completed. The main project contractor in the 1990s is different from the current Hazina Towers Project contractor.

3. The client wanted to increase the floors of the office tower from the original 28 floors to 36 floors. They, as the structural engineers had to do an analysis and mathematical modelling to confirm whether the foundation and structural beams could take the additional floors at an additional cost to NSSF.

4. The terms of reference and architectural fees remained the same as in 1990s.

5. They had not had a prior relationship with NSSF before the commencement of the 1st project in 1998. But because the final accounts prolonged even after the project had technically been completed, their relationship with NSSF had continued on after the completion of the shopping complex in 2003.

6. It was the responsibility of the client, not the consultant, to ensure that they complied with all relevant legal requirements.

7. There **was no competitive bidding for their services in 1994**. The Architect who is the visualizer of the Project, M/s Mruttu Salmann & Associates was in the NSSF panel of Consultants and was invited to design the Project in 1994 and submit to the Board of Trustees.

8. Over time, in the 12 years that the project had stalled, NSSF would request the Quantity Surveyor how much it would cost to complete the project. All the consultants were actually called for a meeting once a decision had been reached at NSSF to complete the project where they were informed of the decision. The letters re-appointing them followed soon

after. There was no prior written communication requesting NSSF to employ them on the stalled project nor letter of offer from NSSF on the same.

9. They did not have a contact at NSSF to keep them briefed on the status of the project, but the Quantity Surveyor, on request, submitted his responses to the Managing Trustee who kept changing over time.

10. The original tender for the project in 1994 was KES 3.181 Billion while the current project was tendered for KES 6.63 Billion.

4.11.6 Consultants' Response to the State Department of Public Works' Report

Foundation

1. The Consultants are in agreement that the foundation is adequate for the designed 40 floors.

Column Strengthening

2. The original design has been superseded by cantilevered floor outside by 1.5m on both towers and inside 1.7m on both towers.
3. Additional 8 floors were also added to conform to the new tower design. The net result is that the gross floor area has increased by 65% compared to original design.
4. 66 columns out of 128 needed strengthening. Out of these 66 columns, only 27 have not been strengthened because they are located in Nakumatt stores (Basement B2 and B3) and business areas where access was denied.
5. Arising out of the detailed analysis and results of core tests, it was recommended that the column dimension be increased with a steel jacket of between 125 and 150mm.

Column Calculation Checks (C30)

6. The State Department of Public Works used Procon software for analysis while current practice for high rise buildings, ETABS – 3D is the recommended software.
7. The State Department of Public Works used axial load of 40,470 Kn – slightly lower than actual 47,007.61 Kn used in design.
8. The major discrepancy however, is that:
   - Design check is based on axial load (compression) while the column is also subjected to bi-axial loading – (bending movement) which were left out;

- The main problem with the calculations is that rebar and concrete strength adopted are much higher than the actual and column configuration are round-shaped and NOT square.
- Schmidt hammer test indicate 50.8N/mm2, however 55 N/mm2 is adopted for calculations.
- The area of steel entered is 32,170mm2 as opposed to 28,944m2.

Justification for reinforcement of Columns using Carbon Fibre

9. During the design check of original design to accommodate the client's requirement of additional eight (8) floors and extension of the floor plates by about 30% per floor, the Consultants found it prudent to check the concrete strength of the existing columns by extracting cylindrical cores for testing.

10. Arising from the tests results, the strength grades used in EYABS model was 40 N/mm^2. From the model assessment, the columns required strengthening.

11. The tower columns were assessed in terms of current rebar (reinforcement) and compared with rebar amounts as determined by ETABS model with additional 8 floors.

12. From the assessment above, it shows that the total number of 66 columns out of 128 columns required strengthening and would be disruptive to the tenant. At that stage, the strengthening method adopted was "steel jacketing."

13. When the contract was awarded, the contractor expressed concern about the jacketing methodology.

14. On June 3rd, 2013, AMA Consulting proposed an alternative method for strengthening – i.e. Sika-wrap method due to the following advantages over reinforced concrete jacket/steel channel:

(i) Increased axial load carrying up to 200%;

(ii) Increase ductility up to tenfold;

(iii)Increased column shear, flexural and seismic strength;

(iv)Minimal change to structural weight, shape and appearance;

(v) Easy to handle and requires minimal clearance for instalment hence reduces disruptions to the tenants;

(vi)Faster and cleaner in its application.

15. As a way forward, the Consultants proposed that the structure can either be finished as it is and occupied up to the 14th floor or completed as redesigned with the strengthening of the 27 columns that are pending.

Additional Oral Submissions

16. The Consultants stood by their position on the need for column strengthening owing to design changes which the State Department of Public Works did not seem to have taken cognizance of in their Report. The **SDPW Report on the building did not take into account the bending movement caused by the extension of the floor plates by about 30% per floor, hence concluding that strengthening of columns was not necessary**.

17. The original design, as per the contract, had provisions for strengthening of columns. The controversy arose after Nakumatt Holdings Limited denied the contractor access to the columns.

18. The lease agreement between NSSF and Nakumatt Holdings Limited had a caveat stipulating that the building could be subject to development during the duration of the lease.

19. On the matter of alleged limited parking space, the Consultants informed the Committee that the building has adequate parking space of 500 parking slots in the basement, which Nakumatt Holdings Ltd. continues to generate revenue from.

COST-BENEFIT ANALYSIS OF COLUMNS STRENGTHENING WITH SIKA WRAP/CONCRETE JACKETING

Preamble

20. The Columns strengthening was a process identified by the Engineers by appropriate testing methods and rigorous re-analysis and redesign before the contract documents went to tender.

21. The cost of columns strengthening was included in the Bills of Quantities and was not an afterthought.

22. The total number of columns identified as requiring strengthening was 66 in number covering basements, areas occupied by Nakumatt up to podium level only.

23. The concrete jacketing (traditional) method which was in the Bills of Quantities was modified in methodology to have more sika wrap and less concrete. This modification was special consideration to the tenant M/S Nakumatt Holdings so that there was least

disruption to his operations. This was effective because it was fast, required less operational area and least debris (cleaning).

24. According to the Engineer, it was even stronger. The contractor welcomed the sika wrap method as it was faster and more convenient. Nakumatt gave the impression that they had agreed access to the areas occupied and indeed gave access for 39 columns to be strengthened. It was not clear how and why they changed their mind midstream. They refused access to the remaining 27 columns which are yet to be strengthened.

Cost Considerations

		AMOUNT (KES)
B1	**Cost of Sika Wrap/Concrete jacketing as provided in the BQ to be applied on 66 no of columns (KES)**	**244,728,603.00**
B2	**Cost of Sika Wrap works already done on the 39 no of columns for the works up to 14th floor including unfixed materials**	*Value of work done - 145,685,750.00* *Unfixed materials - 47,240,000.00* *TOTAL = **192,925,750.00***
B3	**Cost of Sika Wrap/Concrete jacketing UNDONE on remaining 27 columns**	*Value of Works done when complete as in 1 above - 244,728,603.00*
		Less value of works done in 2 above - 192,925,750.00
		Total of remaining works undone = **51, 802,853.00**

Cost Benefit Analysis Options

25. Option of constructing 14 floors only without further column strengthening

26. Option of constructing 40+ floors without further column strengthening.

27. Option of constructing 40+ floors as per design with full concrete strengthening.

Cost benefit analysis for OPTION 1 of work up to 14 floors without further strengthening

28. The structure is done up to 14th floor with 39 columns strengthened to take full development. The columns from 1st to 14th floor were also designed and built to carry the full height of the Tower but these did not require strengthening. The reinforced shear walls were also done to take full development.

29. The amount already spent on column strengthening is **KES 192, 925,750.00** as per item B2 above.

30. This option does not benefit from the decision to omit columns strengthening because its costs are already substantially incurred up to **KES 192, 925,750.00.**

31. The strengthened columns to 14th floor and shear walls will all remain underutilized if the building stops at 14th floor.

32. The cost of saving if no further strengthening is done is only **KES 51,802,853** as in B3 above.

33. The investor will lose all the prospected income of full development. The investor will be required to pay for all other costs arising from delays once they're determined. The project will not be viable due to optimizing use of his plot on the development. The money spent against the much reduced income from the 14 floors will not give payback for a long time.

34. This option is least viable.

Cost benefit analysis for OPTION 2 of work up to 40+ floors without further column strengthening

35. The structure is done up to the 14th floor as in Option 1 above

36. The amount already spent on column strengthening is **KES 192, 925,750.00** as per item B2 above.

37. This option will benefit from the decision to omit columns strengthening by saving the cost of **KES 51,802,853** for the undone columns reported above in B3.

38. The option will further benefit the investor the full realisation of the development. This will in the long run pay back the investor for the investment. The full development will generate more income to help mitigate against other costs arising from the delays when determined.

39. In this option, there will always be the unsettling fear that the building is not sitting well due to weak columns and may collapse. This arises from the fact that the Consulting Engineers M/S Abdul Mullick Associates have reiterated that they take no responsibility of the structure without complete strengthening of the columns. This is a different stand from

the State Department of Public Works position that the building does not need columns strengthening.

40. This fear can be removed if there is a professional meeting of minds between the Consulting Engineers and SDPW.

41. This option is viable except for the disparity between the Consulting Engineers and SDPW explained above.

Cost benefit analysis of OPTION 3 of work up to 40+ floors with full identified columns strengthened

42. The structure is done up to 14th floor as Option 1 above.

43. The amount already spent on column strengthening is **KES 192, 925,750.00** as per item B2 above.

44. This option will cost more for the remaining work in strengthening the columns by **KES 51,802,853** as reported in B3 above.

45. This option will benefit the investor with full realisation of the development. This will in the long run pay back to the investor for the investment. The full development will generate more income to help mitigate against other costs arising from the delays when determined.

46. In this option, if the two Engineers parties (Consultants and SDPW) agree and strengthen all columns, confidence will be brought into the building and there will be no fears of collapse.

47. A substantial cost of strengthening (**KES 192, 925,750.00)** has already been incurred.

48. This option is viable.

Consultants' Observations

49. The SDPW and the Consultant Engineers M/S Abdul Mullick Associates have agreed on a very fundamental position that the 40+ floors can be built and the foundations can take this.

50. The point of difference is the strengthening of the columns, which SDPW says is not necessary, and Abdul Mullick Associates says there is need for strengthening to the selected columns.

51. The present position of the project is that most of the strengthening is already done. The cost of strengthening the remaining columns is the only thing now the client can save. This cost is about **KES 51,802,853**.

52. The client/investor has already or will incur other costs due to delays as will be determined whether they stop at 14 floor or got 40+ floors.

53. It is up to the decision makers to decide if the client can just stop on the 14th floor and fail to reap the benefits of full development, which will reasonably mitigate some of the incurred costs and in time recover the investment, because of the disagreement of **KES 51,802,853** which is the cost of the remaining columns strengthening.

54. The other remaining obstruction to full development if this option is adopted is the access to strengthen the remaining columns. As of now, Nakumatt have refused access. The impasse between the Client and Nakumatt needs to be resolved for the bigger good.

55. All other matters of who bears the blame for this and that, can continue to be sorted out in appropriate forums as this building goes on, if that is so decided.

56. The cost of strengthening the columns at **KES 244,728,603** is **3.6%** of the tender figure of **KES 6,715,218,488**. If this amount could be saved, it would certainly be good for the investment but the strengthening was found necessary by the Consulting Engineers.

57. The final consideration to this Report is that between SDPW and Abdul Mullick Associates, the process of checking whether the strengthening was necessary or not, was not expected to bring an identical outcome. It may have been intended to see a reasonable extent of their disparity in design because, it is probably not possible that two engineers will come up with exact design.

58. The Consultants may therefore be persuaded to start thinking about whether the disparity of **3.6%** of costs in design tolerance is admissible or not.

59. It must not get lost that SDPW and Abdul Mullick Associates Engineers are agreeable in over **95%** of the outcome of their evaluation.

60. Option No. 2 and 3 viable if a consensus is reached on the disparity of the design.

Committee Specific Observations on the Consultants' Submission

The Committee observed THAT –

(i) In line with the Public Procurement and Disposal Act 2005, the then Managing Trustee (in 2010) had no legal standing to appoint or re-appoint the consultants without going through a competitive procurement process for their services. Further that the letters all dated 1st December 2010, re-appointing them, were in fact illegal as per the PPDA 2005 and were referring to a project which had commenced but stalled twelve years earlier.

(ii) Mavji Construction Co. Ltd. was the contractor in the first phase of the Project that was handed over in 2003, while the current contractor is China Jiangxi Ltd.

(iii) Pursuant to the Article 3 and 227 of the Constitution of Kenya, the Consultants were also obligated to follow the applicable laws. They could also be sanctioned, under Article 227(c) of the Constitution, for failure to perform according to professionally regulated procedures, contractual agreements or legislation.

(iv) The cost of strengthening the columns at **KES 244,728,603** is **3.6%** of the tender figure of **KES 6,715,218,488.**

(v) Should column strengthening be abandoned, NSSF will save **KES 51,802,853**. However, the amount already spent on column strengthening is **KES 192, 925,750.00.**

(vi) The SDPW and the Consultant Engineers M/S Abdul Mullick Associates have agreed on a very fundamental position that the 40+ floors can be built and the foundations can take this.

(vii) The impasse between NSSF and Nakumatt ought to be urgently resolved in interest of the public.

(viii) The State Department of Public Works and the Consulting Engineers Abdul Mullick & Associates should, in the interest of the public, have a professional meeting of minds to address the matter of whether column strengthening is really necessary. This will remove the fear of the building collapsing, should further column strengthening be abandoned as per SDPW advice.

4.12 SUBMISSION BY HAZINA TRADE CENTRE OFFICE TOWERS BIDDERS

4.12.1 Submission by Cementers Ltd.

Mr. Ramesh Vishram, the Managing Director of Cementers Ltd. accompanied by Legal Counsel Mr. G. Getao appeared before the Committee on 14th May, 2015 to adduce evidence on the procurement of National Social Security Fund (NSSF) Hazina Trade Centre Office Towers Project contract by NSSF.

Mr. Vishram informed the Committee THAT–

1. Cementers Ltd. is a limited liability company incorporated in Kenya. The Company tendered for the Tender No. 14/2010-2011 advertised by NSSF on 1st February, 2011 in The Daily Nation and The Standard newspapers for the completion of the Hazina Trade Centre Office Towers.

2. The tenders opened/closed on 4th March, 2011 and ten (10) bids out of the total twenty (20) that bought the tender documents were evaluated. The bids opened are as tabulated below:

Bidder No.	Bidder's Name	Bid Sum (KES)	Delivery Period
1	China Jiangxi Int. (K) Ltd.	6,236,557,784	156 weeks
2	EPCO Builders Ltd.	6,497,116,084	160 weeks
3	FUBECO (China Fushun)	6,354,016,059	140 weeks
4	Cementers Ltd.	5,997,711,380	170 weeks
5	Sichuan Huashi Enterprises	6,439,171,049	139 weeks
6	Tulsi Construction Co.	6,720,527,089	190 weeks
7	Seyani Brothers Co. (K) Ltd.	6,731,607,984	212 weeks
8	N. K Brothers Ltd.	6,313,909,101	199 weeks
9	China Wu Yi (K) Co. Ltd.	5,715,752,876.73	130 weeks
10	Parbat Siyani Construction Co. Ltd.	5,951,291,730	159 weeks

Evaluation

3. The evaluation was carried out in three stages; namely Preliminary Evaluation, Technical, Evaluation and Financial Evaluation.

Preliminary Evaluation

4. At the Preliminary Evaluation stage, all the mandatory requirements were evaluated to determine the tenderers' responsiveness. The criteria for evaluation included:

   a) Tender submitted in the required format;
   b) Tender security in the required format, amount and validity;
   c) Tender signed by the lawfully authorised to do so;
   d) Required number of copies;
   e) Tender validity period;
   f) The provision of mandatory documents which included Certificate of Incorporation, valid NSSF compliance certificate, valid tax certificate, directors, audited account for the last years; and

g) Current certificate from the Ministry of Public Works "A", Electricity Regulatory Commission Class 1A, Communications Commission of Kenya Licence and the joint agreements (with the subcontractors).

5. Only Cementers Ltd. had a responsive bid, which underwent evaluation on the technical parameters.

Technical Evaluation

6. M/s Cementers' bid was evaluated and assessed on its level of compliance to the technical requirements and awarded marks. The bidder was evaluated on the following parameters:
   a) Completion and compliance of the particular specifications;
   b) Personnel;
   c) Relevant experience;
   d) Machinery and Equipment
   e) Business support;
   f) Referees; and
   g) Completion program for the works.

7. The cut off marks was 75% and M/s Cementers Ltd. attained a score of 91.2% and therefore proceeded to the financial evaluation stage.

Financial Evaluation

8. The tender sum was checked for full compliance to the specifications, arithmetic errors and consistency in price and was summarised as below:

Bidder's Name	Bid Sum (KES)	Arithmeticly corrected amount	Tender error amount	Error percentag e	Remarks
Cementers Ltd.	5,997,711,380.00	5,997,840,822.00	129,442.00	-0.002%	Error too insignificant

9. The Evaluation Committee then noted that the tenderer complied fully with the technical specifications, had arithmetic error that was too insignificant and its price distributions were consistent.

10. The Committee then recommended that the tender for the completion of the Hazina Trade Centre Office Towers- Nairobi be awarded to M/s Cementers at its quoted price of KES 5,997,711,380.00 inclusive of taxes with a completion period of 170 weeks.

11. The Bidders were notified of the award of the tender to Cementers Ltd. vide notification letters dated 17th April, 2011.

Request for Review of the Award

12. Two companies, China Wu Yi (K) Co. and China Jiangxi lodged separate requests at the Public Procurement Administrative Review Board (PPARB) on 20th April, 2011 and 21st April, 2011, for review of the decision by NSSF to award the Tender No. 14/2010-2011 to Cementers Ltd.

13. The PPARB made the following ruling: -

   iii. *All grounds of appeal of the award of the tender to Cementers Ltd. as raised by China Wu Yi Company failed and subsequently their request for review was dismissed.*

   iv. *Tender Evaluation Committee wrongfully disqualified China Jiangxi from the tender process as there was no written evidence from Ministry of Public Works (MOPW) that their proposed Mechanical Ventilation and Air Conditioning sub-contractor M/s Raerex lacked a current MOPW Registration Certificate. China Jiangxi had submitted a letter from MOPW that was to serve as certificate until such a time a formal certificate is issued to the sub-contractor. The Evaluation Committee had confirmed the sub-contractor's registration verbally with the MOPW.*

   v. *The successful bidder, Cementers Ltd., did not demonstrate in its tender documents that it ever carried out projects comparable in nature and value to the description of the project in the tender documents.*

   vi. *The Tender Evaluation Committee acted contrary to Section 66 (2) PPDA, 2005 which provides "that evaluation and comparison shall be done using that procedures and criteria set out in the tender documents and no other criteria shall be used."*

   vii. *Tender Evaluation Committee had allowed only one bidder to proceed to the technical and financial stages of the process, thereby defeating the objects of Section 2 of the PPDA, 2005 Act which seek to promote fair competition, ensure that competitors are treated fairly; ensure integrity and fairness of the* *procedures used and increase transparency and accountability in the procedures used.*

viii. *In the circumstances, PPARB found the manner in which evaluation was done was flawed and China Jiangxi was wrongfully disqualified from the tender process, and accordingly their appeal succeeded. Pursuant to Section 98 of the Act, PPARB annulled the award of the tender to Cementers Ltd.*

Judicial Review

2. Cementers Ltd. filed an application on 2nd November, 2011 in the High Court for judicial review of the decision of PPARB. They also sought to prohibit NSSF from retendering the tender for completion of Hazina Trade Centre Office Towers.
3. On 29th November, 2011, the Court ruled that Cementers Ltd. failed to disclose any reasons to warrant grant of orders it sought and in the circumstances the application failed for lack of merit.
4. Upon dismissal of the case by the High Court, NSSF initiated fresh procurement, under Tender No. 21/21012-2013 for the completion of Hazina Trade Centre Office Towers.
5. Cementers did not seek a further judicial review at the Court of Appeal after the High Court ruling because the Company did not expect different verdict from the one made by PPARB and the High Court.
6. The Company has never been contracted by NSSF for any business or services and has been in the construction industry for the last 40 years.
7. **The Company did not tender for the re-advertised tender because one of the specifications in the tender documents was that a tenderer must have had constructed and completed two 40-storey buildings in the previous 5 years, which practically all local (Kenyan) companies did not have.**
8. Cementers Ltd. has been in the construction industry for 48 years and is currently undertaking construction of a 28 storey building on Lenana Road. Prior to the first award of the contract to Cementers, the Company had not done any business with NSSF.

Committee Specific Observation

The Committee observed that the requirement set out in the tender documents in the re-advertised tender for having completed two 40-storey building was discriminatory, prejudicial and designed to lock out local (Kenyan) companies from tendering.

4.12.2 Submission by FUBECO Limited

Mr. Shi Zaizhi, Managing Director, FUBECO (China Fushun No. 1 Building Engineering Company Ltd. submitted the following written evidence dated 12th May 2015 on the Company's engagement with NSSF on the matter of NSSF Hazina Towers Project: -

Mr. Zaishi informed the Committee THAT–

1. FUBECO Ltd. tendered for the Project namely "Proposed Hazina Trade Centre Office Towers- Tender Bo. 14/2010-2011 as advertised in the Daily Nation Newspaper of 1st February 2011.
2. They were declared unsuccessful and communication received from NSSF, vide letter dated 7th April 2011, Ref SF/A/10/VOL.XVIII and were requested to collected their Bid Bond vide letter dated 8th April.
3. The Company did not have further communication with NSSF and has no knowledge or evidence on the tender process, evaluation, award or complaints on the project.

4.12.3 Submission by N. K Brothers Ltd.

Mr. Pravin Khoda, Director, N.K. Brothers Ltd. presented the following written evidence dated 13th May, 2015 on the Company's engagement with NSSF on the matter of NSSF Hazina Towers Project: -

Mr. Khoda informed the Committee THAT–

1. The Company responded to the tender notice published in the local dailies on 1st February, 2011 and 16th February, 2011 and consequently submitted their bid on 4th March 2011 with tender amount of KES 6,313,909,101 and expected time frame of 199 weeks.
2. The tenders were publicly opened on 4th March, 2011.
3. The tenders were evaluated by NSSF, who subsequently informed them that their tender was unsuccessful, vide letter Ref. SF/A/10/16/VOL.XVIII dated 7th April 2015.
4. The Company did not lodge any complaints regarding the tender award process as the process was done in conformity with normal tendering procedures.
5. The Company did not participate in the second tender for the project on account of its heavy workload at the time.

4.12.4 Submission by China Wu Yi Co. Ltd.

Mr. Liu Hui, Managing Director, China Wu Yi Co. Ltd. informed the Committee, vide letter dated 19th May, 2015, that the Company participated in the tender for the construction of Hazina Trade Centre Office Towers Tower but lost the bid and accepted the results without reservations.

4.12.5 Submission by Parbat Siyani Construction Co. Ltd.

Mr. Mukesh Halai, Director, Parbat Siyani Construction Ltd. informed the Committee, vide letter Ref. MMH/NACC/001/2015 dated 13th May, 2015, that the Company participated in tender for the proposed NSSF Hazina Trade Centre Office Towers Tower in Nairobi CBD but were unsuccessful. He further added that they did not lodge any complaint or appeal against NSSF's verdict.

4.13 SUBMISSION BY CHINA JIANGXI LTD., HAZINA TRADE CENTRE OFFICE TOWERS CONTRACTOR

Mr. Zhang Jian, Managing Director China Jiangxi Company Limited accompanied by Mr. Zhong Zang, Engineer appeared before the Committee on 28th July, 2015 to adduce evidence on the Tender for the Completion of Hazina Trade Centre Office Towers Project.

Mr. Jian informed the Committee THAT –

1. In January 2011, the National Social Security Fund (NSSF) advertised for the Tender for the Completion of Hazina Trade Centre Office Towers, Nairobi (NSSF Tender No. 14/2010 – 2011).
2. China Jiangxi International participated in the tender and obtained the tender documents after paying the requisite non-refundable fee of KES 5000. The tenders were opened on 4th February, 2011, after which NSSF commenced the evaluation process.
3. Through a letter dated 7th April 2011, the Company received a notification from NSSF to the effect that the tender bid was not successful and were asked to collect their tender security and tender bid bond.
4. Being aggrieved by the decision of NSSF, as communicated through a later dated 7th April 2011, the Company filed a request for review dated 21st April before the Public Procurement Administrative Review Board (PPRAB).
5. The request for review was heard on 13th May 2011.The PPRAB delivered its decision on 17th May, 2011, in which it declared that the tender process was flawed and upheld the

request for review. It accordingly annulled the award of the tender to M/s Cementers Limited and directed NSSF to retender.

6. Being dissatisfied by the decision of the PPRAB, successful bidder Cementers Limited filed a judicial review proceeding in the High Court Being Judicial Review No. 134 of 2011.
7. After hearing the matter, the High Court rendered his Judgement on 29th November, 2012 in which he dismissed the Notice of Motion requesting for judicial review.
8. Cementers Limited, again dissatisfied with the High Court decision filed an appeal at the Court of Appeal vide a notice of Appeal dated 3rd September 2012.
9. The said Cementers also filed an application for stay for execution and injunction being Civil Application No. 2 of 2013. This application was never certified as urgent or heard.
10. The Company was awarded the tender following a fresh tender process, at a contract sum of **6,715,218,188.00** for a contract period of **155 weeks.**

Committee Specific Observation

The Committee observed that following a fresh tender process after nullification of the award to Cementers Ltd., China Jiangxi Ltd. won the tender for the completion of the Hazina Trade Centre Office Towers at a contract sum of 6,715,218,188.00 for a contract period of 155 weeks.

4.14 SUBMISSION BY MR. ATUL SHAH, MD NAKUMATT HOLDINGS LTD.

Mr. Atul Shah, Managing Director Nakumatt Holdings Ltd. accompanied by Advocate, Mr. Manasses Mwangi appeared before the Committee on 18th August 2015 to adduce evidence on the Status the Company's Lease Agreement with NSSF on Hazina Trade Centre Office Towers and its objection to further continuation of the Project.

He informed the Committee THAT–

1. On 12th August 2003, Nakumatt Holdings Limited entered into a lease agreement with NSSF where Nakumatt Holdings leased the entire premises situated on L.R No. 209/6708 Nairobi lying between Monrovia Street and Moktar Daddah Street in the Central Business District of Nairobi, premises otherwise known as Hazina Trade Centre Office Towers. The leased premises comprised basement floors 1, 2, 3 and 4; the ground floor; mezzanine floors 1 and 2; and podium level.
2. The lease agreement was to commence on 1st January, 2004 and run for a period of 20 years, up to 31st December 2023 after which Nakumatt Holdings would quit possession of

the leased premises. It was a condition of the lease agreement *inter alia* that Nakumatt Holdings Ltd. shall enjoy quiet possession of the leased premises. Nakumatt Holdings Ltd. have not terminated the lease agreement and no notice has been issued requiring termination of the lease agreement. However, NSSF has resulted to harassing Nakumatt Holdings Ltd., interrupting the commercial activities of Nakumatt Holdings and its agents, including customers without just cause.

3. Nakumatt Holdings operates the business of a retail supermarket, trading in the name of 'Nakumatt Lifestyle'. Other tenants and/or agents of Nakumatt Holdings operate the business dealing with foods, drinks, pubs, shops, art shops, beauty shops, banks and other forms of businesses that demand maintenance of high standards of cleanliness and hygiene.

4. The Nairobi County Government (then Nairobi City Council), having foreseen the haphazard and hurried manner in which the project was being undertaken, had issued several **conditions** which were to be met by NSSF before, during and even after the completion of the project namely: -

(i) ***The Fund takes responsibility and indemnifies the County against any premise's claims regarding safety of the public and tenants likely to be affected during the development of the Project.***

(ii) ***Undertake to appraise the pre-construction traffic study report and the subsequent Traffic Management Plan and formulate a responsive post-construction Traffic Management Plan and commit funds to implement the same to support the completed development.***

(iii) ***The Fund undertakes a full EIA study, complete with full disclosure of the scope of the referred proposal, with full participation of all parties likely to be impacted by the proposed project and avail a written undertaking to implement satisfactory Environmental Mitigation Plan.***

(iv) ***Provide written commitment to compensate tenants and business operators likely to suffer material or business losses as a result of the implementation of the project.***

5. These conditions have not been met so far by NSSF before, during and even after the completion of the same project.

6. NSSF required a single tenant and despite the building not being to standard, Nakumatt agreed to lease the whole premises, considering that NSSF was supposed to invest the money that belongs to employees, where Nakumatt is a major employer in the country.
7. The Company sub-let the eateries and the shops, which they could not run or manage but always paid NSSF in one cheque, in tandem with their desire to have one tenant.
8. The leases premises were to be redeveloped up to 28 floors. NSSF needed money, and as it did not have the money, NSSF pleaded with Nakumatt Ltd to lease the building as it was.
9. NSSF wanted one person as a tenant and though the building was not conducive for us, Nakumatt Holdings Ltd. decided to take it up, considering that NSSF was supposed to invest the moneys that belonged to employees, where Nakumatt is one of the major employers in the country. Nakumatt agreed on rent based on usage of the whole premises and they sub-let the eateries and the shops that they could not run or manage but always paid NSSF in one cheque in tandem with their desire to have one tenant.
10. Though the lease provides for future development, the redevelopment was not to be undertaken arbitrarily with impunity and/or in a derogatory and spiteful manner.
11. In March 2011, NSSF indicated that they intended to re-develop 28 more floors and they consequently held a meeting. In April 2013, they requested Nakumatt Holdings to send a representative to their meeting to hear what NSSF was proposing to do. Later on, Nakumatt Holdings saw minutes that were never agreed upon as their representatives in the meeting had their role limited to listening to proceedings of the meeting.
12. Initially, the building was to be redeveloped into 28 floors, then later, the number changed to 36 floors and eventually NSSF indicated that they were constructing 39 floors and these haphazard proposals left Nakumatt Holdings wondering what the true position was and whether NSSF was really settled on what it was proposing to do and how the proposed developments would affect the sitting tenants.
13. Concerned with the safety of the shoppers and members of the general public, the amount of dust generated at the construction site, noise pollution, blockade of entrances to the shopping mall, sanitary standards, injuries that may be occasioned on the public, waste management, security issues and who to bear liability for any injuries, Nakumatt Holdings asked NSSF to terminate the lease to allow them move out of the building so that construction could go on uninterrupted. NSSF objected the termination of the lease and

undertook to develop a comprehensive proposal on how the construction would be undertaken while the shopping mall remained operational.

14. NSSF failed to address the concerns raised by Nakumatt and forcefully commenced redevelopment of the building. Most of the areas under occupation were affected and those businesses closed down and the affected tenants, refused to pay any rent due to loss of business.

15. On commencement of the exercise of strengthening the pillars at the basement, one side of the building was blocked off and entrances to the car park were closed off and this greatly affected the usage of the car park. Further the blocking of the entrance and exit on Moktar Daddah Street impacted on the usage of the street by the public because the scaffolding erected around the blocked entrance blocked off the street as well; thus affecting the business.

16. Nakumatt Holdings Ltd. has lost majority of its customers with a customer base of about 25% being maintained currently. Nakumatt Lifestyle thus risks loss of goodwill and eventual closure.

17. As the unhappy situation continues, NSSF continues to demand full rent, a situation that is hard to understand since Nakumatt Holdings Ltd. operates at an under capacity of 30%. The company considers this to be frustrations intended to force them out of the building.

18. The Directorate of Occupational Safety and Health Services inspected the leased premises and in their report on 26th May, 2014 raised various concerns on the safety of the leased premises.

19. On the 5th of June 2014, they issued a revised report countermanding their earlier one of 26th May 2014. The space of time between the two reports was very short and considering that there was an intervening weekend and a public holiday that fell on a week day, there was no sufficient time for the Directorate to conduct appraisals so as to generate another report and having in mind that NSSF is also a landlord to the Directorate, they got concerned that they could have been improperly influenced to issue a positive report. It is unlikely that the revision was not based on professional considerations.

20. Another concern is that loading more weight on the pre-existing structure without prior strengthening of all the pillars and the continued loading of weight on the said structure would render the building a liability and a threat to life and safety of its occupants and the members of the public. Strengthening of all columns has not been done.

21. The construction occupied space that was initially under use by Nakumatt and it was imperative to rework the area occupied by Nakumatt, renegotiate the reimbursements of the costs of maintaining hygiene and cleanliness, due to increased dirt and waste as a result of the construction site.

22. Nakumatt attempted to halt the construction by filing Environment and Land Court Case No. 1170 of 2014 Nakumatt Holdings Ltd. Vs the Board of Trustees and another by filing an Application under Certificate of Urgency on 29th August 2014. The case has not been heard.

23. The construction of the Hazina Trade Centre Office Towers is thus being carried out not only irregularly but also in disregard to the constitutional dictates and statutory provisions. For instance, the said construction is in total violation of the principle of sustainable development and it completely and totally disregards legal principles and best practices governing environmental conservation and sustainability. Failure to involve Nakumatt Holdings Ltd. in the goings on in the Project, when Nakumatt Holdings is an affected party is in total violation of Nakumatt's right to fair administrative action as enshrined in Article 47 of the Constitution of Kenya 2010.

24. Nakumatt has suffered losses attributed to the ongoing construction and has made a demand of KES 1,620,148,507 from NSSF, reflecting the current loss suffered so far by the Company due to reduced business tabulated as follows:

Item Description	**Cost (KES)**
Reduction in Sales	738,419,768.07
Rental Losses	45,06,140.52
Advertising	210,000,000.00
Staff	70,291,204.50
Rental Increase	27,600,000.00
Parking Slots (50)	9,450,000.00
Additional Cleaning Staff	30,558,642.46
Legal Risk (expected claims from tenants)	500,000,000.00
Goodwill/Uncertainty	400,000,000.00
TOTAL LOSSES	**2,031,383,755.55**

25. It is for these reasons and among others that the court proceedings were instituted against continued implementation of the project and Nakumatt Holdings Ltd. continues to maintain its objections to further construction of the building.

26. If Nakumatt exits the building located in CBD, it will suffer loss of good will and reputation from the public.

Status of the Lease

27. The lease was entered into on 12th August 2003 for a term of 20 years commencing on 1st January 2004 and has not been terminated or notice issued for termination. Despite the failure to terminate the lease, NSSF has been acting in a manner inconsistent with the rights of Nakumatt Holdings Ltd. to enjoy quiet possession of the leased premises. This is an indication of the intention of NSSF to compel Nakumatt Holdings Ltd.to terminate the lease agreement.

Objections to Construction of the Project

28. Nakumatt Holdings Ltd. strongly objects to the continued construction of the project for the following reasons:
    (i) The construction is being carried out without the necessary regulatory consents and the approvals and without meeting the prerequisite conditions set by the regulatory or approving authority.
    (ii) The construction is contrary to several statutory and legal provisions, some of which NSSF has failed to remedy, despite the notice requiring them to do so.
    (iii) The continued construction has gravely and negatively affected the business and interests of Nakumatt Holdings at the leased premises.

29. The impugned construction is in total violation of the constitutional principle of sustainable development, as embodied in Article 10 of the Constitution of Kenya, which binds all public officers and individuals, to observe the rule of law and to treat everyone equally before the law, and not to discriminate any person for whatever reason. Further, the construction violates Article 60 of the Constitution, that requires that land shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable.

30. NSSF is pursuing a scheme of construction eviction against Nakumatt where NSSF is engaging in cryptic and dishonest acts and conduct that has the effect of ensuring that

Nakumatt is no longer able to maintain any meaningful business at Hazina Trade Centre Office Towers, which will eventually lead to Nakumatt vacating the premises. Once Nakumatt leaves the premises, through coercive machinations of NSSF, rather than through the elaborate process set out under the lease agreement, then, Nakumatt will only have itself to blame as it will have no *locus standi* to recover any relief against NSSF but on the other hand, NSSF would maintain a valid claim to recover against Nakumatt for the remainder of the ten years which are now not accounted for. NSSF would have a semblance of cogent argument to the effect that Nakumatt would have voluntarily vacated the demised premises, thereby, terminating the lease agreement unilaterally, contrary to the provisions of the said lease agreement.

Committee Specific Observations

The Committee observed THAT–

(i) There seems to have been no adequate, meaningful and conclusive consultations or agreement between NSSF and their client Nakumatt Holdings to address the concerns raised by Nakumatt on redevelopment of the building and to resolve the underlying issues related to the lease agreement.

(ii) Something on the lease agreement if it provided for Nakumatt to give room for NSSF to expand the construction.

(iii) NEMA ought to have considered the issues which emerged after the original EIA license was issued (namely safety of the public, waste management, traffic management and security) before extending the validity of the same license.

4.15 SUBMISSION BY THE NAIROBI COUNTY GOVERNMENT

Mr. Patrick Tom Odongo, County Executive Committee Member for Urban Planning, Housing and Lands accompanied by Mr. Gregory Mwakanongo (the Acting Nairobi City Government County Secretary), Ms. Rose Muema (Chief Officer Urban Planning), Mr. John Barreh (Director Urban Planning, Mr. Justus Kathenge (Director Housing and Lands) Mr. John Ojwang (Ag. Assistant Director) and Mr. Gad Awuonda (County Attorney) appeared before the Committee on 5th October 2015 to adduce evidence on compliance of the NSSF Hazina Towers Project on plot LR. NO 209/6708 along Monrovia Street with City County Government Building By-laws & Regulatory Framework.

Mr. Odongo informed the Committee THAT –

1. The original plan for the development of the NSSF Hazina Towers Project on plot LR No. 209/6708 along Monrovia Street was approved in 1995. The original plan comprised of 25 floors. However, the development was implemented up to ground, mezzanine 1 and 2 (podium level) with 4 number of basements and 387 parking bays.
2. In 2011, additional 9 floors were approved making a total approved development to 34 floors consisting of 4 basement floors for parking, commercial facilities on the podium levels from ground to mezzanine 2 and offices.
3. In March 2013, the City County renewed development plans for 34 floors, vide building plan Reg. No FE 322.
4. In May 2015, another building plan for renewal was submitted, vide plan Reg. No. FF108 and approved but later the plans were disapproved on 18th September, 2015, when it was discovered that the plot number used to submit the plans was incorrect.
5. A building approval issued by NCCG to execute a project is only valid for 2 years and the developer must commence the project within 12 months after obtaining an approval.
6. The following were **statutory requirements that NSSF was required to comply with**:
    1. Secure the approval of building plans, structural designs and hoarding prior to commencing implementation; which they NSSF did.
    2. Secure the site with an approved hoarding, scaffolding and netting to protect the public and users of the building from dust. The hoarding and dust netting were poorly done. Corrective enforcement action was undertaken.
    3. Developer, contractor and consultants to notify the Nairobi City County Government to undertake statutory inspection as required, a condition which has not been complied with.
    4. During the construction, the contractor was required to ensure that noise is maintained at acceptable level at all times during construction activities – this was partially done leading to complaints by neighbours at times.

NSSF Compliance with Conditions Contained in County Letter Dated 18th December, 2013

7. The above mentioned letter spelt out several performance conditions to be observed during the implementation of the project. Some of these conditions include: -;

(i) *The Fund indemnifies Nairobi City County against any possible losses regarding safety of the public, claims by sitting and contiguous tenants likely to be affected during the development of the project;*

(ii) *Responsive post construction traffic management plan;*

(iii) *The Fund undertakes full EIA study with full disclosure of the scope of the project with participation of all contiguous property owners as well as public facilities likely to be impacted negatively by the development;*

(iv) *Provide written commitment to compensate tenants likely to suffer material or business losses as a result of the implementation of the development;*

(v) *Annual statutory payments to NCCG as per its approved fees and charges;*

(vi) *Project Consultants should jointly and severally commit to undertake all statutory inspections and document the same as per the NCCG requirements.*

8. As at the time of their appearance before the Committee, there was no tangible evidence for satisfactory compliance with the conditions by the County.

9. Arising from the above realization that NSSF had failed to comply, NCC wrote a letter to NSSF Ref UP&H/PCED/00100 dated 17th August, 2015 reiterating the need to comply with the condition as earlier set out. In addition, the NCC noticed that the earlier approved building plans and hoarding drawings had expired. Subsequently, an enforcement notice was served on 14th August, 2015 on the developers requiring them to stop further construction until they secure satisfactory approval from NCCG.

10. Though NSSF responded to the NCCG letter dated 17th August, 2015 vide their letter dated 27th August, 2015 Ref. No. SA/A/10/155VOL.XXVII/48, NCCG was of the view that NSSF had not addressed the issues at hand. The last communication to NSSF on the matter was on 7th September, 2015, vide NCCG letter Ref. No. NCC/UP&H/DC/L/OO169/JAO/jnm.

Response to Nakumatt Holdings letter dated 24/3/2014

11. The City County Government could not establish the receipt of the above referred letter. However, Nakumatt Holdings and other tenants operating in the building occupied the premises with full knowledge that the building was incomplete and construction was still to continue.

Complaints Received by NCCG on unforeseen adverse issues concerning the Project

12. The NCCG has received some verbal complaints, especially on noise and corrective action taken accordingly.

Project Status as at October 2015

13. As at 5th October 2015, the construction was at 13th floor. However, after realization that the building plans had expired, an enforcement notice was issued stopping the same until satisfactory approvals are secured by the developer. No construction is taking place. It is however possible to continue with the Project, if all and adequate mitigation measures are put in place.

Committee Observations

The Committee made the following observations: - THAT

(i) The development is located in a busy and highly congested part of the City with existing occupied development. Nairobi City County Government (NCCG) should therefore not have allowed the developer and the contractor to commence the development prior to complying with all County Government Building By-Laws & Regulatory Framework and the precedent license conditions. It is the responsibility of NCCG to ensure compliance with the attendant laws.

(ii) Explicit consensus has not been reached with the tenants of the building, owners and the operators of the neighbouring buildings prior to commencement of the construction activities, regarding the inherent potential negative impact on their businesses, safety and logistics, shortage of parking spaces and traffic management plan.

(iii) The developer and the contractor failed to adequately comply in a comprehensive manner with the project implementing conditions as directed by the NCCG in letters Ref. CPD/ADMIN/006719/JK/jsk dated 20th November, 2013 and Ref. CPD/ADMIN/001105/jsk dated 18th December, 2013 particularly on public safety, environmental impact and security of those of the surrounding properties. The non-compliance led to arrest and prosecution of the contractor on 18th February 2014.

(iv) The developer (NSSF) failed to make full disclosure of the actual scope of the project when Environmental Impact Assessment for the project was undertaken, and therefore the mitigation measures put in place were inadequate. Thus matters of occupational, health and safety and safe operations of the businesses within the vicinity were not adequately considered. This has resulted in complaints from the adjacent commercial establishments including Lilian Towers and Methodist University Plaza.

4.16 SUBMISSION BY PROF. GEOFFREY WAHUNGU, DIRECTOR-GENERAL, NEMA

Prof. Geoffrey Wahungu, Director General, National Environmental Management Authority accompanied by Ms. Salome Machia (Deputy Director – Enforcement) appeared before the Committee on 1st October 2015 to adduce evidence on the Environmental Impact Assessment of the Hazina Trade Centre Office Towers.

The Director General informed the Committee THAT–

1. The Environmental Impact Assessment Report for the proposed extension of Hazina Trade Centre Office Towers by additional 34 floors on Plot LR. No. 209/6708 between Moktar Daddah Street and Monrovia Streets, Nairobi CBD was received on 11th April 2011and was given a reference number NEMA/EIA/5/2/726.

2. The proponent, NSSF, proposed to construct 34 additional floors on the existing building, currently housing Nakumatt Lifestyle supermarket. The works were estimated at KES 2 billion.

3. The EIA Study Reports were dispatched for comments on 12th April 2011 to the lead agencies namely: - Director Housing, Ministry of Housing, Director, Directorate Occupational Health and Safety Services, Department of Physical Planning, Ministry of Lands, Managing Director, Nairobi City Water and Sewerage Company Ltd., Chief Architect, Ministry of Public Works, District Environment Committee and the Town Clerk, City Council of Nairobi.

4. A public notice was prepared on 12th April, 2011 for NSSF to advertise the project in both the Kenya Gazette and the local dailies and submit copies of the adverts to NEMA as evidence of public disclosure. NSSF, submitted copies of advertisements, indicating the advertisements had been done as follows:

   The Kenya Gazette – 24th June 2011 and 1st July 2011
   The Star Newspaper – 6th May 2011 and 13th May 2011

5. Of all the lead agencies consulted, only the City Council of Nairobi responded, vide a letter dated 16th May 2011. It had no objection to the project, however, it gave specific

recommendations and measures to be observed while undertaking the project. The measures included:

(i) The proponent obtains the requisite planning permits from the City Council.

(ii) That firefighting equipment be installed at the building

(iii) The proponent puts in place a proper and effective traffic management plan.

(iv) The proponent obtains written clearance from the Kenya Civil Aviation Authority with regard to the height of the building and the aviation routes.

6. NEMA issued an EIA licence reference 0009531 on 20th September 2011 (**Annex 8**) with the above recommendations. NSSF applied to vary the licence to extend the EIA licence validity period by additional 24 months on the 4th of June, 2013, citing a delay in soliciting of funds. The Authority issued a certificate of variation, allowing the extension of the EIA licence validity period by additional 24 months on 13th June 2013 vide certificate number 000326. (**Annex 10)**

Complaints and Concerns arising from the Project

7. Nginyo Towers had, vide letters dated 9th February 2011, 17th June 2011 and 15th November 2011 complained on issues relating to noise, leaking/burst water pipes and blocked water sewers among others. Gakoi Maina and Company advocates acting for the tenants of the existing building, vide a letter dated 25th February, 2014, complained of disruption of business by the contractor; China Jiangxi International. They also raised the issue of project construction works going on without consultations and due regard to the tenants' safety and security.

Actions Taken by the Nairobi City County Government

8. The Nairobi City County Government, vide a letter dated 22nd July 2013 suspended the renewal of the plan for the development and demanded that: -

i. NSSF revalidates the EIA to include issues of public safety and safe operations of the businesses within, until the issue of public safety and safe operations of the existing businesses within the vicinity is ensured;

ii. The re-validated EIA to include traffic studies and fresh stakeholder participation.

iii. The mitigation measures to include the new information arising from the studies.

Actions Taken by NEMA

9. NSSF, on 26th July 2013 sought NEMA's guidance on the validity of the EIA licence and the certificate of variation in light of the letter from the Nairobi City County.

10. NEMA, on 6th August 2013 confirmed the validity of EIA licence and the certificate of variation, but noted that due to the predictive nature of the EIA process, appropriate improvement orders can be issued to NSSF to address any emerging environmental concerns to the satisfaction of the Authority as provided for on the EIA licence conditions.

11. NEMA, through the Nairobi County Office, inspected the site on 12th March, 2014 and confirmed the ongoing preparatory/preliminary works.

12. On the current status of the project, NEMA has established that no construction work is currently being undertaken on site.

Committee Specific Observations

The Committee observed THAT —

i. NEMA licensed the Hazina Project through issuance of EIA and extended validity of the licence by twenty-four (24) months on 13th June 2013.

ii. NSSF did not satisfy the outlined conditions specified in the EIA, despite giving assurances to meet and adhere to the licence conditions.

iii. NSSF duly advertised on The Kenya Gazette – 24th June 2011 and 1st July 2011 and The Star Newspaper – 6th May 2011 and 13th May 2011 for anyone with complaints or reservations on the construction of Hazina Trade Centre Office Towers. The Committee, however, took issue with The Star's limited circulation in the year 2011 and observed that it would have been more prudent to advertise on the Daily Nation and The Standard which have wider circulation than The Star newspaper.

iv. NSSF did not carry out substantive consultations with the public, Nairobi City Council, tenants in the building and the owners of the other buildings within the vicinity of the proposed project to reach a consensus on how the development will progress without interrupting their businesses and security.

4.17 SITE VISIT TO HAZINA TRADE CENTRE OFFICE TOWERS

The Committee undertook a site visit to Hazina Trade Centre Office Towers on 27th July 2015. In attendance in the meeting were NSSF Senior Management led by Dr. Anthony Omerikwa, Project Consultants (Tana & Associates, Abdul Mullick Associates and Mruttu & Salmann Associates), Nakumatt Holdings represented by the Nakumatt Lifestyle Branch Manager and Project Contractor, China Jiangxi Ltd.

The delegation was given a guided tour of the construction site which included inspection of viewing of column strengthening works using carbon fibre technology. Hazina Trade Centre Office Towers is the second building reinforced using carbon fibre in Kenya.

Project Brief and Status

The Committee heard THAT –

Presentation by NSSF

1. The contractor moved to site on 22 January, 2014 and to date has done column strengthening work from Basement 4 and 3, partly done basement 1 and 2, while the entire 2nd floor is complete. They are yet to gain access to the columns inside Nakumatt Supermarket to strengthen them. The contractor has cast 15 floors.

2. Nakumatt Holdings has sued NSSF for compensation owing to loss of business arising out of on-going construction work that has negatively affected its business. The contractor is therefore unable to proceed vertically to add the remaining floors until all the columns are strengthened, including the ones inside the Supermarket.

3. NSSF further informed the Committee that they put in place the mitigating measures they had agreed with Nakumatt which included construction works being done from one side of the building and not interfering with the supermarket area except the column strengthening works. Though the there is no signed agreement on the same, there are Minutes of the meetings between them where they agreed on the column strengthening works and the mitigating measures to be put in place.

4. NSSF Management informed the Committee that the lease agreement with Nakumatt Holdings contained a clause that allowed completion of the building to be undertaken. Several meetings were held with the Nakumatt Managing Director, where they agreed on column strengthening and scheduling of works within the supermarket to reduce interruption.

5. NSSF's Legal Counsel informed the Committee that there was no arbitration clause in the Lease Agreement.

6. Regarding the status of the court case, the Committee heard that NSSF had filed the relevant documents by 7th July, 2015 and both parties were awaiting judgement.

7. The Project Manager NSSF informed the Committee that the contractor, China Jiangxi Limited had notified them of the delays experienced and that if the matter is not urgently resolved there was a possibility of the contractor filing for claims for the period extending beyond the contract period. NSSF however hopes for a speedy resolution to the stalemate with Nakumatt Holdings and the good working relationship with the contractor to forestall any unintended claims.

8. NSSF further informed the Committee that there was fair competition in the award of the tender and that after re-tendering of the project following the PPOA ruling, 7 out of the 10 initial bidders re-tendered but only two proceeded to the financial evaluation stage and China Jiangxi won and was awarded the tender.

9. On the apparent preferential treatment of contract awards to China Jiangxi Ltd., NSSF informed the Committee that the tenders were awarded through an open tendering process. NSSF has so far awarded the Company 5 projects and 4 to EPCO Builders.

10. NSSF management further informed the Committee that Nakumatt Holdings sent them a proposal, asking that their lease be extended by three years during the construction period and in return they would withdraw the court case. Unfortunately, NSSF did not have a functioning Board of Trustees who could ratify the proposal.

Presentation by Nakumatt Ltd.

11. The Branch Manager, Nakumatt Lifestyle Supermarket admitted that Nakumatt Holdings management was aware of the impending completion of the project.

12. There are 66 columns in the building and 39 requiring reinforcement including the ones inside Nakumatt Supermarket. The Branch Manager, Nakumatt Holdings informed the Committee that the columns which require reinforcement are on the 1st, 2nd and 3rd floors in the Supermarket. During the strengthening works, for safety reasons, clients will not be

allowed to access the premises go to shop. The lease agreement did not provide for Nakumatt Holdings to vacate the premises for the column strengthening to be done.

Presentation by Project Consultants

13. Tana & Associates representative informed the Committee that the project was ongoing, albeit facing challenges. Other sections of the construction were ongoing, but the contractor is unable to proceed with adding more floors until all the columns required to support the weight of the completed building are strengthened. The construction may therefore run behind schedule, if the case with Nakumatt is not resolved quickly.

14. The structural engineer informed the Committee that when they were informed of construction of additional floors on the Hazina Trade Centre Office Towers, an assessment of the existing columns was carried out and it was found that they needed strengthening to be able to support 36 storeys. There was also an increase of the number of floors from the initial 34 to the current.

15. To reinforce the columns, two scenarios were presented one of concrete reinforcement or carbon fibre technology, a new technology. Of the two, it was found that concrete reinforcement would take a lot of material and time. Further, while reinforcing the columns, the contractor may need to use heavy equipment while chipping and inserting the steel rods into the columns which can weaken them and cause them to fail. The consultants and the contractor therefore settled on carbon fibre technology which would be less disruptive to Nakumatt Holdings, but access is still required within its premises to strengthen the columns.

16. Carbon fibre are strips of carbon graphite weaved and glued together to form a mesh, which is twice as strong as steel and easier to use. They strip the cover of the column and wrap the carbon fibre around it.

17. The Committee heard that column strengthening works is part of the costs of the contract and was priced in the tender documents. The suit claims by Nakumatt Holdings Ltd. were however unforeseen, especially if the construction exceeds the contract period and the contractor claims more fees. Currently, the project is within the costs and there are contingency funds for unforeseen issues cropping up.

18. Regarding the large cracks on a column just outside the room where the session was taking place, the Structural Engineer informed the Committee that, two weeks into the commencement of construction works, the Project was stopped, thereby, causing the cracks to appear because the works should have taken four weeks.

Presentation by the Contractor, China Jiangxi Ltd.

19. The Contractor informed the Committee that the Project commenced in January 2013 and they moved to the site in October 2014. If the disruption that started in April 2015 had not occurred, the project would now be on the 22nd floor. The contractor is able to complete two floors per work for a contract period of 155 weeks. He has so far spent 76 weeks which is approximately 50 % of the contract period yet they are stuck on 15th floor.

20. The Contractor further informed the Committee that while they await the outcome of the court case, they have been doing other works on the building, which will mitigate the delay period experienced while trying to keep the costs down. It is not possible to estimate the claim they may make because the contract is still within the contract period.

21. Without the delays occasioned by the court case, the expected completion date of Hazina Trade Centre Office Towers was 2nd June, 2016.

22. China Jiangxi informed the Committee that it took them approximately a month to reinforce the columns within the four basements. If Nakumatt Supermarket allowed them to continue they could do one or two columns at a time, work at night or do all the columns on each floor at the same time to reduce the amount of time and inconvenience to the Supermarket. But owing to the disruption, some of the construction workers have been redeployed and getting them back will be a challenge.

4.18 SUBMISSION BY (PROF. ARCH.) PAUL MARINGA, PRINCIPAL SECRETARY, STATE DEPARTMENT OF PUBLIC WORKS

Prof. Arch. Paul Maringa, CBS, Principal Secretary, State Department of Public Works in the Ministry of Transport, Infrastructure, Housing and Urban Development, accompanied by Arch Kureba N.N., OGW - Works Secretary; Arch. Eng. E.N Waithaka, Eng. S. N. Charagu, Eng. J. N Gikonyo and Eng. Boniface Karobia appeared before the Committee on 7th February, 2017 to adduce evidence on the matter of Hazina Trade Centre Towers Project.

He submitted THAT –

Introduction

1. The Project, situated between Monrovia and Moktar Daddah Streets on a 1.121-acre plot, was designed and documented by the following Consultants commissioned by the NSSF.

Project Architect	-	*Mruttu Salman & Associates*
Project Quantity Surveyor	-	*Tana & Associates*
Project Structural Civil/Engineer	-	*Abdul Mullick Associates*
Project Services Engineer	-	*Metroeng Consultants*

2. Initially, the Project was designed to comprise 4 baseline levels, a podium and 25 floors. The contract for construction of the whole project was awarded but it was executed only up to the podium level because of financial constraints.

3. The completed part of the Building including all the parking spaces was leased to Nakumatt Holdings Ltd. for a period of 20 years from 1st January, 2004.

4. In 2010, the Project was restructured to accommodate 36 levels above the podium. The floors were also cantilevered to create more internal office space. This effectively increased the total area of the building by 38,188m^2.

5. The project was then contracted to M/S China Jianxi International Kenya Ltd. at a contract sum of KES 6,599,888,888.00 with a contract period of 155 weeks commencing on 2nd June, 2013 with a completion date of 2nd June, 2016. The Contract period was later extended by the Project Consultants to 30th March, 2017.

6. An advanced payment of KES 671,521,818.80 was made to the contractor at the commencement of the Project and only KES 133,384,021.42 has been recovered to date.

7. The amount certified for payment to date is KES 1,912,043,004.00, which is 29% of the contract sum.

8. The total work executed to date is approximately 21% of the overall scope. The Contractor has executed works up to the 15th floor above the podium but could not proceed further because the Project Consultants insisted that columns needed to be strengthened using Sika Wrap method first. The works therefore stalled.

9. The workmanship of the works executed is rated as satisfactory. It is however noted that no works are ongoing as at February 2017.

Involvement of the State Department of Public Works

10. The State Department of Public Works was approached by the Board of Trustees, National Social Security Fund to provide technical services in determining the efficacy and effectiveness of the Structural System of the ongoing Hazina Towers Project on Plot No. 209/6708, Nairobi County vide their letter Ref No. SF/A/10/155 VOL. XXIX/(41) of 11th March, 2016.

11. A team from State Department of Public Works visited the site and held a consultative meeting with the consultants, and National Social Security Fund supervisory staff on 26th May, 2016. The consultants were requested to furnish the State Department of Public Works (SDPW) with documents that would help the engineers from (SDPW) evaluate the project

12. The consulting engineers held several meetings with the team from Public Works who needed to understand the project and its challenges. From the analysis of the documents submitted by the Consultants, a preliminary report was prepared and submitted to National Social Security Fund. The analysis showed that the structural design was adequate to carry original design scope of 25 floor above the podium as the effectiveness of Sika Wrap could not be assured. This report was discussed with the Finance subcommittee and the members requested that the final report be prepared urgently.

13. Meanwhile, the State Department of Public Works vide their letter MOPW/CR/1/5/54, of 16th August, 2016 called for a consultative meeting among the stakeholders of the project on 26th August, 2016 to deliberate on the way forward.

14. During the above-mentioned meeting, the Consulting Project Structural Engineers, Ms. Abdul Mullick Associates were requested to submit to the Structural Department all the structural drawings, calculation and any other information to demonstrate the ability of the foundation to carry the additional floors and how SIKA wrap technology was able to carry the additional load. The Structural Engineer from the State Department of Public Works was required to go through the drawings and the calculation and give advice on the way forward. The minutes of the meeting are attached.

15. The Structural Department evaluated the documents and data submitted and concluded that the higher tower could only be constructed up to 20 floors above the podium level and up to a level of 14 floors above the podium for the lower tower. This information was communicated to the Fund through letter, BD114/NSSF/EXEC.APT/42 of 6th September, 2016.

16. Following the Fund's request for a meeting to communicate the information to the Consultants, vide their letter Ref. No. SF/A/155 VOL. XXX/22, a follow up meeting was held on 29th September, 2016.

17. It was agreed during the meeting that independent tests be performed to establish the structural integrity of the structure. The Structural Department therefore set up a team to work with Material Testing and Research Division of the Ministry of Transport, Infrastructure, Housing and Urban Development to draw terms of reference and establish the tests to be carried out and the cost implication.

18. The cost of carrying out the test on the structure submitted by the Material Testing and Research Division totalling Kshs. 1,749,260.00 was forwarded to National Social Security Fund, vide letter PW/A/200/144/15 of 31st October, 2016. The tests were carried out after National Social Security Fund made the required payments.

Technical Analysis

19. The Material Testing and Research Division (MTRD) carried out Tests on the existing structure.

20. The parameters tested included a check on physical conditions by visual inspection, re-bar details by electromagnetic/ Radar tests and *in situ* concrete strength using the Schmidt Hammer Tests.

21. From the analysis of the documents and data with respect to concrete tests provided by MTRD, State Department of Public Works found out that the structure was sound enough to carry 40 floors without the use of Sika Wrap. The findings and recommendations were forwarded to National Social Security Fund vide letter PW/A/200/114/16 of 18th January, 2017.

22. The analysis and checks on the design in respect of reinforcements and foundations by the State Department of Public Works also show that the structure can adequately carry and sustain the loading for 40 Suspended Floors comprising of 4 Basement Floors, 2 Mezzanine Floors, a Podium and 33 Office Floors.

23. The analysis further indicates that finishes for the floor and cladding will have to be lightweight materials.

The Design

24. The project was initially designed to accommodate 4 Basement Levels, a Podium and 25 floors all covering an area of approximately 28,000 square metres.

25. The total area for the current project is 38,188 m^2, with the lettable space of 24,961.50 m^2 and the circulation/common areas of 13,226.60 m^2. This gives lettable space to services area ratio of 65:35.

26. To increase the area of lettable space, cantilevered floors were added.

27. It is noted that:

    (i) The offices that were to be created initially required a total of 387 parking spaces as per the requirement of the City Council then.

    (ii) Restructuring the project and creating a floor space of 38,188 square metres required parking lots to the tune of one thousand and twenty-seven (1,027) as given by the minutes of the meeting held at City Hall on 21st July, 2013 among National Social Security Fund, Nairobi City Council, National Environmental Management Authority, Project

Consultants and the contractor. This gives a short fall of 640 parking lots which had not been catered for in the restructured design.

Approvals

28. Since the inception of the project, the approvals for architectural and structural drawings had been renewed three times.

29. The Nairobi City County Government has indicated in its meeting with the project stakeholders that it would not issue an occupation certificate for the project unless the required 640 parking spaces are provided.

30. The approval for traffic management system has not been obtained.

31. The Consultants had obtained approvals from Nairobi City County government for concrete jacketing but not for Sika Wrap.

Effectiveness and Suitability of Sika Wrap in Strengthening Columns in the Building

32. The Material Testing and Research Division laboratories were not able to test the work on Sika Wrap since they have no equipment to do so. It is worth noting that the Consultants did not provide local examples of projects that used the Sika Wrap Technology for structural strengthening.

33. From SDPW analysis, the structural system has been found to be sound to carry the anticipated number of floors without the use of Sika Wrap material.

Viability of the Project

34. Without the additional 640 parking spaces required to cater for the users of the addition area of the restructured project coupled with the traffic congestion usually experienced in the area and particularly on the Moktar Daddar and Monrovia streets, the project might not attract the envisaged clientele. the result of these will be that the rates will be lower than anticipated, thus affecting the returns on the project.

35. The Consultant Quantity Surveyor has indicated an amount of Kshs. 1,723,608,033.71 arising from an evaluated claim was due for payment to the contractor by 4th February, 2016. This continues to rise as the issues leading to the claim have not been resolved. Given that the project contract sum was Kshs. 6,599,888,888.00, the total project cost is as tabulated below:

Project Costs

S/NO	DESCRIPTION	AMOUNT (KSHS.)
1.	Original Contract Sum	6,599,888,888.00
2.	Cost of Claims	1,723,608,033.71
3.	**Construction Cost**	**8,323,496,921.71**
4.	**Projected Consultancy Fees (Say 15% of Construction Cost)**	1,248,524,538.00
	Total Project Cost	**9,572,021,459.71**

36. From the areas schedule of the Project, the total floor area for the project is 38,188.1m², with the lettable space and the circulation/common areas being 24,961.50 and 13,226.60 square metres respectively.

37. From calculations, the construction cost per square metre for the Project is Kshs. 250,654.56 which is abnormally higher than the average of Kshs. 60,000 for high end office buildings.

38. At an average rent of Kshs. 90 per month per square foot and assuming full occupancy for the lettable office space, a monthly rent of Kshs. 24,169,606.27will be realized. At Kshs. 10,000 per parking space per month, the 387 parking spaces will generate an income of Kshs. 3,870,000 per month. The total monthly income of Kshs. 28,039,606.27 or Kshs. 336,475,275.26 will be realized per year.

39. Given the project costs of Kshs. 9,572,021,459.71, the payback period for the project would be 24.45 years. Investments in real estate require a payback period of fifteen years and less in order to realize profits and good returns.

40. The above analysis does not however take into account the discounting factor due to inflation and the running costs of the building. These two factors will have the effect of increasing the project life cycle costs and thus reducing profitability further.

Evaluation Report

41. From the technical analysis, the project is structurally viable as the foundation whose design is a composite of raft and piling and is adequate to carry 40 suspended floors. The concrete and reinforcements in columns are adequate to carry 40 suspended floors.

Possible Way Forward

42. The decision on whether to proceed with the project or not will be influenced by factors other than the structural integrity. Since the total project cost is high, the time required to break even is long and therefore the need for the Fund to consider the technical viability vis-a-vis the profitability of the completed project.

43. The extra offices will require parking spaces and there will be need for the fund to consider ways of providing such, if the building is to be constructed to the required standard and zoning provisions.

Errors Inherent in the Design

44. The design of the restructured building did not take into consideration the parking requirements for the extra office space created. The project faces the challenge of non-issuance of occupation certificate by the Nairobi City County Government after completion unless the required 640 parking spaces for the additional office space are provided.

Effectiveness and Suitability of Sika Wrap in strengthening of Columns in the Building

45. Though the Department did not test the effectiveness of Sika Wrap, the analysis of the structural system shows that its use is not necessary.

Committee Specific Observations

The Committee observed THAT–

(i) The building's foundation is adequate for the designed 40 floors;

(ii) Further development of the building was halted at the 15th floor due to safety concerns as the existing columns cannot safely support the additional load of additional floors.

(iii) The building is located in a congested area of the city and the parking slots provided do not correspond to the expected number of visitors/tenants of the building.

4.19 SUBMISSION BY ADVENTIS INHOUSE AFRICA, PROJECT CONSULTANT (MAVOKO PROJECT)

The Architect & Partner in Adventis Inhouse Africa (AIA), Mr. Mohammed Munyanya appeared before the Committee on 21st May, 2015 to adduce evidence on the NSSF Joint Venture Project in Mavoko Municipality.

Mr. Munyanya informed the Committee THAT –

1. AIA was invited by NSSF vide letter Ref SF/A/10/16/VOL XVII dated 14th December 2010 to quote for "Provision of Consultancy Services for Evaluation of International Expression of Interest on Joint Venture in Project Development." The letter stated that NSSF was seeking the services of an experienced consultant to undertake the project. AIA is indeed experienced as detailed in its company profile. The advertisement was in relation to Expression of Interest Advertisement No. 05/2010-2011 for Joint Property Development.

2. The Terms of Reference were

   (i) Evaluation of technical responses
   (ii) Preparation of analysis report and ranking from the best to the lowest.
   (iii) Preparation of Request for proposal Documents (RFPs) to be issued to the short-listed firms.
   (iv) Evaluation of the technical response to RFPs
   (v) Preparation of a detailed analysis report & ranking from the best to the worst

3. After the initial stage, AIA was notified vide letter from NSSF dated 31st January 2011 that their technical proposal was successful and were invited to attend the opening of the financial proposals on 2nd February 2011. They replied to NSSF on 1st February 2011 confirming attendance.

4. On 18th February 2011, AIA received letter Ref. SF/A/10/16/VOL. advising that that their bid was successful and were awarded the contract for Technical Consultant for Evaluation of EOI No 05/2010-2011 responses and other associated services at the quoted tender sum of KES 4,728,160 (four million seven hundred and twenty-eight thousand, one hundred and sixty shillings only) and project management fee at 1.5% of the project cost.

5. On 24th February 2011, AIA was issued with acceptance letter.

6. On 5th April 2011, AIA entered into an agreement on the Project.

7. Under cover letter dated 20th April 2011, AIA issued a tender evaluation report for EOI Tender No. 05/2010-2011 for joint venture property development for a 960-acre parcel of land at Mavoko Municipality; 3.6-acre property on Kenyatta Avenue and 3.5-acre property in Milimani next to State House.

8. According to the evaluation, it was an open tendering process by advertising in the local dailies on October 2010.

9. According to the Report, the evaluation team recommended the top three firms/consortia in each of the site be shortlisted and invited to participate in submitting the detailed Request for Proposal as follows:

a) **Mavoko Sub County Property**

(i) China CAMC Engineering Company Limited- 86 marks

(ii) Joel E.D Nyaseme& Associates-77 marks

(iii) Housing Finance-65 marks

b) **Kenyatta Avenue property**

(i) China CAMC Engineering Company Limited- 86 marks

(ii) Sichuan Huashi Enterprises Corporation(EA) Limited- 72 marks

(iii) African Legend Limited- 61 marks

10. AIA requested that great emphasis be placed on the details of the bidder's proposals, level of investment and the expected returns to the Fund.

11. On 8th June 2011, NSSF Board of Trustees informed AIA of the approval to proceed to phase II of the works as per the contract. The instructions were as follows:

(i) **Mavoko Plots**: - a mixed development for self-sufficient township comprising up to 30,000 housing units plus all amenities. The cut off marks for bidders is 60% and therefore African Legend with 61 marks is added to the other three bidders.

(ii) **Kenyatta Avenue plots**: - a mixed urban complex development with a convention centre and only the three bidders will be invited to participate.

12. The Client NSSF further specified that

(i) All RFP bidders be subjected to stringent criteria to sift proposals

(ii) An analysis on the risks of handing over two contracts to one contractor be provided

(iii) Economic viability of all the concepts be provided.

(iv) Ensure optimization of the plot coverage

(v) Clear responsibility levels on joint ventures (where necessary) be indicated.

13. On 14th July 2011, NSSF requested them to revise in line with the standard tender documents and in compliance with PPOA, for procurement of works (Turnkey Projects). AIA forwarded copies of the revised copies of the Request for Proposal draft documents for Mavoko, Kenyatta Avenue and Milimani plots for NSSF to review.

14. On 8th June 2011, AIA received further instructions from NSSF Ref SFG/10/266/Vol 27 (.

15. On 15th June, 2011, the client wrote to them again asking them to forward bid proposals as received from the bidders on the projects. AIA responded the same day under forwarding letter Ref AIA/11/371-CL 003.

16. They were instructed by the Client on 21st June 2011 to proceed and prepare RFP documents. AIA forwarded the same vide letter Ref AIA/11/371-Cl 004 dated 8th July 2011 for Mavoko, Kenyatta Avenue and Milimani Projects.

17. On 14th July, 2011, they received a letter from the Client asking them to revise the RFP documents, which they did and forwarded vide letter Ref AIA/11/371-CL 005.

18. There was a lull until 27th September 2012 when NSSF advised AIA that they had been retained as consultants even though the Request for Proposals No. 16 and 17 for captioned projects had collapsed. They were retained in a bid to jump start and fast track the process as follows:

    (i) Facilitate the acquisition of various government organs approvals for the projects to proceed.
    (ii) Prepare revised Request for Proposal (RFP) documents after receiving the requisite approvals.
    (iii) Assist in the evaluation of the re-issued bids.
    (iv) All other terms under contract 10/2010-2011 including project management remain as provided in the contracts.

19. AIA responded, vide letter Ref AIA/11/371-CL 008 dated 28th September, 2012, giving a proposal on how to proceed, based on the aforementioned letter.

20. On 25th June 2014, they wrote to NSSF seeking a confirmation of project status after noticing activity on the Milimani project as advertised in the local dailies.

21. On 23rd July 2014, the Client responded, vide letter Ref SF/A/10/272 VOL II. (5) stating that Stage 2 of the Projects "collapsed" and that "the Fund did not instruct" them to proceed to evaluate and submit recommendations on the Joint Venture Partner to undertake the Joint Venture Project".

22. NSSF further explained that AIS progressed from Stage 1 evaluation of EOI for which they were paid KES 2,296,800, but Milimani project ceased to be part of the joint venture at this

stage. They proceeded to stage 2 i.e. for Mavoko and Kenyatta Avenue plots and prepared and submitted acceptable Requests for Proposal (RFPs) tender documents for which service you rendered and were paid KES 454,720 all inclusive. However, due to the collapse of stage 2, NSSF did not instruct them to proceed to evaluate and submit recommendation on Joint Venture Partner to undertake the Joint Venture Project and as a result of the failure, AIA was unable to progress to stage 3 and 4 to undertake project management since the contract automatically lapsed at stage 2.

23. AIA wrote back to the Client on 8th August 2014 vide letter Ref AIA/11/371B-CL 002 giving the correct tender reference in lieu of the incorrect one quoted by the Client in their letter Ref SF/A/10/272 VOL II (5) above, maintaining that their contract had not lapsed and also reiterating that they would be entitled to contract fees as the project are implemented.

24. AIA cannot be held responsible for not progressing to the 3rd and 4th stages. They informed NSSF that the project management stage 4 was a distinct and independent component of the contract and was never premised on the failure to progress to stage 3 but was anchored on actual commencement of the project. They contend that the contract does not allude to lapsing or automatic termination except where the consultant becomes unable to provide the services. They therefore contend that they are still contracted by NSSF until the implementation of the projects of Mavoko, Kenyatta Avenue and Milimani. The sites have not moved, they still stand.

25. Vide letter Ref. AIA/11/371B-CL 003 dated 28th October 2015, AIA sought response to the above letter.

26. NSSF responded on 3rd November 2014 vide letter Ref SF/A/10/272/VOL. II. /63 maintaining that their position conveyed vide SF/A/10/272 VOL.II(5) stands.

27. AIA will seek legal redress on the matter since the client has proceed with the projects without their professional input despite the fact that they have been duly retained to offer the services and have also been partly paid.

28. Asked whether acreage in Mavoko Sub County is sufficient for 60,000 housing units, Mr. Munyanya responded that 60,000 units would be too dense for Mavoko Sub County and may not be supported by the local infrastructure and bylaws.

29. The choice of joint venture property however makes good business sense and NSSF requires a lot of resources and the right partner for the joint venture to be successful.

Committee Specific Observations

The Committee made the following observations: THAT–

i. The process leading to procurement of AIA was not clear since they were randomly picked among others but not subjected to a competitive tendering process as per the PPDA 2005.
ii. Although NSSF has terminated AIA contract, AIA contends that it was based on the wrong contract and that they are still available to continue with the work they were contracted to do.
iii. Unless the stalemate is resolved, the tax payer could lose money if AIA proceeds with legal redress.
iv. It was not clear whether the high density of the Mavoko Project initially projected at 30,000 units but later increased to 60,000 units was allowed in the County by-laws.

4.20 SUBMISSION BY SINOHYDRO TIANJIN ENGINEERING CO. LTD.

Mr. Eric Mutua, Advocate for Sinohydro Tianjin Engineering Co. Ltd. one of the bidders of Mavoko Joint Venture Property Development made the following written evidence vide letter ref. EM/1468/08 dated 12th June, 2015: - THAT–

1. Following a newspaper notice advertised by NSSF on 22nd October, 2013, Sinohydro Engineering Ltd. tendered for the Joint Venture Property Development in Mavoko Sub County on 24th April, 2014.

2. NSSF requested for extension of the bid security for ninety (90) days. The Company subsequently confirmed acceptance of the request and submitted an extended bid security on 27th October, 2014.

3. On 4th February, 2015, the Company was notified by NSSF that the tender had been terminated and was invited to submit new proposals for the project. The Company subsequently submitted the new bid on 15th April, 2015.

4. Vide letter Ref. SF/A/11/60/VOL.1/25 dated 14th May, 2015, NSSF informed the Company that the new tender had also been terminated.

5. The Company entered into a consulting agreement with M/s Reverof Consult International Ltd. to provide expertise services in documentation for the tender and ensure compliance with the relevant laws. The said agreement was however terminated on 1st December, 2014 without performance from either party.

6. The Company informed the Committee that it was not involved in the Kenyatta Avenue Project.

4.21 SUBMISSION BY REVER OF CONSULT INTERNATIONAL LTD

Mr. Kioko Kilukumi, advocate for Mr. Solomon Muthamia who is a representative of Reverof Consult International Ltd., informed the Committee vide letter Ref. KK/GEN/SM/012/2015 THAT–

1. Reverof Ltd. entered into a contract with Sinohydro Tianjin Engineering Co. Ltd. to provide consulting services. Art. 1.2 and 1.3 of the consultancy agreement stated that there was no partnership and agency between the contracting parties.

2. Art. 3 of the Consulting Agreement further specifies that Reverof's role was to ensure that the tender documents were correctly completed and in compliance with the applicable procurement laws and practices in Kenya.

3. Reverof Ltd. was involved in the tendering process of the Mavoko Project and its involvement was limited to the terms of the consultancy service agreement dated 30th June, 2014.

4. Mr. Muthamia signed the agreement with Sinohydro Tianjin Ltd. as a duly authorized representative of Reverof Consult International Ltd., a foreign company registered in the United Arab Emirates.

5. The Agreement was cancelled on 1st December 2014 and Reverof Ltd. had no further dealings regarding the project.

6. In accordance with Art. 5.1 of the Agreement, Reverof Ltd. was to be paid upon the award of the tender to Sinohydro Tianjin Engineering Co. Ltd. Since the tender was terminated, no payment was made to Reverof Ltd.

5.0 COMMITTEE GENERAL OBSERVATIONS

GENERAL OBSERVATIONS ON THE COMPLETION OF THE NSSF HAZINA TRADE CENTRE OFFICE TOWERS IN THE NAIROBI CENTRAL BUSINESS DISTRICT

From the oral and written evidence submitted, the Committee made the following general observations and findings —

(i) **THAT,** the procurement process for the completion of the NSSF Hazina Trade Centre Office Towers in Nairobi Central Business District was shrouded in opaqueness and as such, the process lacked fairness, equity, transparency and competitiveness.

(ii) **THAT,** approval for the project from the then Nairobi City Council was conducted before the full scope of the project was determined to establish traffic management master plan, public safety environmental and social risks the project poses to businesses operating within the vicinity, neighbouring buildings and streets due the nature of the site.

(iii) **THAT,** there was an oversight in renewal of the building plan approvals and extension of the National Environment Management Assessment Authority (NEMA) licence, in that, renewals were undertaken without appropriate validation of the Environmental Impact Assessment and traffic study report. This means that urban development changes that have taken place over the period which have a bearing on the proposed development in as far as planning and environmental acceptability is concerned, were not reviewed and taken into consideration.

(iv) **THAT,** Mr. Alex Kazongo, the former Managing Trustee reappointed the consultants on 1st December, 2010 without subjecting them to a competitive procurement process. The reappointment letters referred to a project which had commenced but stalled twelve years earlier. This was in total disregard of Articles 3 and 227 of the Constitution and the Public Procurement and Disposal Act, 2005.

(v) **THAT,** the revival and the enhancement of the Hazina Trade Centre Office Towers Project in the year 2013 should have been treated as a new contract and thus subject to the Public Procurement and Disposal Act, 2005. The re-engagement of the Project Consultants from the original project to oversee the enhanced Hazina Tower Project, therefore, was in breach of the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006.

(vi) **THAT,** China Jiangxi International Ltd. was found to have made an arithmetic error of KES 115,329,300 in its financial bid. The Company accepted the arithmetic error and consequently adjusted their tender sum upwards from KES 6,599,888,888 to KES 6,715,218,188. NSSF informed China Jiangxi about the arithmetic error after the evaluation process and not before, contrary to Section 63 of the PPDA 2005 and clause 5.7, Instruction to Bidders, in the bid document.

(vii) **THAT,** the financial evaluation of the tender for the completion of the NSSF Hazina Trade Centre Office Towers was not carried out by an Evaluation Committee established in accordance with Regulation 16(7) of the Public Procurement and Disposal Regulations, 2006. This is evidenced by a letter Ref. No. TA/454/13 from Tana & Associates dated 7th February, 2013 forwarding the financial evaluation report. In addition, the unsigned report did not recommend which firm was to be awarded the tender although from the Report, China Jiangxi International (K) Ltd. was the lowest evaluated bidder even after correcting the arithmetic error of KES 115,329,300.

(viii) **THAT,** the successful bidder repeated provisional sums for some un-quantified works in the Bill of Quantities (BQ) in its financial bid documents. For example, in the BQ for sub contract for mechanical ventilation and air conditioning installation, which tellingly the Fund failed to subcontract against the mandatory tender requirements, the following provisional sums were provided:

(a) PC for Plenum Chamber and associated works = KES 5,000,000

(b) PC for basement fans automation = KES 5,000,000

(c) Provisional Sum for contingency sum = KES 2,000,000

Still in the same BQ the Company included the following provisional sums: -

(d) Provided the sum of KES 80,000,000 to cover the cost of mechanical builders in plenum chambers, fans in basement and services refurbishment and interconnection.

(e) Under the subcontract for mechanical ventilation and air conditioning, China Jiangxi International (K) Ltd. was the sub-contractor at KES 33,973,867 which included provisional sums of KES 5,000,000; KES 5,000,000; and KES 2,000,000

(f) *The total tender sum of KES 6,715,218,488 awarded to China Jiangxi International (K) Ltd. included all these provisional sums listed above that is KES 80,000,000; and KES 2,000,000.*

This double provision may have significantly escalated the cost of the project and loss of funds, and the Fund, therefore, stands to lose funds through double counting.

(ix) **THAT,** China Railways No. 5 Engineering Group Co. Ltd. and China Wu Yi Ltd. did not provide Certificate of Incorporation which was a mandatory requirement, but were considered responsive during preliminary evaluation against the provisions of Section 64(1) of the Act. The failure to disqualify the two firms was inconsistent with Regulation 48(1) of the PPDR 2006 and this may have been done to make the process appear competitive. The procuring entity did not correct errors noted in the financial bid of the successful bidder in accordance with Section 63 of the Act and clause 5.7, Instruction to Bidders, in the bid document.

(x) **THAT,** the Evaluation Committee failed to adhere to the provisions of Section 64(1) of the Act by not considering the audited accounts of the joint venture partners (sub-contractors) of the winning bid and in consequence made the Company responsive.

(xi) **THAT,** the Fund failed to put in place satisfactory mitigation measures during the construction of the Hazina Office Towers and as a result the Nairobi City County issued an order putting in abeyance the proposed development of the office towers from July 2013 to December 2013.

(xii) **THAT,** the Nairobi City County Government approved the building plan for the enhanced project subject to vacation by all existing tenants including the main tenant Nakumatt Holdings Ltd. This is bound to attract compensation claims for loss of business and breach of an existing 20-year lease tenancy agreement entered into by the Fund (lessor) and Nakumatt Holdings Ltd. (lessee).

(xiii) **THAT,** Nakumatt Holdings Ltd has sued the Fund vide Milimani Land Case No. 1170 of 2014 for among others, seeking to restrain NSSF from continuing with construction of Hazina Trade Centre Office Towers until all the contentious issues are settled including compensation for loss of business amounting to KES1.6 billion. This negates the very objective for which the project was conceived, which is, return on investments for its members.

(xiv) **THAT,** the NSSF may not realize value for money owing to the delay in completing the Project, which will likely attract claims from the Contractor. Further, should the Fund abandon strengthening of the columns as per State Department of Public Works' advice, the Fund will have made a loss of KES 244,728,603, which is 3.6% of the tender figure of KES 6,715,218,488. The amount already spent on column strengthening is KES 192, 925,750.00. The remaining column strengthening works amounts to KES 51,802,853.

(xv) **THAT,** on governance matters, the Fund has had a high turnover of Managing Trustees. For instance, between the years 2010 and 2017, the Fund has had five (5) Managing Trustees managing the Fund. This high turnover affected the effective implementation of various projects including the Hazina project.

OBSERVATIONS ON THE JOINT VENTURE PROPERTY DEVELOPMENT IN MAVOKO SUB-COUNTY AND KENYATTA AVENUE (NAIROBI CBD)

a) The Joint Venture Property Development in Mavoko Sub-County

The Committee made the following observations:

(i) **THAT**, there is disparity in acreage of land for the proposed project development. According to PPOA, 960 acres are available while NSSF informed the Committee that 1,010 acres are available. It's not clear what the true position is and this also has a bearing on the value of the exact land available for development.

(ii) **THAT**, the Fund's Mavoko land is an expansive parcel of land which has been lying idle since 1993 when it was acquired and there are fears of encroachment by squatters. In 2010, the Board, while reviewing its idle assets and upon the recommendation of management, decided to tender for Expression of Interest from international bidders seeking optimal use of the land.

(iii) **THAT**, the Board of Trustees approved the development of the land through a joint venture scheme, whereby NSSF was to contribute land (10%) while the winning bidder would inject cash (90 %) necessary to build 20,000-30,000 houses with amenities targeting (lower) middle class owners. The profit from this development would be shared proportionately to capital contribution.

(iv) **THAT,** the procuring entity was advised by PPOA that the original tender was invalidated by enactment and implementation of the Public Private Partnership (PPP) Act, 2013, and the law cannot, therefore, be applied retrogressively. Despite the advice, the Fund proceeded to invite for new tenders through restricted tendering method using the list of the bidders of the lapsed tender. It was improper for the Fund's Tendering Committee to use a list of bidders who responded to a terminated tender. The Fund should have instead conducted the re-tendering process through open tendering.

(v) **THAT,** further, the Cabinet approval on the project was a policy decision, but not necessarily an approval of procurement and compliance to procurement regulations by the contracting entity.

(vi) **THAT,** the tender was terminated on 13th May, 2015 owing to negative publicity surrounding it. The termination was done in accordance with section 36(1) of the Public Procurement and Disposal Act, 2005 on recommendation of the Tender Processing Committee.

(vii) **THAT,** although the tender was cancelled, public funds were spent in the procurement process of the joint ventures as well as in advertisements to cancel the tender.

(a) Kenyatta Avenue (Nairobi CBD)

The Committee made the following observations:

(i) **THAT**, the Fund planned to undertake a development on 3.6 acres of land it owns along Kenyatta Avenue in Nairobi Central Business District in order to improve returns on investment. Currently, the piece of land is not optimally utilized other than capital appreciation.

(ii) **THAT,** the development was approved by the Board's Operation and Investment Committee in its 13th meeting held on 31st August, 2010.

(iii) **THAT,** International Request for Proposals (IRFP's) No. 8/2013 – 2014 for Joint Venture Property Development in CBD was advertised on 22nd October, 2013.

(iv) **THAT**, the closing and opening of the IRFPs for the project was successfully concluded on 22nd April, 2014, two firms responded. Following the implementation of the PPP Act, 2013, the Fund sought clarification from the Public Private Partnership (PPP) Unit on whether the Kenyatta Avenue project as originally conceptualized fell under the PPP arrangement.

(v) **THAT,** the tender was terminated on 13th May, 2015 owing to negative publicity surrounding it. The termination was done in accordance with section 36(1) of the Public Procurement and Disposal Act, 2005 on recommendation of the Tender Processing Committee.

(vi) **THAT,** the Cabinet approval on the project was a policy decision, but not necessarily an approval of procurement and compliance to procurement regulations by the contracting entity.

(vii) **THAT,** although the tender Kenyatta Avenue was cancelled, public funds were spent in the procurement process of the project as well as in advertisements to cancel the tender.

6.0 COMMITTEE GENERAL RECOMMENDATIONS

From the evidence adduced (oral and written) and the observations made, the Committee recommends as follows:

(i) **THAT,** the Ethics and Anti-Corruption Commission investigates the conduct of Mr. Alex Kazongo, the former Managing Trustee for contravention of Section 74 of the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006 in the re-appointment of the Project Consultants for the revived Hazina Trade Centre Office Towers project. This re-appointment of consultants is tantamount to direct procurement.

The Ethics and Anti-Corruption Commission to report to the National Assembly, the implementation status of this recommendation, not later than six (6) months after the adoption of this Report;

(ii) **THAT,** the Fund and all State Corporations in general, must strictly adhere to the requirements of the Constitution of Kenya, the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act, 2012 in the implementation of projects. Sufficient due diligence should be carried out prior to project implementation to avoid claims and losses that may accrue from interrupted implementation, similar to the Hazina Trade Centre Office Towers Project, for which Nakumatt Holdings Ltd. is claiming KES 1.6 billion for losses incurred through breach of contract;

(iii) **THAT,** the Cabinet Secretary, Ministry of Transport, Infrastructure, Housing and Urban Development should urgently convene a meeting of all relevant stakeholders to agree on the structural viability of the Hazina Trade Centre project and its completion at minimum cost within the stipulated timelines.

The Cabinet Secretary, Ministry of Transport, Infrastructure, Housing and Urban Development to report to the National Assembly, the implementation status of this recommendation, not later than three (3) months after the adoption of this Report;

(iv) **THAT,** the impasse between NSSF and Nakumatt Limited ought to be urgently resolved in the interest of the public, to allow for completion of the project.

The Managing Trustee, NSSF to report to the National Assembly, the implementation status of this recommendation, not later than three (3) months after the adoption of this Report;

(v) **THAT,** in future, the Fund should conduct a feasibility study on capital projects to determine the viability of the investments before commencement of the projects;

(vi) **THAT,** the Fund should urgently secure its property in Mavoko to avoid encroachment by private developers;

(vii) **THAT,** to mitigate against the high turnover of Managing Trustees, the NSSF Act should be amended with a view to improving the governance structure of the Fund and provide for security of tenure for the Managing Trustee.

CONCLUSION & WAY FORWARD

Taking into account the inordinate delay to complete the Hazina Trade Centre Office Towers project, the opportunity cost, contractual obligations and the colossal amount of funds already spent on the Project in the completion, **the most prudent and reasonable way-forward for the project is for all the concerned parties including the National Social Security Fund, the Ministry of EAC, Labour and State Protection, the Ministry of Transport, Infrastructure, Housing and Urban Development, the Nairobi City County Government, the Project Consultants and Nakumatt Holdings Limited, to urgently address the contentious issues hindering completion of the Project. This will create a conducive environment for the contractor to meet his contractual obligations as per the contract and ensure that the Project is completed as envisaged and pensioners obtain value for their money.**

ANNEXURES