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SA

24/4/19

THE NATIONAL ASSEMBLY
PAPERS LAID

DATE: 24 APR 2019

DAY: Wednesday

TABLED BY: Chairperson, DC on
Justice & Legal Affairs

TABLE: Getrude Chebet

PARLIAMENT
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REPUBLIC OF KENYA



TWELFTH PARLIAMENT – THIRD SESSION, 2019

THE NATIONAL ASSEMBLY

THE DEPARTMENTAL COMMITTEE ON JUSTICE AND
LEGAL AFFAIRS

REPORT ON CONSIDERATION OF THE LAW OF
CONTRACT (AMENDMENT) BILL, 2019

DIRECTORATE OF COMMITTEE,
PARLIAMENT BUILDINGS,
NAIROBI

APRIL, 2019

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LIST OF ABBREVIATIONS AND ACRONYMS

Hon	-	Honourable
KBA	-	Kenya Bankers Association
KEPSA	-	Kenya Private Sector Alliance

LIST OF ANNEXURES

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Annexure 2: Copy of newspaper advertisement inviting the public to submit memoranda on the Bill

Annexure 3: Stakeholder memoranda on the Bill

CHAIRPERSON'S FOREWORD

The Law of Contract (Amendment) Bill, 2019 was published in the Kenya Gazette on 28th January, 2019 (National Assembly Bill No. 1/2019). The Bill underwent First Reading on 13th February, 2019 and was committed to the Departmental Committee on Justice and Legal Affairs for review and report to the House pursuant to the provisions of Standing Order 127.

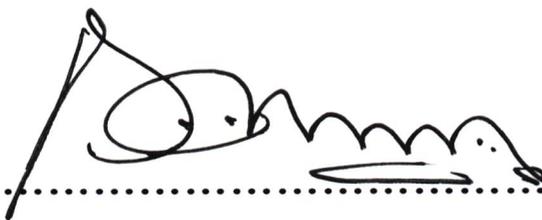
The Committee wishes to draw the attention of the House to its recommendation in 2018, asking the House to reject a similar amendment that was contained in the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12/2018). The Committee had then recommended rejection of the amendment having taken into account submissions by the Attorney-General, the Kenya Bankers Association and the Law Society of Kenya who had all called for further consultations among stakeholders before the passage of the proposal. Upon hearing from the Legislative Proposal's sponsor, the Committee was persuaded by the proposed amendment and recommends for the passage of the Bill subject to passage of one minor amendment.

Pursuant to the provisions of Article 118 of the Constitution of Kenya and Standing Order 127 (3), through advertisement in the local daily newspapers of 19th February, 2019, the Clerk of the National Assembly invited the public to make representations on the Bill. Stakeholders most notably the Kenya Bankers Association (KBA), the

Kenya Private Sector Alliance (KEPSA) and Kipkenda and Company Advocates responded. Indeed, their views were invaluable to the Committee in the consideration and final recommendations on the Bill.

May I take this opportunity to commend the Committee Members for their devotion and commitment to duty which made the consideration of the Bill successful. May I also express gratitude to the Offices of Speaker and Clerk of the National Assembly for providing direction and the Committee secretariat for providing technical and logistical support.

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order 199 (6), it is my pleasant privilege and duty to present to the House a report of the Committee on the Law of Contract (Amendment) Bill, 2019.

Signed..........Date.....26.03.2019.....

HON. WILLIAM CHEPTUMO, M.P.
CHAIRPERSON, DEPARTMENTAL COMMITTEE ON
JUSTICE AND LEGAL AFFAIRS

PART 1

1. PREFACE

1.1. Mandate of the Committee

1. The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-

- (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- (b) study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- (c) study and review all legislation referred to it;
- (d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;

- (e) investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;
- (f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)
- (g) examine treaties, agreements and conventions;
- (h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- (i) consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and
- (j) Examine any questions raised by Members on a matter within its mandate.

2. The Second Schedule of the Standing Orders on Departmental Committees further outlines the Subjects of the Committee, as follows-

- (a) Constitutional affairs;

- (b) The administration of law and Justice
- (c) The Judiciary;
- (d) Public prosecutions;
- (e) Elections;
- (f) Ethics, integrity and anti-corruption; and
- (g) Human rights.

1.2. Committee Membership

3. The Committee was constituted on Thursday, 14th December, 2017 and comprises the following Honourable Members-

No.	NAME	CONSTITU- ENCY	PARTY
1.	Hon. William Cheptumo, M.P. – <i>Chairperson</i>	Baringo North	Jubilee
2.	Hon. Alice Muthoni Wahome, M.P. – <i>Vice Chairperson</i>	Kandara	Jubilee
3.	Hon. John Olago Aluoch, M.P.	Kisumu West	ODM
4.	Hon. Roselinda Soipan Tuya, M.P.	Narok County	Jubilee
5.	Hon. Charles Gimose, M.P.	Hamisi	Ford Kenya
6.	Hon. William Kamoti Mwamkale, M.P.	Rabai	ODM
7.	Hon. Peter Opondo Kaluma, M.P.	Homa Bay	ODM
8.	Hon. Ben Orori Momanyi, M.P.	Borabu	Wiper Democratic Movement
9.	Hon. Johana Ng’eno, M.P.	Emurua Dikirr	KANU

10.	Hon. George Gitonga Murugara, M.P.	Tharaka	Democratic Party
11.	Hon. Anthony Githiaka Kiai, M.P.	Mukurueni	Jubilee
12.	Hon. Gladys Boss Shollei, CBS, M.P.	Uasin Gishu County	Jubilee
13.	Hon. Beatrice Adagala, M.P.	Vihiga County	Amani National Congress
14.	Hon. Jennifer Shamalla, M.P.	Special Interests	Jubilee
15.	Hon. John Munene Wambugu, M.P.	Kirinyaga	Jubilee
16.	Hon. Japheth Mutai, M.P.	Bureti	Jubilee
17.	Hon. Adan Haji Yussuf, M.P.	Mandera West	Economic Freedom Party
18.	Hon. John Kiarie Waweru, M.P.	Dagoretti South	Jubilee
19.	Hon. Zuleikha Hassan, M.P.	Kwale County	ODM

1.3. Committee Secretariat

4. The officers facilitating the Committee include -

Mr. George Gazemba	-	Principal Clerk Assistant II
Mr. Denis Abisai	-	Principal Legal Counsel I
Ms. Halima Hussein	-	Clerk Assistant III
Ms. Fiona Musili	-	Research Officer III
Mr. Omar Abdirahim	-	Fiscal Analyst III
Mr. Joseph Okongo	-	Media Liaison Officer
Mr. Hakeem Kimiti	-	Audio Officer
Ms. Roselyne Ndegi	-	Serjeant-at-Arms

Minutes of Committee sittings on proceedings on the legislative proposal form annexure 1 of this report.

PART 2

2. INTRODUCTION AND BACKGROUND

2.1. Memorandum of objects and reasons of the Bill

5. The principal object of the Law of contract (Amendment) Bill, 2019 is to amend the Law of Contract Act. It proposes to amend the Law of Contract Act, Cap. 23 so that in case of a default by the principal borrower, the creditor should first realise the assets of the principal borrower before proceeding to realise the assets of the guarantor.
6. The Bill further provides for the amendment to section 3 of the Law of Contract Act to provide that before a creditor pursues a guarantor in law, he or she should first realise the assets of the principal debtor.
7. The Bill does not delegate legislative powers to the Cabinet Secretary nor does it limit fundamental rights and freedoms.
8. The Bill does not affect the functions of the County Governments and is therefore not a Bill concerning counties for purposes of the Standing Orders within the meaning of article 110 of the Constitution of Kenya.

9. The enactment of this Bill shall not occasion additional expenditure of public funds.

PART 3

3. PUBLIC PARTICIPATION IN THE REVIEW OF THE BILLS

10. Article 118 (1) (b) of the Constitution of Kenya provides as follows-

“Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees”

11. Standing Order 127(3) & (3A) requires *the* Departmental Committee to which a Bill is committed to facilitate public participation and to take into account the views and recommendations of the public when the Committee makes its recommendations to the House

12. In line with the Constitution and Standing Orders, the Departmental Committee on Justice and Legal Affairs, in the local daily newspapers of 19th February, 2019 attached as annexure 2 of the report invited the public to make presentations on the Bill.

13. The Committee received three (3) written memoranda forming annexure 3 of the report from the following organizations -

- (a) Kipkenda and Company Advocates;
- (b) Kenya Private Sector Alliance (KEPSA); and
- (c) Kenya Bankers Association (KBA).

14. The Committee extensively considered the contents of the submissions and details of the deliberations and the Committee's observations and recommendations are contained in part 4 and 5 of this report.

PART 4

4. CLAUSE BY CLAUSE CONSIDERATION OF THE BILL

15. This part of the report deals with the Clause by Clause consideration of the Bill by the Committees after taking into consideration the views of the aforementioned stakeholders.

4.1 Clause 1- Short Title

16. Clause 1 relates to the short title of the Bill

4.2 Committee Observations and recommendations

17. The Committee observed that there were no stakeholder comments received on this Clause and therefore recommends that the Clause be agreed to as it appears in the Bill.

4.3 Clause 2: Amendment of Section 3 of CAP 23

18. This Clause provides for the amendment to section 3 of the Act to provide that before a creditor pursues a guarantor in law, he or she should first realise the security of the principal debtor.

19. The following stakeholders submitted memoranda on this clause as captured hereunder-

4.4 Stakeholder views

4.4.1 Kipkenda and Company Advocates

20. The firm of advocates proposed that the Clause be drafted as follows-

“(1A) Notwithstanding the provisions of subsection (1), unless the contracting parties otherwise agree, before a suit is brought against a defendant under sub-section (1), the plaintiff shall first realize the security (if any) and or assets of the principal borrower provided that where a party unilaterally varies such agreement or memorandum to which such special promise to answer for the debt, default or miscarriage of another person is promised, to the detriment of the defendant (guarantor), the exclusion of this clause or an otherwise agreement shall be deemed forfeited and unenforceable.”

4.5 Committee observations

21. The Committee observed that the proposed redrafting of the Clause contradicted Standing Order 133 (5) of the National Assembly Standing Orders which provides that no amendment shall be permitted to be moved if the amendment deals with a different subject or proposes to unreasonably or unduly expand

the subject of the Bill, or is not appropriate or is not in logical sequence to the subject matter of the Bill.

22. The Committee noted that whereas the principal object of the Bill as originated by the sponsoring Member was to require creditors to first realise the assets of the principal borrower before proceeding to realise the assets of the guarantor, the proposed amendment by Messrs Kipkenda and Company Advocates would unduly expand the subject matter by introducing other concepts like unilateral variation of contract terms and parties' freedom to contract.

4.5.1 Kenya Private Sector Alliance (KEPSA)

23. KEPSA submitted that the proposed amendment is good for guarantors as it offers them a semblance of security 'against the principal wilfully causing them to answer for their debts despite the principal being capable of honouring their own debts'. The proposed amendment thus makes it easier for people to offer themselves to stand surety for other people.

24. KEPSA further submitted that the proposed amendment will affect creditors/plaintiffs negatively as it will make the process of recovering debts longer and more expensive. KEPSA was also of the view that the amendment will create a loophole in the law that may give guarantors ample time to conceal or dispose of their assets to avoid servicing the debts they guaranteed.

25. KEPSA further stated that the amendment may negatively impact private sector credit growth to Micro, Small and Medium Enterprises (MSMEs) due to reduced appetite by lenders to rely on third party collateral if the law comes into effect. Lenders will experience considerable frustration and delay in realizing existing guarantees and third-party securities as they will now first exhaust the enforcement process through the principal borrower.

26. KEPSA proposed that the Bill be amended by inserting a new sub-clause (1A) to provide that for financiers who are regulated under the Banking Act, Microfinance Act and the Auctioneers Act, the liability of the guarantor be made co-extensive with that of the principal debtor, unless otherwise provided for in the contract. KEPSA was also of the view that the requirement in the Bill to pursue the principal debtor's assets prior to bringing suit against a guarantor should be restricted to instances where a personal guarantee is not supported by a security.

27. KEPSA further submitted that there should be a clause in the Bill providing that the law shall not be applied retrospectively, in order to protect existing rights possessed at the time of entering into contracts and avoid imposing new duties with respect to transactions already completed.

4.6 The Committee observations

28. The Committee agreed with the submissions by KEPISA to the extent that the proposed amendment was good for guarantors as it protected them from principal borrowers who may wilfully cause guarantors to answer for their debts despite the borrowers being capable of honouring their own debts.

29. The Committee considered the second submission by KEPISA that the amendment may negatively impact private sector credit growth to business enterprises due to reduced appetite by lenders to rely on third party collateral and was of the view that it was upon the lenders to exercise due diligence on the ability of the principal borrowers to repay the debts before lending out their money. As such, the Committee was of the view that the liability of the guarantor should be treated as a secondary obligation which is contingent on the principal failing to perform the obligations which have been guaranteed and any recovery attempts should first target the assets of the principal.

30. The Committee considered the third submissions by KEPISA that the law should not be amended and applied retrospectively and agreed that there is indeed need to amend the Bill to clarify that the amendment will protect existing proprietary rights possessed at the time of entering into contracts before the proposed change in the law.

4.6.1 Kenya Bankers Association

31. The Kenya Bankers Association submitted as follows:-

- (a) The Bill and the Memorandum of Objects and Reasons refer to different legal terms (“security” and “assets”) which may cause confusion and ambiguity when implementing the amendment;
- (b) The words “(“security” and “assets”) are not defined in the Bill or in the current Law of Contract Act, Cap. 23;
- (c) The amendment will lead to reduced appetite by lenders to rely on third party collateral if the law comes into force, which may impact lending arrangements generally as assets from the borrower may be insufficient to cover the debt;
- (d) Lack of specific indication that the law shall not be applied retrospectively;
- (e) Lack of clear distinction between a guarantee which is supported by security from the personal guarantor;
- (f) The amendment may provide a legal loophole where guarantors who have provided third party security to their own companies may deliberately divert the borrowed funds

from the companies with the knowledge that the lender must first exhaust the enforcement process over the company through Kenya's lengthy court processes.

32. The KBA recommended that the Bill should provide a clear definition of the term "security" and that the focus of the Bill should be for the creditor to demonstrate that the guarantor has read and understood the nature of obligations under the underlying contract. KBA further proposed that the law should have a clause stating that it shall not apply retrospectively.

33. The KBA further proposed that there should be a clause in the Bill providing that the law shall not be applied retrospectively and that the requirement in the Bill to pursue the principal debtor's assets prior to bringing suit against a guarantor should be restricted to instances where a personal guarantee is not supported by a security.

4.7 Committee Observations

34. The Committee noted the submissions by the KBA that the use of the term "assets" in the Memorandum of Objects and Reasons and the subsequent use of the term "security" in Clause 2 of the Bill was confusing and ambiguous.

35. The Committee thus proposes that Clause 2 of the Bill be amended by deleting the word “security” and substituting therefor the word “assets”. The justification for the proposed amendment is to rectify an inadvertent drafting error and align the Bill to intentions of the sponsor of the Bill as clearly set out in the memorandum of objects and reasons.

36. The Committee did not agree with the submissions by the KBA that there was need to define the term “assets” as used in the Bill because the term was used in its ordinary and natural sense. In legislative drafting, Parliament only provides definitions when words are being used in an unusual or technical sense.

37. The Committee considered the submission by KBA that the amendment may negatively impact private sector credit growth to business enterprises due to reduced appetite by lenders to rely on third party collateral and was of the view that it was upon the lenders to exercise due diligence on the ability of the principal borrowers to repay the debts before lending out their money. As such, the Committee was of the view that the liability of the guarantor should be treated as a secondary obligation which is contingent on the principal failing to perform the obligations which have been guaranteed and any recovery attempts should first target the assets of the principal.

38. The Committee considered the submissions by KBA that the law should not be amended and applied retrospectively and

agreed that there is indeed need to amend the Bill to clarify that the amendment will protect existing proprietary rights possessed at the time of entering into contracts before the proposed change in the law.

PART 5

5. COMMITTEE RECOMMENDATIONS

39. The Committee, having considered the Bill clause by clause and the submissions from the public proposes that the Bill be passed subject to the inclusion of the following amendment to Clause 2-

40. deleting the word “security” appearing in the proposed new subsection (1A) and substituting therefor with the word “assets”;

(a) inserting the following proposed new subsection immediately after the proposed new subsection (1A)-

(1B) for the avoidance of doubt, subsection (1A) shall not apply to any transaction or contract entered into before it came into force.

Rationale for the amendment

(i) To provide for the law not be applied retrospectively and that the requirement in the Bill to pursue the principal

debtor's assets prior to bringing suit against a guarantor should be restricted to instances where a personal guarantee is not supported by a security.

- (ii) To provide clarity in the use of the term "assets" in the Memorandum of Objects and Reasons and the subsequent use of the word "security" in Clause 2 of the Bill was confusing and ambiguous
- (iii) To provide for the liability of the guarantor being treated as secondary obligation which is contingent on the principal failing to perform the obligations which have been guaranteed and any recovery attempts should first target the assets of the principal.

Sign..........Date.....26-03-2019.....

HON. WILLIAM CHEPTUMO, M.P.
CHAIRPERSON, DEPARTMENTAL COMMITTEE ON
JUSTICE AND LEGAL AFFAIRS

ANNEXURE 1

(Minutes of Committee sittings on the consideration of the Bill and adoption of report)

MIN No. 471/2019:-

**CONSIDERATION AND ADOPTION OF
DRAFT REPORT ON THE LAW OF
CONTRACT (AMENDMENT) BILL, 2019**

The Committee considered and adopted the report on the Law of Contract (Amendment) Bill, 2019. The adoption was proposed by Hon Alice Wahome and seconded by Hon Jennifer Shamalla.

MIN No.472 /2019:-

**CONSIDERATION AND ADOPTION OF
DRAFT REPORT ON THE LEGISLATIVE
PROPOSAL ON PUBLIC PARTICIPATION
BY HON. CHRIS WAMALWA, MP.**

The adoption of the report on the legislative proposal on public participation by Hon Chris Wamalwa was deferred to the next meeting.

MIN No. 473/2019:-

ANY OTHER BUSINESS

The following matters were raised;

- 1) The Committee raised concerns over the Judiciary matters regarding petitions against the Supreme Court Judges and the Committee agreed to deliberate on the matter during its next Sitting.
- 2) The Committee noted with concerns the recent ruling delivered by three judges of the Court of Appeal that allowed petition seeking to register a non-governmental organization whose sole mandate was to address the violence and human rights abuses suffered by gay and lesbian people with NGO Coordination Board. The Committee resolved to discuss the matter during its next Sitting.
- 3) The Committee further noted the judgement by Court of Appeal regarding Parliament to enact law to reduce the age of consent from 18 to 16 in the Sexual Offences Act, 2003 and agreed to discuss it in the next meeting

4) Invitations

Rationale: The Attorney General is responsible for matters relating to justice and legal affairs in the current government structure. The Attorney-General is also the titular head of the bar as provided for in section 6 (2) of the Office of the Attorney General Act, No. 49 of 2012 and has the requisite qualifications and experience to review the Code of Conduct applicable to the County Attorney, the County Solicitor and the County Legal Counsel.

2. **Clause 5** provides for the procedure for appointment and the qualifications for appointment expected of a person seeking the Office of the County Attorney. Clause 5 (2) provides that the persons should have at least five years' experience as an Advocate of the High Court of Kenya and meet the requirements of Chapter Six of the Constitution.

The Committee further observed that admission as an advocate brings the County Attorney within the purview of the statutory body responsible for the professional regulation of advocates (the Law Society of Kenya). The LSK has a duty to ensure that all advocates uphold high standards of professional integrity and the person to be appointed as County Attorney should not be exempted from these standards.

3. **Clause 6** provides for the tenure of office of the County Attorney which is a term of six years.

The Committee observed that the County Attorney requires security of tenure and resolved to amend the clause by inserting the word "renewable" immediately before the word "term".

Rationale: The amendment will provide security of tenure and ensure ease in transition whenever a new Governor takes office.

The Committee was of the view that it is important to give the County Attorney the status and terms of service enjoyed by the members of the county executive committee in order to attract a high calibre of advocates to the position and retain the ones currently serving in those offices, if they have the stipulated qualifications. The Committee thus recommends that a new subclause (2) be inserted in Clause 2, to read as follows-

- (2) The County Attorney shall have the status and rank of a member of the county executive committee.

The adoption of the report was proposed by Hon Boss Shollei and seconded by Peter Kaluma.

MIN No. 468/2019:-

**CONFIRMATION OF MINUTES OF
PREVIOUS SITTINGS**

Confirmation of Minutes were deferred

MIN No. 469/2019:-

**CONSIDERATION OF LEGISLATIVE
PROPOSAL TO AMEND ARTICLES 107,
108, 117, 151 OF THE CONSTITUTION OF
KENYA BY HON. JOSHUA KUTUNY, MP.**

The Meeting was informed that Hon Joshua Kutuny who was scheduled to appear before the Committee to prosecute his proposal has requested for rescheduling of the meeting to a later date. The Committee acceded to the request and resolved to meet the Member on Thursday, 28th March, 2019.

MIN No. 470 /2019:-

**CONSIDERATION AND ADOPTION THE
DRAFT REPORT ON THE OFFICE OF
THE COUNTY ATTORNEY BILL
(SENATE BILL NO. 3 OF 2019)**

The Committee considered and adopted the report on the Office of the County Attorney Bill (Senate Bill No. 3 of 2019) with the following amendments;

1. **Clause 2** on interpretations of the terms used in the Bill

The Committee observed that there is no Cabinet Secretary responsible for matters relating to justice and legal affairs in the current government structure who would perform the functions contemplated in the substantive Part of the Bill.

The Committee therefore recommended that the definition of the term "Cabinet Secretary" be deleted and be substituted with the following new definition;

"Attorney-General" means the Attorney-General appointed under Article 156 of the Constitution;

MINUTES OF THE ONE HUNDRED AND TWENTIETH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON WEDNESDAY, 26TH MARCH, 2019 AT 11:54 A.M. IN BOARDROOM, 2ND FLOOR, PROTECTION HOUSE, PARLIAMENT BUILDING

PRESENT-

- | | | |
|--|---|-------------------------|
| 1. Hon. William Cheptumo, M.P. | - | Chairperson |
| 2. Hon. Alice Muthoni Wahome, M.P. | - | Vice Chairperson |
| 3. Hon. William K. Mwamkale, M.P. | | |
| 4. Hon. Peter Kaluma, M.P. | | |
| 5. Hon. George G. Murugara, M.P. | | |
| 6. Hon. Anthony G. Kiai, M.P. | | |
| 7. Hon. Gladys Boss Shollei, CBS, M.P. | | |
| 8. Hon. Beatrice Adagala, M.P. | | |
| 9. Hon. Jennifer Shamalla, M.P. | | |
| 10. Hon. John M. Wambugu, M.P. | | |

ABSENT WITH APOLOGIES

1. Hon. John Olago Aluoch, M.P.
2. Hon. Ben Momanyi, M.P.
3. Hon. Roselinda Soipan Tuya, M.P.
4. Hon. Johana Ng'eno, M.P.
5. Hon. Zuleikha Hassan, M.P.
6. Hon. Charles Gimose, M.P.
7. Hon. John Kiarie Waweru, M.P.
8. Hon. Adan Haji Yussuf, M.P.
9. Hon. Japheth Mutai, M.P.

IN ATTENDANCE-

COMMITTEE SECRETARIAT-

- | | | |
|-----------------------|---|---------------------------|
| 1. Mr. Denis Abisai | - | Principal Legal Counsel I |
| 2. Ms. Halima Hussein | - | Third Clerk Assistant |
| 3. Ms. Roselyn Ndegi | - | Serjeant-at-Arms |
| 4. Mr. Hakeem Kimiti | - | Audio Officer |
| 5. Mr. Simon Maina | - | Support Staff |

MIN No.467/2019:-

PRELIMINARIES

The meeting commenced at 11.54 a.m. with a word of prayer by Chairperson

The Committee received the following invitations;

- a) Invitation to participate in a right to Information Learning Program in India from 1st to 8th April, 2019 and the Committee nominated Hon Peter Kaluma and Hon Adan Haji to attend the training
- b) An invitation to attend the Commonwealth Law Conference in Zambia from 8th to 12th April, 2019 and the Committee nominated the Chairperson and Hon John Munene to attend the conference.

MIN No. 474 /2019:-

ADJOURNMENT

There being no other business to transact, the meeting was adjourned at ten minutes past One O'clock.

Signed.....
Chairperson

Date.....2/4/19.....

MINUTES OF THE ONE HUNDRED AND EIGHTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY, 5TH MARCH, 2019 AT 10.45 A.M. IN THE COMMONWEALTH PARLIAMENTARY ASSOCIATION (CPA) ROOM, MAIN PARLIAMENT BUILDING

PRESENT-

1. Hon. William Cheptumo, M.P. - **Chairperson**
2. Hon. John Olago Aluoch, M.P.
3. Hon. William K. Mwamkale, M.P.
4. Hon. Peter Kaluma, M.P.
5. Hon. Charles Gimose, M.P.
6. Hon. Beatrice Adagala, M.P.
7. Hon. Jennifer Shamalla, M.P.
8. Hon. Anthony G. Kiai, M.P.
9. Hon. Japheth Mutai, M.P.

ABSENT WITH APOLOGIES-

1. Hon. Alice Muthoni Wahome, M.P. - **Vice Chairperson**
2. Hon. Ben Momanyi, M.P.
3. Hon. Roselinda Soipan Tuya, M.P.
4. Hon. George G. Murugara, M.P.
5. Hon. Gladys Boss Shollei, CBS, M.P.
6. Hon. Adan Haji Yussuf, M.P.
7. Hon. John M. Wambugu, M.P.

ABSENT-

1. Hon. Johana Ng'eno, M.P.
2. Hon. Zuleikha Hassan, M.P.
3. Hon. John Kiarie Waweru, M.P.

IN ATTENDANCE-

COMMITTEE SECRETARIAT-

1. Mr. George Gazemba - Principal Clerk Assistant II
2. Mr. Denis Abisai - Principal Legal Counsel I

3. Ms. Halima Hussein - Third Clerk Assistant
4. Mr. Hakeem Kimiti - Audio Officer

MIN No. 411/2019:-

PRELIMINARIES

The meeting commenced at 10.45 a.m. with a word of prayer by the Chairperson.

MIN No. 412/2019:-

**CONFIRMATION OF MINUTES OF
PREVIOUS SITTINGS**

Minutes of the One Hundred and Seventh Sitting held on Thursday, 28th February, 2019 at 10.00 a.m. in the Boardroom on 2nd Floor, Continental House, Parliament Buildings were confirmed as true record of proceedings and signed by the Chairperson. The confirmation was proposed by Hon. Anthony Kiai and seconded by Hon. Jennifer Shamalla.

MIN No. 413/2019:-

MATTERS ARISING

The following matters arose: -

- (i) Under Minute No. 408/2019 (i), it was confirmed that all Committee Members were invited to the launch of the State of Judiciary and Administration of Justice report for the year 2017/2018 on 28th February, 2019 at 9.00 a.m. at the Supreme Court of Kenya Building;
- (ii) Under Minute No. 408/2019 (ii), the secretariat was tasked to provide schedules of all sittings that had been submitted to the Accounts Department for payment for follow up;
- (iii) Under Minute No. 408/2019 (iv), the secretariat informed the meeting that it had obtained from the Table Office the National Ethics and Anti-Corruption Policy and the Instrument for Ratification (Accession) of the Agreement for the Establishment of the International Anti-Corruption Academy as an International Organization. The Committee resolved to consider them and report to the House notwithstanding the fact that the instruments had not been received by the Committee through the usual formal channels.

MIN No. 414/2019:-

**CONSIDERATION OF LEGISLATIVE
PROPOSAL TO REPEAL ARTICLE 79
OF THE CONSTITUTION OF KENYA
BY HON. CORNELLY SEREM**

The Legislative Proposal's Sponsor Hon. Cornelly Serem was to appear before the Committee to prosecute a case for its publication but requested for postponement of the meeting to Thursday, 7th March, 2019. The Committee observed that the Legislative Proposal if enacted would abolish the Ethics and Anti-Corruption Commission and coming at a time, when corruption matters were making news headlines in the country, the timing for such Legislative Proposal was not appropriate and this could have made it difficult for the Member to prosecute it.

The Committee granted the postponement but resolved that this was last postponement in view of the strict timelines within which the Committee has to consider the Legislative Proposal and report to the House and also considering that the Member had in the past requested for postponement of meetings on three different occasions.

MIN No. 415/2019:-

**CONSIDERATION OF REPORT ON
LEGISLATIVE PROPOSAL TO AMEND ARTICLE
97 (C) OF THE CONSTITUTION BY HON.
GEORGE KARIUKI**

The Legislative Proposal seeks to include persons in diaspora amongst the special interest groups from which nominations to the National Assembly are made. The Committee having heard views of the Legislative Proposal's sponsor and the Kenya Law Reform Commission resolved that the Legislative Proposal should not be proceeded with on account of the following-

- (i) Kenyans in diaspora do not constitute a constituency in the same term as women, Persons With Disabilities, ethnic minorities and marginalised communities as provided for under Article 100 of the Constitution of Kenya;
- (ii) The representation contemplated under Article 97(1) of the Constitution of Kenya is not based on financial contribution to the economy. The fact that persons in diaspora contributed Kshs.270 billion to the economy during the 2017/2018 Financial Year should guarantee them nomination to the National Assembly is irrelevant.

MIN No. 416/2019:-

CONSIDERATION OF THE LAW OF
CONTRACT (AMENDMENT) BILL,
2019

The Legal Counsel took the Committee through a brief on the memoranda received from the following institutions-

(i) Kipkenda and Company Advocates

Kipkenda and Company Advocates proposed redrafting of Clause 1 of the Bill to:-

- Ensure the amendments clearly target the principal borrower;
- Exclude instances where the parties agree otherwise;
- Allow parties to opt out of the agreement if one party unilaterally varies the terms;
- Provide for situations where there is no security;
- Provide for realization of the assets of the principal not offered as security

The Committee observed that the proposed amendments if carried would violate Standing Order 133(5) which provides that no amendment to a Bill shall be allowed if such amendment deals with a different subject or proposes to unreasonably or unduly expand the subject of the Bill.

(ii) Kenya Private Sector Alliance's (KEPSA)

Kenya Private Sector Alliance (KEPSA) written memorandum submitted as follows-

- The amendment was good for guarantors as it offered them a semblance of security against the principal willfully causing them to answer for their debts despite the principal being capable of paying off their own debts;
- The proposed amendment would make the process of recovering debts by creditors longer and costlier and would also accord

guarantors ample time to conceal assets thereby making it difficult to recover from them where Lenders were unable to recover from borrowers.

- The amendment would negatively impact on the private sector credit growth due to reduced appetite by the lenders to lend money as recovery in case of default borrower was complicated.
- The Association proposed an amendment to Clause 2 by inserting at the end thereof the following words *‘any payments made on behalf of the principal debtor so long as it is... ..’*

The Committee observed that the proposed amendment was not legible for consideration but tasked the Legal Counsel to seek clarification with KEPSA as to what they were proposing and report to the Committee at the next meeting.

(iii) Kenya Bankers Association (KBA)

The Kenya Bankers Association submitted as follows-

- The Bill and the Memorandum of Objects and reasons refer to the different legal terms between “security” and “assets” which would cause confusion and ambiguity when implementing the amendment;
- The words “security” and “assets” are not defined in the Bill or in the current Law of Contract, Cap, 23. The Association proposed that the word “asset” be substituted with the word “security” and that the focus in the Bill should be for the creditor to demonstrate that the guarantor has read and understood the nature of the obligations under the underlying contract.

The Committee considered the Association’s submissions and resolved to substitute the word “assets” in the Bill with the word “security”

The Committee resolved to consider and adopt the report on the Bill on Thursday, 7th March, 2019 for tabling in the House for second reading.

MIN No. 417/2019:-

**CONSIDERATION OF THE OFFICE OF
THE COUNTY ATTORNEY BILL
(SENATE BILL NO 3 OF 2018)**

The Lead Clerk informed the meeting that it had established from the Parliamentary Budget Office that the Bill was not a money Bill. Thereafter, the Legal Counsel took the Committee through views received by the Senate Standing Committee on Justice, Legal Affairs and Human Rights from the following stakeholders-

- (i) Council of Governors (CoG);
- (ii) County Assemblies Forum (CAF);
- (iii) County Assembly of Machakos;
- (iv) County Assembly of Nyandarua;
- (v) Inter-Governmental Relations Technical Committee;
- (vi) Kenya Law Reform Commission;
- (vii) Law Society of Kenya; and
- (viii) National Gender and Equality Commission.

(i) The National Gender and Equality Commission

The Commission submitted as follows-

- Qualifications and remuneration for appointment as the County Attorney should be equivalent to those of a High Court Judge. Rationale for this was that the Office of the County Attorney was given a lot of responsibilities in the Bill and as such it demands the holder of the office to have enough continuous experience;
- The County Solicitor should have the same qualifications and terms of service of a Chief Magistrate as the office comes with a lot of responsibilities.

(ii) Council of Governors

The Council of Governors submitted as follows-

- County Governments experienced challenges attracting legal practitioners to their employment because of poor terms and

conditions of service and was of the view that the position be open to all fields;

- The functions of the County Attorney should be expanded to include the County Assembly and the County Solicitor and Legal Counsel should have minimum three years' experience for appointment to office.

(iii) Law Society of Kenya

The Law Society of Kenya submitted as follows-

- The minimum number of years for appointment to the Office of County Attorney should be five (5) years as many Advocates were being admitted to the Bar annually whereas the employment opportunities available to them were limited;
- The County Solicitor should be competitively recruited and appointed by the County Service Board in consultation with the County Attorney. The Board shall also be responsible for appointment of County Legal Counsels.
- Determination and remuneration of the County Attorney and County Solicitor should be expressly provided for. Failure to oblige negates the doctrine for equal pay for equal job done.
- Clause 32 (1) should be amended to add a transition clause to read as follows: Persons duly appointed by the Governor or County Executive and currently in office as either Legal Advisors, County Attorney or Heads of Legal shall continue to be in office and exercise their functions in accordance to this Act until the next general elections after which the Governor shall be at liberty to appoint a new County Attorney. The Bill does not take into account those persons such as head of legal, legal advisor or County Attorney currently appointed by the Governor. Further, that Clause 32 (2) be deleted noting that the Bill in section 32 (2) is inconsistent to the prevailing circumstances of appointees by Governor already serving in the foregoing positions.

(iv) The Kenya Law Reform Commission

The Kenya Law Reform Commission submitted as follows-

- Restricting the qualification of the persons to be appointed as County Attorney to only advocates of the high Court of Kenya was prohibitive.
- The Bill should provide that the County Attorney is the principal legal advisor to the County Government and not only to the executive arm.
- Clause 7 (2) (a) of the Bill should establish administrative units in accordance with the guidelines issued by the County Assemblies Public Service Board so as to align them with the County Governments Act. The Commission further proposed to include a clause to provide that the County Attorney should not be under the direction or control of any other person while discharging his duties;
- The Kenya Law Reform Commission was of the opinion that the Bill should have a new provision to designate the County Attorney Office as State Office in accordance with Article 260 of the Constitution of Kenya. The Commission noted that the Office cannot purport to have the status of another state office unless it is designated as such by statute;

(vii) Inter-Governmental Relations Technical Committee

The Committee submitted as follows-

- Clause 28 should specify that the monies received by the Office of the County Attorney and the monies should be spent in accordance to the Public Finance Management Act, 2012;
- There were loopholes in the transition provisions that may justify claims for payments of gratuity if the current staff have continued to be in office. The IGTR also submitted that the Act should not be applied retrospectively.

(ix) The County Assemblies Forum

The Forum submitted as follows-

- Some counties had enacted a law to deal with matters of legal services in their governments. As such, the proposed new law should provide mechanisms for removing conflicts between the national law and the laws already passed or to be enacted by the County Governments;
- The national law should protect the holder of the Office of County Attorney from arbitrary removal from office.
- Most County Attorney laws passed in the Counties were enacted in compliance with the model laws developed by the KLRC.

The Committee-

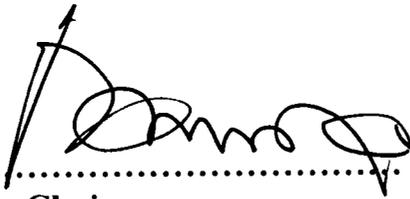
- (i) Was convinced that the Senate conducted sufficient public participation on the Bill. The Committee was further satisfied that key stakeholders submitted views to the Senate. Consequently, there was no need for the Committee to do another public participation;
- (ii) Tasked the Legal Counsel to confirm if the structure of County Government, procedure for appointment and security of tenure of the County Attorney and the County Solicitor at County level mirrored in on the National Government and advise at the next meeting.
- (iii) To enable the County Attorney work independently and without fear of being removed from office by the appointing authority, provision be made in the Bill that his/her appointment shall be approved by the County Assembly and removal shall be through a petition initiated in the County Assembly.
- (iv) Was of the view that for one to qualify to be appointed to the Office of the County Attorney, he or she should have minimum seven (7) years' experience as an Advocate of the High Court of Kenya.

Having taken the Committee through the views of the public on the Bill, the Legal Counsel would at the next meeting be taking the Committee through the Bill's content.

MIN No. 418/2019:-

ADJOURNMENT

There being no other business to transact, the meeting was adjourned at ten minutes past noon till Thursday, 7th March, 2019 at 10.00 a.m. at a venue to be advised.

Signed.....
Chairperson

Date.....14.03.19-

ANNEXURE 2

(Copy of newspaper advertisement
inviting the public to submit memoranda
on the Bill)



Busia. What started as a small inflammation when she was six has made it difficult for her to walk or engage in any other activity

Girl wants arm cut off to end suffering

Teenager has a condition that has caused swelling, but her family cannot afford to have her treated.

By Ignatius Odanga
iodanga@standardmedia.co.ke

What started as a small swelling on Cynthia Nekesa's left arm has now become a major problem that has complicated her life.

When the swelling started, Nekesa's parents, Francis Wanakawa and Roselyne Awino, thought it would go away. However, the arm has become so heavy that Nekesa has difficulties walking.

The Form Three student at Tingolo Secondary School in Butula constituency can only attend lessons three times a week.

To walk, she has to lean to the right side to balance the extra weight.

Condition is non-cancerous

■ It is a genetic disorder of the nervous system. It mainly affects how nerve cells form and grow. It causes tumours to grow on the nerves

■ One can inherit neurofibromatosis from parents or it can be caused by a mutation in genes

■ Neurofibromatosis is usually non-cancerous. Type 1 usually appears in childhood, while Types 2 and 3 manifest in early adulthood

■ Some cases do not require treatment while others need chemotherapy, radiation therapy or surgery

■ It may also cause tumours in the brain and spinal cord

Nekesa, 18, from Masendebare village, does not like the way people stare at her because of her condition.

Doctors have diagnosed Nekesa's condition as neurofibromatosis, according to a discharge form from Moi Teaching and Referral Hospital dated September 6, 2006.

Neurofibromatosis is a genetic condition that causes tumours to grow in the nervous system. Hospital records show that Nekesa was six when she was admitted to hospital on August 13, 2006 and underwent surgery.

Doctors recommended regular checkups to manage her condition. However, lack of money has complicated her treatment.

A frustrated Nekesa now wants the arm removed altogether.

"I just want this arm amputated so I can have some peace. It is too heavy and painful. I wonder if I will ever find a solution to this problem. I desire to



Form Three student Cynthia Nekesa, whose left arm is swollen due to a non-cancerous condition known as neurofibromatosis. [Ignatius Odanga, Standard]

live a normal life."

The teenager said it had been difficult to concentrate on studies.

"I have difficulties walking because of the extra weight. That is why I only go to school thrice a week."

Her father, Mr Wanakawa, moved to Nairobi early this year to look for a job to raise money for the treatment of his second born child. He works at a construction site in Rongai, Kajiado County.

"I sympathise with my daughter, especially when the hand starts paining. Yet I cannot do anything to ease her pain," said Wanakawa.

Major problem

"At first, the swelling did not look like a major problem. However, we were shocked when it continued growing. We would take her to local health facilities where she would be given medicine to ease the pain but this did not take away the swelling."

Tingolo Secondary Deputy Principal Andrew Biketi said Nekesa has often pleaded with teachers for help.

"The girl is ever absent but we understand. The hand is too heavy and the distance to school is long," said Mr Biketi.

Nekesa and her sister, a student at the same school, depend on bursary.

REPUBLIC OF KENYA



NATIONAL ASSEMBLY TWELFTH PARLIAMENT – THIRD SESSION

In the matter of consideration by the National Assembly:-
The Law of Contract (Amendment) Bill, 2019

SUBMISSION OF MEMORANDA

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

The Law of Contract (Amendment) Bill, 2019 seeks to amend the Law of Contract Act, Cap 23, Laws of Kenya to provide that in case of default by the principal borrower, the creditor should first realize the assets of the principal borrower before proceeding to realize the assets of the guarantor.

The Law of Contract (Amendment) Bill, 2019 has undergone First Reading in accordance with the provisions of Standing Order 127(3) and is now committed to the Departmental Committee on Justice and Legal Affairs for consideration and thereafter report to the House.

Pursuant to Article 118(1)(b) and Standing Order 127(3), the Committee invites interested members of the public to submit any representations that they may have on the said Bill. The representations may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk of the National Assembly, Main Parliament Buildings, Nairobi, or emailed to clerk@parliament.go.ke, to be received on or before Monday, 25th February, 2019 at 5.00 pm.

MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY

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ANNEXURE 3

(Stakeholder memoranda on the Bill)

2

CAZOMBIA
pls deaf
FA
29/12/19



KIPKENDA

1) D/Committees
22/02

Your Ref: TBA

Our Ref: SK/18/PAL/4099

Date: 21st February, 2019

The Clerk of the National Assembly,
Office of the Clerk, 1st Floor,
Main Parliament Buildings,
P.O. Box 41842 – 00100,
NAIROBI, KENYA

By Email: clerk@parliament.go.ke

Dear Sir/Madam,

**RE: IN THE MATTER OF CONSIDERATION BY THE NATIONAL ASSEMBLY
OF THE LAW OF CONTRACT (AMENDMENT) BILL, 2019**

Reference is made to the above subject matter, your invitation to submit memoranda and article 118 (1) (b), 119 of the *Constitution of Kenya, 2010*. We submit our comments and proposals as follows:

1. Ambiguity on the meaning attached to the word “principal”

We submit that the last clause “Security of the principal” is ambiguous as it does not clearly define the principal in relation to the debt. We propose that since the intent of the amendment means to shift burden to the principal debtor the same should be reworded to state so. We therefore suggest the words “Security of the Principal” be substituted with “Security of the principal borrower” in order to make it clear and unambiguous and for ease of interpretation.

2. Exclusion of Instances where the Parties Otherwise Agree

The proposed amendment as it stands is a noble move towards securing the rights of guarantors. This proposal however has a bearing on the hallowed principle of freedom of contract. You will appreciate that ideally parties are free to negotiate their own terms and in appropriate circumstances, the law should allow them such latitude.

Kipkenda & Co. Advocates

Off Riverside Drive
behind 9 Riverside Building

+254 02 22 45748 / 43205
+254 739 120 881

The proposed amendment as it is currently worded does not allow parties to stipulate otherwise in their contractual agreements. This means therefore that an agreement to the contrary would be contra - statute and hence unenforceable.

The other effect of the mandatory wording it would have is that, it will impact access to credit and the cost of such access. To cure this, it is our proposal that parties should be allowed to waive the clause or to otherwise modify it to suit their situation.

We therefore suggest the addition of the words 'unless the contacting parties otherwise agree' immediately after the words 'notwithstanding subsection (1),' thereof.

3. Allowing parties to opt out of the agreement if one party unilaterally varies the terms

The effect of the proposal to allow parties to contract out of the mandatory clause as proposed in our first proposal has another challenge. Since there are three parties i.e. lender, borrower and the guarantor, if any of the parties vary the agreement unilaterally, without the consent of the other then the party prejudiced should be allowed to opt out of the exclusion and allow the mandatory clause to take effect.

This will especially be instrumental in instances whereby the lender or the principal borrowers vary the terms of the contract to the detriment of the guarantor. The guarantor should be allowed to re-invoke the provisions of Subsection (1).

In achieving this, we further proposed the addition of the words 'provided that where a party unilaterally varies such agreement or memorandum to which such special promise to answer for the debt, default or miscarriages of another person is premised to the detriment of the defendant (guarantor), the exclusion of this clause or an otherwise agreement shall be deemed forfeited and unenforceable.'

This will be very crucial in further protecting the interest of the defendants (guarantors) from the mischief of principal borrowers or from the adverse actions of a lender which is the principal objective of the amendment herein.

4. Amendment presumes that there is always a security – add ‘if any’

We submit that first, the amendment assumes that there is a security which is not always the case. To cure that we submit the addition of the words ‘if any’ immediately after the word ‘security’ in order to clear any doubt.

5. Realisation of the debt should not be limited to security (if any) but also the assets of the principal

The proposed amendment assumes that there is always a security provided by the principal. This is quite specific and will not cure instances where there is no security provided.

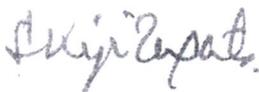
To cure this, we suppose that the amendment should add the words ‘or assets’ immediately after the words ‘security’ in order to protect the defendant (guarantor) till the assets of the principal debtor are exhausted. This will have the effect of making the principal debtor to the much extent possible answerable for his debts and further protect the defendant (guarantor)

Proposed Ideal Phrasing of the Clause

We urge you to consider the following as the ideal amendment to serve the interests espoused above (with our additions underlined):

“(1A) Notwithstanding the provisions of subsection (1), unless the contracting parties otherwise agree, before a suit is brought against a defendant under subsection (1), the plaintiff shall first realise the security (if any) and/or assets of the principal borrower provided that where a party unilaterally varies such agreement or memorandum to which such special promise to answer for the debt, default or miscarriages of another person is premised, to the detriment of the defendant (guarantor), the exclusion of this clause or an otherwise agreement shall be deemed forfeited and unenforceable.”

Yours Faithfully,



**S. K. KIPLAGAT
KIPKENDA AND COMPANY ADVOCATES**

/s/



114

① D/committees
26/02



KENYA BANKERS
ASSOCIATION

22nd February 2019

② CAZEMBA
pls deaf
RA
27/2/19

The Clerk,
National Assembly of Kenya
P.O Box 41842-00100,
Nairobi, Kenya.

Dear Sir,

RE: KBA COMMENTS ON THE PROPOSED AMENDMENT TO THE LAW OF CONTRACT ACT, CAP 23

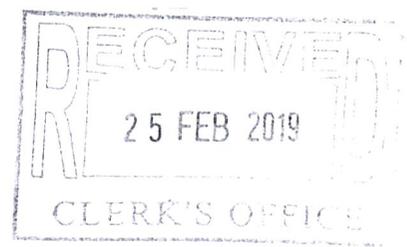
We draw your attention to the advertisement on page 9 of Tuesday's [19/02/2019] Daily Nation calling for submissions on the proposed amendments to the Law of Contract Act.

Towards this end, we would wish to submit our observations and recommendations to your members for their review and kind consideration.

We look forward to your response.

Yours sincerely,

Dr. Habil Olaka
CHIEF EXECUTIVE OFFICER





LAW OF CONTRACT (AMENDMENT) BILL 2019, FEEDBACK

We have reviewed the proposed Law of Contract (amendment) Bill 2019 that has been introduced in Parliament for debate and prepared a summary of the foreseeable issues and the proposed recommendations for your kind submission to the Departmental Committee on Justice & Legal Affairs of the National Assembly for their consideration, as below:

ISSUES

1. The Bill and the Memorandum refer to different legal terms i.e. 'security' and 'assets', respectively. These words possess differing legal definitions and as such, may cause confusion and ambiguity when attempting to implement the amendment.
2. Neither the Proposed Bill, nor the Current Law of Contract Act, Cap 23 provides a definition for these two words. The Law of Contract Act at Section 2, provides that, English law of Contract shall apply in Kenya. Upon scrutiny of the English Law of Contract, it has been observed that there is no express definitions provided for 'assets' and 'security'.
3. Reduced appetite by lenders to rely on third party collateral if the law comes into effect, which may impact lending arrangements generally as assets from the borrower may be insufficient to cover the debt.
4. Lenders experiencing considerable frustration and delays on realisation of existing guarantees and other third party securities if they have to first exhaust the enforcement process through the principal borrower.
5. Lack of specific indication that the proposed law shall not apply retrospectively. This may lead to retrospective application thus significantly impairing rights possessed at the time of entering into the contracts, increase creditor's liabilities for past conduct, and imposing new duties with respect to transactions already completed.
6. Lack of clear distinction between a guarantee which is supported by security from the Personal Guarantor, for example a charge over real property or cash collateral and one which is not.
7. Reduced appetite to lenders if the law were to come into effect, which will lead to a sharply reduced confidence in the SME sector, who mostly borrow against 3rd party collateral thus impacting negatively on Private Sector Credit Growth.
8. The amendment may provide a legal loophole for mischief by guarantors who are providers of third party security to their own companies where such guarantors may deliberately divert the borrowed funds from the



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.....

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companies with the knowledge that the lender must first exhaust enforcement process over the company through Kenya's lengthy court processes.

RECOMMENDATIONS

1. The Bill should provide a clear cut definition of the term 'security'.
2. The focus on the law should be for the creditor to demonstrate that;
 - the guarantor has read and understood the nature of the obligations under the underlying contract with respect to which they are guaranteeing; and
 - Any changes to the underlying agreement that impact the guarantor's obligations should require the guarantor's prior consent failing which the guarantor would be discharged from any obligations post the amendment.
3. The law should have a clause stating that it shall not apply retrospectively.
4. The requirement of the Bill to pursue the principal debtors assets prior to bringing suit against a guarantor should be restricted to instances where a personal guarantee is not supported by a security.
5. A kind consideration of the proposed amendments to mitigate the envisaged risks.





① O/Kom...
8/26/19

SUBMISSIONS ON THE LAW OF CONTRACT (AMENDMENT) BILL 2019

The Law of Contract Act CAP 23 is the primary Statute that applies to contracts in Kenya. The purpose of CAP 23 is to apply the English common law of contract to Kenya, with certain modifications.

② CAZGMBA
pls deaf
VA
27/12/19

On 13th February 2019, the Law of Contract Amendment Bill went through the 1st reading before the National Assembly. The Bill seeks to amend the Law of Contract Act to provide that in case of default by the principal borrower, the creditor should first realize the assets of the principal borrower before proceeding to realize the assets of the guarantor.

It introduces a Clause 1A under Section 3 (1). Section 3 (1) which precedes the proposed Clause reads:

No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

The proposed Clause 1A reads:

Notwithstanding subsection 1, before a suit is brought against a defendant under subsection (1), the Plaintiff shall first realize the security of the principal.

This has a multiple effect:

1. For the **guarantors**, it offers them a semblance of security against the Principal wilfully causing them to answer for their debts despite the Principal being capable of honouring their own debts. This makes it easier for people to offer themselves to stand surety for other people.

The guarantors should therefore not be worried because ideally in most contracts of guarantee, it is implied that the guarantor is entitled to recover any payments made on behalf of the principal debtor so long as it is stipulated so under the agreement.

In essence any changes to the underlying agreement that impact the guarantor's obligations should require the guarantor's prior consent failing which the guarantor would be discharged from any obligations post the amendment.

2. For the **Plaintiff/creditors**, this will make the process of recovering the debts longer and costlier. It also gives the guarantor ample time to conceal/dispose of their assets so as to avoid servicing the Debtor's debts. While this (concealing/disposing of assets to avoid creditors) has been criminalized under Section 316 of the Penal Code, it is only limited to selling or removing property **after or within two months before the date of any unsatisfied judgment** or order for payment of money obtained against the debtor/guarantor. It is therefore not a crime to conceal or dispose of the assets any time

NATIONAL ASSEMBLY
RECEIVED
26 FEB 2019
SENIOR DEPUTY CLERK
J. W. N.
P. O. Box 41842-00100, NAIROBI

outside the two month period. The process of realizing the principal's assets will most certainly take longer than two months, thus giving guarantors a loophole through which to conceal assets.

This may lead to reduced appetite by lenders to rely on third party collateral if the law comes into effect, which may impact lending arrangements generally as assets from the borrower may be insufficient to cover the debt. This will be as a result of lenders experiencing considerable frustration and delays on realisation of existing guarantees and other third-party securities if they have to first exhaust the enforcement process through the principal borrower. Of significance is the impact to MSMEs who mostly borrow against 3rd party collateral thus impacting negatively on Private Sector Credit Growth.

For financiers who are regulated under the Banking Act and Microfinance Act Auctioneers Act, there could be a proposal to make the liability of the guarantor is co-extensive with that of the principal debtor, **unless otherwise provided by the contract**. This gives the financier the option of limiting the application of the proposed amendment.

3. The Act could include a universal definition of a contract:

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

4. When there is more time to give input on the Bill, the Bill should include codification of some of the key common law principles such as:
 - i. Communication, Acceptance and Revocation of Proposals
 - ii. Contracts, Voidable Contracts and Void Agreements
 - iii. Contingent Contracts
 - iv. Performance and breach of contracts
 - v. Indemnity and Guarantee
 - vi. Agency

Clause Number	Current Clause in the Bill	Proposed Amendment	Rationale and Justification
	<p><i>Notwithstanding subsection 1, before a suit is brought against a defendant under subsection (1), the Plaintiff shall first realize the security of the principal.</i></p>	<p>Add the following sentence at the end of 1A: any payments made on behalf of the principal debtor so long as it is</p>	<p>It offers the guarantors a semblance of security against the Principal willfully/fraudulently causing them to answer for their debts despite the Principal being capable of honouring their own debts. This will make it easier for people to offer themselves to stand surety for other people. While in most contracts of guarantee it is implied that the guarantor is entitled to recover any payments made on behalf of the principal debtor, some agreements may not cater for this.</p>
1A		<p>Add Clause 1B: creditors regulated by the Banking Act and Microfinance Act 2006 unless otherwise provided</p>	<p>For financiers who are regulated under the Banking Act and Microfinance Act Auctioneers Act, there could be a proposal to make the liability of the guarantor is co-extensive with that of the principal debtor, <u>unless otherwise provided by the contract.</u> If not, it will make it <u>more</u> difficult for lenders to lend even where there is an able guarantor. This ripple effect on access to credit will be huge.</p>
	<p>The Bill and the Memorandum refer to different legal terms i.e. 'security' and 'assets', respectively. These words possess differing legal definitions and as such, may cause confusion and ambiguity when attempting to implement the amendment.</p>	<p>The Bill should provide a clear-cut definition of the term 'security'.</p>	<p>Neither the Proposed Bill, nor the Current Law of Contract Act, Cap 23 provides a definition for these two words. The Law of Contract Act at Section 2, provides that, English law of Contract shall apply in Kenya. Upon scrutiny of the English Law of Contract, it has been observed that there are no express definitions provided for 'assets' and 'security' By coming up with definitions will help to reduce ambiguities during interpretation of contractual terms.</p>
	<p>Lack of specific indication that the proposed law shall not apply retrospectively. This may lead to retrospective application thus</p>	<p>The law should have a clause stating that it shall not apply retrospectively</p>	<p>This is to mitigate against the identified risks.</p>

	significantly impairing rights possessed at the time of entering into the contracts, increase creditor's liabilities for past conduct, and imposing new duties with respect to transactions already completed.		
	Lack of clear distinction between a guarantee which is supported by security from the Personal Guarantor, for example a charge over real property or cash collateral and one which is not.	The requirement of the Bill to pursue the principal debtor's assets prior to bringing suit against a guarantor should be restricted to instances where a personal guarantee is not supported by a security.	

The Clause Number	Current Clause in the Bill	Proposed Amendment	Rationale and Justification
1A	<i>Notwithstanding subsection 1, before a suit is brought against a defendant under subsection (1), the Plaintiff shall first realize the security of the principal.</i>	Add the following sentence at the end of 1A: any payments made on behalf of the principal debtor so long as it is	It offers the guarantors a semblance of security against the Principal willfully/fraudulently causing them to answer for their debts despite the Principal being capable of honouring their own debts. This will make it easier for people to offer themselves to stand surety for other people. While in most contracts of guarantee it is implied that the guarantor is entitled to recover any payments made on behalf of the principal debtor, some agreements may not cater for this.
1A		Add Clause 1B: creditors regulated by the Banking Act and Microfinance Act 2006 unless otherwise provided	For financiers who are regulated under the Banking Act and Microfinance Act Auctioneers Act, there could be a proposal to make the liability of the guarantor is co-extensive with that of the principal debtor, unless otherwise provided by the contract . If not, it will make it more difficult for lenders to lend even where there is an able guarantor. This ripple effect on access to credit will be huge.
	The Bill and the Memorandum refer to different legal terms i.e. 'security' and 'assets', respectively. These words possess differing legal definitions and as such, may cause confusion and ambiguity when attempting to implement the amendment.	The Bill should provide a clear-cut definition of the term 'security'.	Neither the Proposed Bill, nor the Current Law of Contract Act, Cap 23 provides a definition for these two words. The Law of Contract Act at Section 2, provides that, English law of Contract shall apply in Kenya. Upon scrutiny of the English Law of Contract, it has been observed that there are no express definitions provided for 'assets' and 'security' By coming up with definitions will help to reduce ambiguities during interpretation of contractual terms.
	Lack of specific indication that the proposed law shall not apply retrospectively. This may lead to retrospective application thus	The law should have a clause stating that it shall not apply retrospectively	This is to mitigate against the identified risks.

	<p>significantly impairing rights possessed at the time of entering into the contracts, increase creditor's liabilities for past conduct, and imposing new duties with respect to transactions already completed.</p>		
	<p>Lack of clear distinction between a guarantee which is supported by security from the Personal Guarantor, for example a charge over real property or cash-collateral and one which is not.</p>	<p>The requirement of the Bill to pursue the principal debtor's assets prior to bringing suit against a guarantor should be restricted to instances where a personal guarantee is not-supported by a security.</p>	