

REPUBLIC OF KENYA



KENYA NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT

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**THE REPORT OF THE JOINT BUDGET AND APPROPRIATIONS  
COMMITTEE AND DEPARTMENTAL COMMITTEE ON FINANCE,  
PLANNING AND TRADE ON SETTLEMENT OF FOREIGN COURT  
JUDGEMENTS AGAINST GOVERNMENT OF KENYA**

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APRIL, 2014

*paper laid*

*29/4/2014*

**PARLIAMENT  
OF KENYA  
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## Prologue

### **Mr. Speaker,**

The Budget and Appropriations Committee held various consultative meetings on the first Supplementary Estimates for 2013/14 and as expected consulted with the various stakeholders among them the Departmental Committees and the National Treasury. During its consultative meeting with National Treasury on the supplementary estimates several issues were raised and discussed. The National Treasury did indicate to the committee that in-order for the Government to finance the 2013/14 budget there was need to raise resources through an International Sovereign Bond. The National Treasury also informed the committee that resources were needed to retire a syndicated loan that is due in the month of May, 2014. In this regard, The National Treasury requested that they appear before the Committee to discuss details of the Sovereign Bond and the applications of the proceeds from its issuance.

On 18<sup>th</sup> February, 2014, the Principal Secretary, to the National Treasury appeared before the Committee for consultations on the Supplementary Estimates. During this meeting, he informed the Committee that the Government was considering issuing a sovereign bond. However, there were some hindrances; Firstly, there was lack of a clear legal framework. Secondly, there were two litigation cases which had been determined against Government of Kenya.

Given that this latter issue touches on the mandate of the Budget and Appropriations Committee as well as Departmental Committee of Finance, Planning and Trade, it was therefore, decided that the committees hold joint sittings. The two committees held meetings on 19<sup>th</sup> February, 2014 and 22<sup>nd</sup> April, 2014. The purpose of the meetings was to consider the issue of Sovereign Bond and the payment of the litigation cases.

**Mr. Speaker Sir,** Members of the Joint Committees of the Budget and Appropriations Committee and the Departmental Committee on Finance, Planning and Trade as currently constituted comprises the following Members:-

1. **Hon. Mutava Musyimi , M.P – Chair, Budget and Appropriations Committee**
2. **Hon. Benjamin Langat, MP – Chairperson, Finance, Planning and Trade**
3. **Hon. Nelson Gaichuhie, MP - Vice Chairperson, Finance, Planning and Trade**
4. **Hon. Mary Emaase, M.P - Vice Chair, Budget and Appropriations Committee**

5. Hon Peter Weru Kinyua, M.P
6. Hon. Abdikadir Omar Aden, M.P
7. Hon. Abdul Rahim Dawood, MP
8. Hon. Abdulaziz Farah , M.P
9. Hon. Abdullswamad Sheriff, MP
10. Hon. Alfred Agoi, M.P
11. Hon. Alfred Sambu, M.P
12. Hon. Ali Fatuma Ibrahim, M.P
13. Hon. Alice Ng'ang'a, M.P
14. Hon. Andrew Toboso, MP
15. Hon. Banticha Jaldesa , M.P
16. Hon. Benjamin Andola Andayi, M.P
17. Hon. Benjamin Langat, M.P
18. Hon. Bitok S. Kirwa, M.P
19. Hon. Charles Nyamai, M.P
20. Hon. Clement Wambugu , M.P
21. Hon. Daniel Nanok , M.P
22. Hon. Dennis Kariuki, M.P
23. Hon. Dorcas Kedogo, M.P
24. Hon. Dr. J.W. Nyikal, M.P
25. Hon. Dr. Reginalda Wanyonyi, M.P
26. Hon. Eng. Shadrack Manga, MP
27. Hon. Francis Njenga, M.P
28. Hon. George Muchai, M.P
29. Hon. Iringo Cyprian Kubai, MP
30. Hon. Irshad Sumra, M.P
31. Hon. Isaack Mwaura, M.P
32. Hon. Jackson Kiptanui, M.P
33. Hon. James Gakuya, M.P
34. Hon. James Luswetii, M.P
35. Hon. Jamleck Kamau, M.P
36. Hon. Jared O. Opiyo, M.P
37. Hon. Jimmy Nuru Angwenyi, MP
38. Hon. Joash Olum , MP
39. Hon. John Mbadi, M.P
40. Hon. John Sakwa , MP
41. Hon. Johnson Sakaja , MP
42. Hon. Jonathan Lati Lelelit, M.P
43. Hon. Jones Mlolwa , MP
44. Hon. Joseph Limo, M.P
45. Hon. Khatib Mwashetani, M.P
46. Hon. KK Stephen Kinyanjui, M.P
47. Hon. Makali Mulu Benson, M.P
48. Hon. Mohammed Shidiye, M.P
49. Hon. Moses Lessonet, M.P
50. Hon. Moses Ole Sakuda, M.P
51. Hon. Muriuki Njagagua, M.P
52. Hon. Oburu Oginga , MP
53. Hon. Rose Nyamunga , MP
54. Hon. Omar Mwinyi, M.P
55. Hon. Omondi G. W. Mallan, M.P
56. Hon. Patrick King'ola Makau , MP
57. Hon. Patrick Ole Ntutu, M.P
58. Hon. Priscilla Nyokabi, M.P
59. Hon. Ronald Tonui, MP
60. Hon. Sammy Koech, MP
61. Hon. Sammy Mwaita, MP
62. Hon. Samuel Gichigi, M.P
63. Hon. Shakeel Shabbir Ahmed, MP
64. Hon. Shukran Hussein Gure, M.P
65. Hon. Silverse Lisamula Anami, M.P
66. Hon. Suleiman M. Kasuti, M.P
67. Hon. Timothy M. E. Bosire, MP
68. Hon. Tirus N. Ngahu, MP
69. Hon. Tiyah Galgalo, M.P
70. Hon. (Eng) Stephen Ngare, M.P

**Mandate of the Budget and Appropriations Committee and the Finance Planning and Trade Committee**

The Budget and Appropriations Committee is established under the Standing Order 207 and is mandated to: investigate, inquire into and report on all matters related to coordination, control and monitoring of the national budget, discuss and review the estimates and make recommendations to the House; examine the Budget Policy Statement presented to the House; examine Bills related to the national budget, including Appropriations Bills; and evaluate tax estimates, economic and budgetary policies and programmes with direct Budget outlays. Further, the Budget and Appropriations Committee is given legal backing under the Public Finance Management Act, 2012 and the Constitution article 221 (4 and 5).

On the other hand, the Departmental Committee on Finance, Planning & Trade is one of the twelve Departmental committees of the National Assembly established under SO 216 and mandated to, inter alia; 'to study and review all legislations referred to it;

Specifically, the Committee deals with Public finance, monetary policies, public debt, financial institutions, investment and divestiture policies, pricing policies, banking, insurance, population, revenue policies, planning, national development, trade, tourism promotion and management, commerce and industry.

SIGNED.......... DATE..... 29.4.14 .....

**Hon. Mutava Musyimi, M.P**  
**Chairman, Budget and Appropriations Committee**

SIGNED.......... DATE..... 29-4-2014 .....

**Hon. Benjamin Langat, M.P**  
**Chairman, Finance, Planning and Trade Committee**

## **ACKNOWLEDGEMENT**

Mr. Speaker, on behalf of the two committees, we wish to sincerely thank you and the Presidium of the House for the enormous support accorded to the Joint Committee. We also wish to thank the Office of the Clerk of National Assembly for facilitating the two Committees to hold a joint sitting. The Joint Committee extends its gratitude to the staff of Parliament, particularly the Parliamentary Budget Office (PBO) and Clerk to Departmental Committee of Finance, Planning and Trade who assisted the two Committees in compilation of this report.

The Joint Committee is also grateful to various senior government officials, especially the Cabinet Secretary National Treasury, the Attorney General, Solicitor General and Principal Secretary National Treasury, who appeared before the two committees and made presentations which formed the basis of this report. Lastly, we are thankful to our colleagues in the two Committees for their commitment and dedication during the sittings. Together, their input was of great importance.

# THE REPORT OF THE JOINT BUDGET AND APPROPRIATIONS COMMITTEE AND THE COMMITTEE ON FINANCE, PLANNING AND TRADE ON SETTLEMENT OF FOREIGN COURT JUDGEMENTS AGAINST THE GOK

## Background

1. **Mr. Speaker, Sir**, during the processing of the *First Supplementary Estimates For 2013/14* tabled before Parliament on 12<sup>th</sup> February 2014, it was brought to the attention of the Budget and Appropriations Committee, that the Government was planning to issue the first International Sovereign Bond for approximately US\$1.5 billion (equivalent to Ksh 130 billion) to finance the Fiscal Year 2013/2014 budget. However, during the consultations with the National Treasury it emerged that tied to the issuance of the International Sovereign Bond, there were two challenges namely;;
  - a. **The legal framework:** *There was need to amend the Public Finance Management Act, 2012 to allow International floating of the bond; and*
  - b. **Litigation challenges:** *Litigation/ Cases and Judgement against the Government of Kenya in London UK and in Geneva Switzerland relating to the two cases in which the litigants had obtained a court order to attach government properties abroad.*
2. The Committee considered the matter as of utmost urgency and required further details from the National Treasury with regard to International Sovereign Bond. Additionally, the Committee expressed the need to jointly be brought to the attention of the Committee on Finance, Planning and Trade. Further, the Committee observed that the matter needed further consultations and adequate information for consideration as it has multiple effects even on the future budgets and the general investment environment at the global arena.
3. **Mr. Speaker, Sir**, having met the Joint Committee consequently advised the National Treasury to furnish it with additional and adequate information in order to explore the matter in a more detailed manner and examine the merits of the case before the Committees. The issues were basically two fold; *amending the Public Finance*

*Management law to address the International floating of the Sovereign Bond and the pending solutions to the disclosure of the Litigation suits Cases and subsequential Judgement against the Government of Kenya.*

4. Subsequently, the National Treasury submitted the requisite proposed Public Finance Management Act (Amendment) Bill, 2014 and the amendments are being processed.

### **Submission by the National Treasury**

5. Indeed, **Mr. Speaker Sir**, during the meeting held on 19<sup>th</sup> February 2014 the National Treasury made the submission with respect to issuance of the International Sovereign Bond. More importantly, the impact of Litigation/ Cases and Judgement against the Government of Kenya in London UK and in Geneva Switzerland on the issuance of the bond..
6. The matter related to the claims made by two companies and the facts are as stated here below and in **annex I and II**
  - **Universal Satspace** (Bandwidth network project). Mediation in Nairobi in February 2013 agreed on payment of \$7.6 million (Ksh. 653 million) by GoK. After waiting for 10 months to be paid as agreed the claimant went to court in London on 20<sup>th</sup> December 2013 and judgement was upheld and Kenya was expected to pay \$7,874,431. (Ksh 677 million) being principal of \$ 7,600,000 and interest of \$ 274,431) by 17<sup>th</sup> January 2014 inclusive of costs of £60,000. This amount continues to attract interest at 8.75% per annum which translates to \$1,665 per day beginning 21<sup>st</sup> December 2013
  - **First Mercantile Securities Corporation** (Broadband network project). The amount due for payment, including accrued interest and cost as at 24<sup>th</sup> March 2014 is \$10.7 (Ksh920 million) and the claimant has sought Registration of Judgement in the High Court in London to compel Kenya to pay or else proceed with attachment proceedings.
7. Mr. Speaker, Sir, the National Treasury sought and received audience with the Parliamentary Committee on Budget and Appropriations on 18<sup>th</sup> February 2014 and the joint Budget and Appropriations and Finance, Planning and Trade Committees on 19<sup>th</sup>

February 2014. The joint committee considered the issues related to the debts and agreed as follows;

- i. That the National Treasury provides to them the Legal Opinion of the Attorney General;
- ii. More details on the history, character and quantum of the debts; and
- iii. Produce evidence of approval by the executive (Cabinet).

8. Mr. Speaker, Sir, the National Treasury appeared before the joint Parliamentary Budget and Appropriations Committee and the Finance, Planning and Trade Committee on 22<sup>nd</sup> April 2014. The National Treasury having complied with the earlier demands/recommendation that The National Treasury provides to them the Legal Opinion of the Attorney General and evidence of approval by the executive(Cabinet). The Joint Committee noted that the National Treasury had indeed complied with the earlier directive to provide Attorney General's Legal Opinion and the Executive's approval (**See annex III and IV**).

9. From the foregoing, **Mr. Speaker Sir**, the National Treasury sought audience with the two parliamentary Committees with two objectives of:

- i.) First of all, informing the parliamentary Committees with the progress made towards the realization of the issuance of the International Sovereign Bond in the International Market ; and
- ii.) Secondly, to seek approval of the Committees to initiate the necessary processes and mechanism within the disposal of the National Treasury geared towards unlocking the hurdles that faced the issuance of the Sovereign Bond. The second part can only proceed with parliamentary approval lest it is construed to imply that parliament approved payment of the suspended Anglo leasing projects.

10. Mr. Speaker, Sir, no doubt, failure to hasten the settlement process would injure Kenya's reputation and image at the international market. Further delay is defraying the consequential costs would result to adverse and negative publicity in the international

market. Some of the negative consequences of failure to honour our debt obligations as and when they fall due include:

- i. Enforcement of judgments/attachment of GoK assets,
- ii. Stoppage of the Bond process,
- iii. Fiscal risk,
- iv. Interest charges on the judgements,
- v. Higher costs, and
- vi. Projection of Poor international image and reputation.

11. Further, the Joint Committee abides by the Attorney General's Office advice that it has exhausted all judicial action to forestall payment of the judgement debts. The way forward is for GOK to settle so as to minimize further loss to GOK as the outstanding awards continue to accrue interest. Crucially, this will facilitate the successful issuance of the International Sovereign Bond.

### **Recommendation**

12. **Mr. Speaker Sir**, in light of attendant risks associated with failure to comply with court orders, complications in raising resources through a Sovereign Bond, and the likely loss of the Country's international reputation, the Joint Committee recommends that the Judgment debts in favour of **First Mercantile Securities Corporation** and **Universal Satspace** amounting to Ksh 1.4 billion be settled expeditiously.

Annexes pendix 1: Minutes of the 1<sup>st</sup> and 2<sup>nd</sup> Joint Meeting of the two Committees

Appendix 2: Report from Treasury on settlement of foreign court judgments against Government of Kenya on postal corporation of Kenya projects financed and carried out by first mercantile and Universal Satspace respectively

Appendix 3: Correspondence from National Treasury seeking audience with Budget and Appropriations and Finance, Planning and Trade Departmental Committee to update them.

Legal Opinion of the Attorney General and  
Written evidence of approval by the executive (Cabinet).

# ANNEX (D)

MINUTES OF THE 1<sup>ST</sup> JOINT MEETING OF THE BUDGET AND APPROPRIATIONS AND FINANCE, PLANNING AND TRADE COMMITTEES HELD ON WEDNESDAY, 19<sup>TH</sup> FEBRUARY 2014 AT 11:00 AM AT COUNTY HALL CHAMBERS

**PRESENT**

1. Hon. Mutava Musyimi, MP - Joint Chair
2. Hon. Nelson Gaichuhie, MP – Vice- Chair Finance Committee (Joint Chair)
3. Hon. Mary Emaase, MP
4. Hon. Abdikadir Omar Aden, MP
5. Hon. Abdulaziz Farah, MP
6. Hon. Alfred Agoi, MP
7. Hon. Alfred Sambu, MP
8. Hon. Banticha Jaldesa, MP
9. Hon. Benjamin Andola Andayi, MP
10. Hon. Bitok S. Kirwa, MP
11. Hon. Charles Nyamai, MP
12. Hon. Chrisantus W. Wakhungu, MP
13. Hon. Clement Wambugu, MP
14. Hon. Daniel Nanok, MP
15. Hon. Dorcas Kedogo, MP
16. Hon. Dennis Kariuki, MP
17. Hon. Dr. J.W. Nyikal, MP
18. Hon. Dr. Reginalda Wanyonyi, MP
19. Hon.(Eng) Stephen Ngare, MP
20. Hon. Francis Njenga, MP
21. Hon. George Muchai, MP
22. Hon. Isaack Mwaura, MP
23. Hon. Irshadali Sumra, MP
24. Hon. George Wanjohi, MP
25. Hon. Jackson Kiptanui, MP
26. Hon. James Gakuya, MP
27. Hon. James Lusweti, MP
28. Hon. Jamleck Kamau, MP
29. Hon. Jared O. Opiyo, MP
30. Hon. John Mbadi, MP
31. Hon. Jonathan Lati Lelelit, MP
32. Hon. Joseph Limo, MP
33. Hon. KK Stephen Kinyanjui, MP
34. Hon. Makali Mulu Benson, MP
35. Hon. Mohammed Shidiye, MP

- 35.Hon. Mohammed Shidiye, MP
- 36.Hon. Moses Lessonet, MP
- 37.Hon. Muriuki Njagagua, MP
- 38.Hon. Omar Mwinyi, MP
- 39.Hon. Omondi George W. Mallan, MP
- 40.Hon. Patrick Ole Ntutu, MP
- 41.Hon. Priscilla Nyokabi, MP
- 42.Hon. Samuel Gichigi, MP
- 43.Hon. Silverse Lisamula Anami, MP
- 44.Hon. Tiyah Galgalo. MP
- 45.Hon. Sammy Koech, MP
- 46.Hon. Sammy Mwaita, MP
- 47.Hon. Sakwa John Bunyasi, MP
- 48.Hon. Jimmy Nuru Angwenyi, MP
- 49.Hon. Abdullswamad Sheriff, MP
- 50.Hon. Abdul Rahim Dawood, MP
- 51.Hon. Eng. Shadrack Manga, MP
- 52.Hon. Dr. Oburu Oginga, MP
- 53.Hon. Patrick Makau King'ola, MP

#### ABSENT

- 1. Hon. Benjamin Langat, MP - Chairperson, Finance, Planning & Trade
- 2. Hon. Alice Ng'ang'a, MP
- 3. Hon. Ali Fatuma Ibrahim, MP
- 4. Hon. Benjamin Langat, MP
- 5. Hon. Moses Ole Sakuda, MP
- 6. Hon. Suleiman Murunga Kasuti, MP
- 7. Hon. Peter Weru Kinyua, MP
- 8. Hon. Shukran Hussein Gure, MP
- 9. Hon. Sakaja Johnson, MP
- 10. Hon. Tiras Ngahu, MP
- 11. Hon. Joash Olum, MP
- 12. Hon. Shakeel Shabbir Ahmed, MP
- 13. Hon. Jones Mlolwa, MP
- 14. Hon. Ronald Tonui, MP
- 15. Hon. Rose Nyamunga,MP
- 16. Hon. Iringo Cyprian Kubai, MP

## IN ATTENDANCE

1. Dr. Kamau Thugge
2. Mrs. Felister Kivisi
3. Mr. Charles Kairu

## NATIONAL TREASURY

- Principal Secretary  
Staff  
Staff

## IN ATTENDANCE

1. Mrs. Phyllis Makau
2. Mr. Martin Masinde
3. Ms. Lucy Makara
4. Mr. Frederick Muthengi
5. Mr. Joseph Ndirangu
6. Mr. Danson Kachumbo
7. Mr. Tobias Opana

## COMMITTEES SECRETARIAT

- Director, Parliamentary Budget Office  
Senior Deputy Director  
Principal Fiscal Analyst  
Principal Fiscal Analyst/Clerk  
Fiscal Analyst  
Junior legislative fellow  
Junior legislative fellow

## AGENDA

1. Preliminaries /Confirmation of Agenda
2. *Presentation by the Principal Secretary- National Treasury*
3. Any Other Business

### MIN BAC/FPT/JM/001/2014: Preliminaries and Confirmation of Agenda

The Chairman Budget and Appropriations called the meeting to order at 10:00 am and led the members with a word of prayer. He informed Members that he would Co-chair the meeting with the Vice-Chair Finance, Planning and Trade Committee since the substantive Chairperson of the Committee was out of the Country on official matters. He explained that the joint meeting had been called after a call by the Principal Secretary, National Treasury, who was seeking audience with the joint Committees on the matter of sovereign bond that the Government intended to issue and thus the need for a discussion with the two Committees.

### MIN BAC/FPT/JM/002/2014: Presentation by the Principal Secretary- National Treasury

The Principal Secretary informed the meeting that;

- (i) The Government was planning to issue the first ever International Sovereign Bond for amounting to Kshs. 130 billion to finance the 2013/14 budget as well as retire the syndicated loan that was issued to finance the 2012/13 budget. The Bond was expected to be floated to the Irish Stock Exchange by

14<sup>th</sup> of February, 2014. However, this has not happened due to restrictions in the PFM Act, 2012 as well as court award in favour of two Anglo-leasing types of companies.

- (ii) The Principal Secretary stated that in its current form, the Public Finance Management Act, 2012 does not have provisions to support the issuance of the sovereign bond. More specifically, there is need to amend **Sections 50, 53 and 55** of the Act.
- (iii) With regard to litigations against the Government of Kenya, the meeting was informed that as part of the issuance process, the Government was advised by its lead transaction managers that they are expected to provide full disclosure about the debt obligations of the country, before the bond is issued. More specifically, the committees were informed that the two cases, namely; First mercantile securities co-orporation (Broadband network project) and Universal satspace (Bandwidth network project) have been ongoing. Indeed, the judgment has been made in favor of the complainants.
- (iv) First mercantile securities co-orporation was involved supply of Very Small Aperture Terminal (**VSAT**) equipment by Spacenet to connect all the post offices. The Co-orpoaration guaranteed payments for the supplied equipment. In 12<sup>th</sup> August, 2004 the Government suspended payments of the Anglo-leasing projects types of projects. Upon suspension of payments the company went to court in Geneva to claim \$ 12.7 Million plus penalty interest of at 8.75% p.a. The Court gave its verdict against the GOK on 14<sup>th</sup> May, 2009 for **Kshs. 516 Million**. The Country through Attorney General lodged an appeal but lost it in November, 2012. This culminated into a judgement of Kshs. 868 million being made in favour of the plaintiff. From the date of the judgement, the claim has been earning a daily interest of **\$1,413** translating to Kshs.121, 518 at an exchange rate of Kshs.86 to the dollar. As at 6<sup>th</sup> December, 2013 amount due for payment stood at **Kshs. 908 Million**. Further, members were informed that the Plaintiff has gone to seek for registration of Judgement in the High Court of London to compel GOK to pay or else proceed with attachment proceedings. The Government has already received a notice of intention to attach its mission assets in Geneva.
- (v) With regard to the case involving Universal Satspace, the company signed an agreement with GOK for provision of bandwidth and network management of all post offices for 10 years. After the GOK suspension of payments the company filed a suit in London Court. Members were informed that there

there were mediation meetings in Nairobi in February, 2013. Arising from this meetings, the Government agreed to pay **Kshs. 653 Million**. By December, 2013 the claim had not been paid, this resulted to the firm going to London Court. Subsequently, on 20<sup>th</sup> December, 2013, the firm was awarded compensation amounting to **Kshs. 685 Million**. (Principal and Interest). The case continues to accrue a daily interest of us\$ **1,665** or **Kshs. 143,190** ( at a dollar rate of Kshs.86)

(vi) Members were informed that all appeals against the judgements have not been successful.

(vii) Further Members were informed that there are risks to the Country if the claims are not settled, which are:

(1) The bond may not be floated and thus the Government will result to domestic borrowing which has an effect of pushing the interest rates high and thus destabilise the macro-economic framework; and

(2) The possibility that the plaintiff may apply to the courts seeking to enforce the awards and impound the proceeds of the bond if it is floated.

#### MIN BAC/FPT/JM/003/2014: Committees' Concerns

The Committees were concerned on what the cabinet position was on the matter and why the National Treasury was seeking Parliament's approval for the matter at hand. Further, the Committees sought to know the opinion of the Attorney General on the matter.

#### MIN BAC/FPT/JM/004/2014: Committees' Recommendation

The Committees agreed to support the National Treasury so that the Sovereign Bond can be floated in the market without difficulties but on condition that:

- (i) The National Treasury submits written legal opinion of the Attorney General on the two cases and whether there are other avenues of appeal on the two cases.
- (ii) Written evidence from the Executive (Cabinet) on whether it has approved these payments

MIN BAC/FPT/JM/005/2014: Adjournment

There being no other business the Chairman, Budget and Appropriations Committee adjourned the meeting at 1.30 pm.

SIGNED




.....  
CHAIRPERSON, BUDGET AND APPROPRIATIONS COMMITTEE

29.4.14

.....  
DATE

SIGNED



.....  
CHAIRPERSON, FINANCE, PLANNING AND TRADE COMMITTEE

29-4-2014

.....  
DATE

e

MINUTES OF THE 2<sup>nd</sup> JOINT MEETING OF THE BUDGET AND  
APPROPRIATIONS COMMITTEE AND FINANCE, PLANNING AND TRADE  
COMMITTEE HELD ON TUESDAY, 22<sup>ND</sup> FEBRUARY 2014 AT 10:00 AM AT  
MAIN CHAMBER, PARLIAMENT BUILDINGS

**PRESENT**

1. Hon. Mutava Musyimi, MP - Joint Chair
2. Hon. Benjamin Langat, MP - Joint Chair
3. Hon. Abdikadir Omar Aden, MP
4. Hon. Abdulaziz Farah, MP
5. Hon. Alfred Sambu, MP
6. Hon. Benjamin Andola Andayi, MP
7. Hon. Charles Nyamai, MP
8. Hon. Clement Wambugu, MP
9. Hon. Dorcas Kedogo, MP
10. Hon. Dennis Kariuki, MP
11. Hon. Dr. J.W. Nyikal, MP
12. Hon. Dr. Reginalda Wanyonyi, MP
13. Hon.(Eng) Stephen Ngare, MP
14. Hon. James Gakuya, MP
15. Hon. James Lusweti, MP
16. Hon. Jared O. Opiyo, MP
17. Hon. John Mbadi, MP
18. Hon. Jonathan Lati Lelelit, MP
19. Hon. Joseph Limo, MP
20. Hon. Kahatib Mwashetani, M.P
21. Hon. KK Stephen Kinyanjui, MP
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28. Hon. Samuel Gichigi,MP
29. Hon. Silverse Lisamula Anami, MP
30. Hon. Suleiman Murunga Kasuti,MP
31. Hon. Tiyah Galgalo. MP
32. Hon. Jimmy Angwenyi, MP
33. Hon. Eng. Shadrack Manga, MP
34. Hon. Sammy Koech, MP
35. Hon. Tiras Ngahu, MP

36. Hon. Rose Nyamunga, MP
37. Hon. Sakwa Bunyasi, MP
38. Hon. Jones Mlolwa, MP
39. Hon. Abdul Rahim Dawood, MP
40. Hon. Joash Olum, MP
41. Hon. Patrick Makau King'ola, MP
42. Hon. Timothy Bosire, MP

#### ABSENT

1. Hon. Andrew Toboso, MP
2. Hon. Sammy Mwaita, MP
3. Hon. Shakeel Shabbir, MP
4. Hon. Sumra Irshadali, MP
5. Hon. Sakaja Johnson, MP
6. Hon. Abdullswamad Sheriff, MP
7. Hon. Dr. Oburu Oginga, MP
8. Hon. Ronald Tonui, MP
9. Hon. Iringo Cyprian Kubai, MP
10. Hon. Kirwa Bitok, MP
11. Hon. Alice Ng'ang'a, MP
12. Hon. Ali Fatuma Ibrahim, MP
13. Hon. Alfred Agoi, MP
14. Hon. Banticha Jaldesa, MP
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16. Hon. Francis Njenga, MP
17. Hon. George Muchai, MP
18. Hon. Isaack Mwaura, MP
19. Hon. Jackson Kiptanui, MP
20. Hon. Jamleck Kamau, MP
21. Hon. Nelson Gaichuhie, MP
22. Hon. Mary Emaase, MP
23. Hon. Muriuki Njagagua, MP
24. Hon. Omar Mwinyi, MP
25. Hon. Moses Ole Sakuda, MP
26. Hon. Peter Weru Kinyua, MP
27. Hon. Shukran Hussein Gure, MP

#### IN ATTENDANCE

1. Mr. Henry Rotich
2. Dr. Kamau Thugge
3. Ms. Fellister S. Kivisi

#### NATIONAL TREASURY

Cabinet Secretary  
Principal Secretary  
Staff

#### IN ATTENDANCE

1. Prof. Githu Muigai
2. Tom Odede
3. Muthoni Kimani

#### STATE LAW OFFICE

Attorney General  
Staff  
Staff

#### IN ATTENDANCE

1. Mr. Martin Masinde
2. Mr. Robert Nyaga
3. Mr. Frederick Muthengi
4. Mr. Joseph Ndirangu
5. Ms. Esther Nginyo

#### COMMITTEE SECRETARIAT

Senior Deputy Director  
Chief Fiscal Analyst  
Principal Fiscal Analyst/Clerk  
Fiscal Analyst  
Clerk Assistant

#### AGENDA

1. Preliminaries
2. *Presentation by the Cabinet Secretary- National Treasury*
3. *Presentation by the Attorney General*
4. Any Other Business

#### MIN BAC/FPT/JM/006/2014: Preliminaries

The Chairperson, Budget and Appropriations Committee called the meeting to order at 10.30 am and word of prayer was said. He informed the meeting that it was a called after the National Treasury sought for audience with both committees to update Members on the progress of the settlement of foreign court judgements against Government of Kenya as detailed in the National Treasury's letter Ref: NT/DMD/SEC/GN"D" dated 15<sup>th</sup> April, 2014.

MIN BAC/FPT/JM/007/2014: Presentation by the Cabinet Secretary, The National Treasury

The Cabinet Secretary briefed and informed the meeting on the progress of the two foreign judgement cases against GOK: First Mercantile and Universal Satspace as follows that;

- i. It can be recalled that during the previous joint meeting of the two committees, the National Treasury was tasked that it should provide the evidence of payment approval by the Cabinet and the legal opinion of the Attorney General on the way forward with regards to the judgements.
- ii. The Meeting was informed that the National Security Council meeting held on 25<sup>th</sup> February, 2014 directed the Chief of Staff and Head of Public Service, the Cabinet Secretary for the National Treasury, the Attorney General, the Cabinet Secretary for Foreign Affairs and Cabinet Secretary for defence to explore on any other avenues to be used to settle the matter, and to proceed on the basis of what they agree after briefing the President.
- iii. Further, the joint committees were informed that the Attorney General hired Dentons of UK, an International Law firm to advice on whether there exists any other avenue to resolve the issue to which Dentons advised that there were no legal avenue left for GOK apart from settling the payments. Subsequently, the Attorney General and the Cabinet Secretary, The National Treasury, consequently engaged the counsel for the claimants in negotiations on 28<sup>th</sup> March and 1<sup>st</sup> April, 2014 with the aim of reaching an agreement on the settlement of the debts. The outcome of the negotiations is that the claimant agreed to forgo 50% interest on the First Mercantile case, equivalent to \$2,349, 264 (Kshs. 204 million). This had the effect of reducing the total judgement debt by 13% from \$18,770,926 to \$16,421,662.
- iv. The meeting was informed that the settlement Agreement Letters have been signed by GOK and the claimants and the National Treasury is now processing the documentation for payment.

- v. The National Treasury requested for the approval of the National Assembly to settle these judgement debts of Kshs. 1.4 billion by 28<sup>th</sup> April, 2014 failure to which GOK assets would be attached.

**MIN BAC/FPT/JM/008/2014: Presentation by the Attorney General**

The Attorney General made a presentation and informed the meeting that;

- i. The case against GOK was first filed in July, 2006 seeking compensation of US\$12.3 million. The Government appealed the case but lost.
- ii. The case was referred to mediation pursuant to the English civil rules of procedure to resolve the issue.
- iii. The Mediation process brought down a claim of US\$ 14 million to US\$ 7.6 million.
- iv. The claimant went to court in London after waiting for 10 months to be paid. However, the judgement was upheld and GOK was expected to pay \$7,874,431(Kshs. 677 million) being principal of \$7.6million and interest of \$274,431. The amounts continue to continue to attract interest.
- v. GOK received advise from local and international legal advisors, and investment bankers that the debt needed to be disclosed before any payments are made.
- vi. GOK has other debts which are under management.

**MIN BAC/FPT/JM/009/2014: Committees Concerns**

Members raised concerns on the following issues why the executive was involving parliament on the matter at hand. Further the meeting sought to know the progress of putting in place deterrent measures for the culprit involved in this case.

The Cabinet Secretary informed the Members that executive needed to involve parliament as the matter had been investigated by the Public Accounts Committee which recommended that negotiations be made with the creditors. The executive in addition to seeking approval for settling the judgement debts was informing Parliament on the progress so far made pursuant to the recommendations. Further, the peculiarity of the case necessitated the executive to involve parliament.

Further, the Attorney General informed the Committee that investigations on those involved were still on-going and materials on the case so far received from friendly governments and other sources have been availed to the Ethics and Anti-Corruption Commission (EACC) for analyses and possible prosecution of those involved.

MIN BAC/FPT/JM/010/2014: Committee's Recommendations

The joint meeting recommended and directed that the secretariat work on a joint committee reports that will be tabled in the House seeking its approval on the matter.

MIN BAC/FPT/JM/011/2014: Adjournment

The Chairperson adjourned the meeting at 1.05 pm.

SIGNED



.....  
CHAIRPERSON, BUDGET AND APPROPRIATIONS COMMITTEE

29-4-14

.....  
DATE

SIGNED



.....  
CHAIRPERSON, FINANCE, PLANNING AND TRADE COMMITTEE

29-4-2014

.....  
DATE

**MINUTES OF THE 3RD JOINT MEETING OF THE BUDGET AND APPROPRIATIONS COMMITTEE AND FINANCE, PLANNING AND TRADE COMMITTEE HELD ON TUESDAY, 29<sup>TH</sup> APRIL, 2014 AT 11:00 AM AT THE SMALL DINING, PARLIAMENT BUILDINGS**

**PRESENT**

1. **Hon. Mutava Musyimi, MP - Joint Chair**
2. **Hon. Benjamin Langat, MP - Chairperson, Finance, Planning & Trade**
3. Hon. Abdikadir Omar Aden, MP
4. Hon. Abdulaziz Farah, MP
5. Hon. Alfred Sambu, MP
6. Hon. Benjamin Andola Andayi, MP
7. Hon. Bitok S. Kirwa, MP
8. Hon. Daniel Nanok, MP
9. Hon. Dorcas Kedogo, MP
10. Hon. Dennis Kariuki, MP
11. Hon. Dr. J.W. Nyikal, MP
12. Hon. Dr. Reginalda Wanyonyi, MP
13. Hon. Francis Njenga, MP
14. Hon. George Muchai, MP
15. Hon. James Gakuya, MP
16. Hon. Jared O. Opiyo, MP
17. Hon. Jonathan Lati Lelelit, MP
18. Hon. Joseph Limo, MP
19. Hon. KK Stephen Kinyanjui, MP
20. Hon. Makali Mulu Benson, MP
21. Hon. Mohammed Shidiye, MP
22. Hon. Moses Lessonet, MP
23. Hon. Muriuki Njagagua, MP
24. Hon. Omar Mwinyi, MP
25. Hon. Omondi George W. Mallan, MP
26. Hon. Patrick Ole Ntutu, MP
27. Hon. Priscilla Nyokabi, MP
28. Hon. Samuel Gichigi, MP
29. Hon. Silverse Lisamula Anami, MP
30. Hon. Sammy Mwaita, MP
31. Hon. Jimmy Nuru Angwenyi, MP

- 32.Hon. Dr. Oburu Oginga, MP
- 33.Hon. Alice Ng'ang'a, MP
34. Hon. Ali Fatuma Ibrahim, MP
- 35.Hon. Jackson Kiptanui, MP
- 36.Hon. Jamleck Kamau, MP
- 37.Hon. Nelson Gaichuhie, MP –
- 38.Hon. Suleiman Murunga Kasuti, MP
- 39.Hon. Peter Weru Kinyua, MP
- 40.Hon. Sakaja Johnson, MP
- 41.Hon. Alice Ng'ang'a, MP
42. Hon. Ali Fatuma Ibrahim, MP
- 43.Hon. Rose Nyamunga, M.P
- 44.Hon. Iringo Cyprian Kubai, MP
- 45.Hon. Timothy Bosire,MP
- 46.Hon. Shakeel Shabbir Ahmed, MP

**Absent**

1. Hon. Alfred Agoi, MP
2. Hon. Tiras Ngahu, MP
3. Hon. Joash Olum, MP
4. Hon. Banticha Jaldesa, MP
5. Hon. Jones Mlolwa, MP
6. Hon. Charles Nyamai, MP
7. Hon. Mary Emaase, MP
8. Hon. Patrick Makau King'ola, MP
9. Hon. Jackson Kiptanui, MP
- 10.Hon. Abdullswamad Sheriff, MP
- 11.Hon. Abdul Rahim Dawood, MP
- 12.Hon. Ronald Tonui, MP
- 13.Hon. Sakwa John Bunyasi, MP
- 14.Hon. John Mbadi, MP
- 15.Hon. Isaack Mwaura, MP
- 16.Hon. Irshadali Sumra, MP
- 17.Hon. Tiyah Galgalo. MP
- 18.Hon. Moses Ole Sakuda, MP
- 19.Hon.(Eng) Stephen Ngare, MP



#### **MIN BAC/FPT/JM/010/2014: Preliminaries and Confirmation of Agenda**

The Chairperson, Committee on Budget and Appropriation called the meeting to order at 11.57 am, followed by a word of prayer.

#### **MIN BAC/FPT/JM/011/2014: Confirmation of Minutes**

Minutes of the first and second joint sittings held on 19<sup>th</sup> February and 22<sup>nd</sup> April, 2014 respectively were confirmed by the members present and they were co-signed by the joint- Chairpersons.

#### **MIN BAC/FPT/JM/012/2014: Presentation by the Cabinet Secretary- National Treasury**

The Cabinet Secretary, The National Treasury made a presentation before the Joint Committees on issues related to the court awards on two security contracts and informed them on the background, courts award for First Mercantile Securities Corporation and Universal Satspace, the importance of complying with the court judgement, merits of paying and cost of not complying with the court order.

#### **MIN BAC/FPT/JM/013/2014: Committees' Observations**

The Committee was concerned on what would happen to other pending contracts that have not been paid. Further, the Committee reiterated on the need to put in place deterrent measures by bring to book those who were involved in the Anglo-Leasing case.

The Committee also noted that there is need to have legal status for other contracts to avert similar scenario.

#### **MIN BAC/FPT/JM/014/2014: Consideration and adoption of the Joint Committees report and Committees Concerns**

Several members were concerned on the need for revealing of the owners of the two companies that took the Kenya Government to Court. They stated that there is a likelihood that other Anglo-leasing related companies might also go to court and seek payments. After long deliberations majority of members supported the report recommendations while the following members opposed the report recommendations.

- (1) Hon. Benson Makali Mulu, MP
- (2) Hon. Dr. James Nyikal, M.P
- (3) Hon. Benjamin Andayi, M.P
- (4) Hon. Joseph Limo, MP
- (5) Hon. Timothy Bosire, M.P
- (6) Hon. Rose Nyamunga, M.P
- (7) Hon. Jared Opiyo, M.P

**MIN BAC/FPT/JM/015/2014: Adjournment**

There being no other business the Chairman, Budget and Appropriations Committee adjourned the meeting at 1.57 pm.

SIGNED



.....  
CHAIRPERSON, BUDGET AND APPROPRIATIONS COMMITTEE

29. 4. 14

.....  
DATE

SIGNED



.....  
CHAIRPERSON, FINANCE, PLANNING AND TRADE COMMITTEE

29-4-2014

.....  
DATE



REPUBLIC OF KENYA  
THE NATIONAL TREASURY

ANNEX 2:

Telegraphic Address: 22921  
Finance – Nairobi  
FAX NO. 310833  
Telephone: 2252299  
When Replying Please Quote

THE NATIONAL TREASURY  
P O BOX 30007 - 00100  
NAIROBI

Ref: NT/DMD/SEC/GN "A"

22<sup>nd</sup> April 2014

Hon. Mutava Musyimi  
The Chairman  
Budget and Appropriations Committee  
PARLIAMENT

Hon. Benjamin Langat  
The Chairman  
Finance, Planning and Trade Committees  
PARLIAMENT

Dear *Hon. Langat*

REPORT ON SETTLEMENT OF COURT AWARDS AGAINST GOVERNMENT OF  
KENYA: FIRST MERCANTILE AND UNIVERSAL SATSPACE

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Reference is made to the above subject and the meeting of your joint committee on 22<sup>nd</sup> April 2014.

The purpose of this letter is to forward to you the draft report and attachments as agreed.

Yours

*Sincerely*

DR. KAMAU THUGGE, EBS  
PRINCIPAL SECRETARY/NATIONAL TREASURY





## NOTES ON THE PROGRESS OF RESOLUTION OF THE TWO FOREIGN JUDGEMENT DEBTS AGAINST GOK: FIRST MERCANTILE AND UNIVERSAL SATSPACE

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- 1 The National Treasury sought and received audience with the Budget and Appropriations Committee on 18<sup>th</sup> February 2014 and the joint Budget and Appropriations and Finance, Planning and Trade Committees on 19<sup>th</sup> February 2014.
- 2 Both committees gave approval for settlement of the judgement debts on condition that the National Treasury provides the Committees with:
  - a) Evidence of payment approval by the Cabinet; and
  - b) The Legal Opinion of the Attorney General on the way forward with regard to the judgements.
- 3 **The National Security Council (NSC) meeting held on 25<sup>th</sup> February 2014 directed** the Chief of Staff and Head of Public Service, the Cabinet Secretary for the National Treasury, the Attorney General, Cabinet Secretary for Foreign Affairs and Cabinet Secretary for Defence to **explore whether there were any other avenues that could be used to settle the matter, and to proceed on the basis of what they agree after briefing the President.**
- 4 The Attorney General hired Dentons of UK, an International Law firm to advice on whether there exists any other avenue to resolve the issue. **Dentons advised that there was no legal avenue left for GoK apart from settling the payments.**

- 5 Following this outcome, the Attorney General and the Cabinet Secretary/National Treasury engaged the counsel for the claimants in negotiations on 28<sup>th</sup> March and 1<sup>st</sup> April 2014 with the aim of reaching an agreement on the settlement of the debts.
- 6 The outcome of the negotiations is that the claimant agreed to forego 50% interest on the First Mercantile case , equivalent to \$2,349,264( Ksh204 million). **This had the effect of reducing the total judgement debt by 13% from \$18,770,926 to \$16,421,662.**
- 7 **The Attorney General has given his legal opinion indicating that GOK should settle the agreed amounts.**
- 8 **The Settlement Agreement Letters have been signed by GoK and the claimants and the National Treasury is now processing the documentation for payment.**

**The National Treasury requests the approval of National Assembly to settle these judgement debts.**

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*22 April 2014*

# REPORT ON SETTLEMENT OF FOREIGN COURT JUDGEMENTS AGAINST GOK ON POSTAL CORPORATION OF KENYA PROJECTS FINANCED AND CARRIED OUT BY FIRST MERCANTILE AND UNIVERSAL SATSPACE RESPECTIVELY

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## I. BACKGROUND

1. The Government is planning to issue the first International Sovereign Bond to finance the Fiscal Year 2013/2014 budget. Towards this process, the National Treasury has contracted international Lead Counsel and Joint Lead Managers to assist in the transaction. These advisers are working with a GoK team comprising of officers of the National Treasury, Central Bank of Kenya and the Attorney General's Office.
2. The preparation of the Bond Offering Circular (OC) is well under way and it has been submitted to the Irish Stock Exchange where the Bond will be listed for trading. The OC is currently being reviewed and finalized. However, the next steps in the process cannot be undertaken due to two outstanding litigation issues.
3. As part of the Bond issuance process, GoK is expected to disclose all litigation cases against it and state whether they pose risks to the bond investors. In Kenya's case the following two cases pose a big risk to the bond issuance.
4. Two judgements have been entered against the Government of Kenya in Geneva, Switzerland and in London, UK. The details of the cases are as follows (**see also Annex 1**):-

### a) **Broadband Network Project**(First Mercantile Securities Corporation)

The facts of this case are as follows:-

- The project involved supply of VSAT equipment by Spacenet to connect all the post offices in Kenya. First Mercantile Securities Corporation (FMSC) guaranteed payments for the supplied equipment.
- On 12<sup>th</sup> August 2004, GOK suspended payments for this project.

- Arising from the suspension of payments, in January 2006, First Mercantile Securities Ltd filed a claim of US\$12.7 million plus penalty interest at 8.75 p.a. against the Kenya government in Geneva Court of First instance.
- On 14th May 2009, the suit was determined against GoK for \$6.0 million (Ksh516 million).
- The Attorney General lodged an appeal but this was defeated in November 2012 and a Judgement of \$10.1 million (Ksh868 million) was made against GoK.
- This amount continues to attract interest of \$1,413 per day beginning 6<sup>th</sup> December 2012.
- The amount due for payment, including accrued interest and cost as at 24<sup>th</sup> March 2014 is \$10.7 (Ksh920 million) and the claimant has sought Registration of Judgement in the High Court in London to compel Kenya to pay or else proceed with attachment proceedings.
- GOK also received a notice of attachment of GOK Mission assets in Geneva due to non- payment (**Annex 2**).
- GOK also received a demand letter for payment of the judgement debt giving 17<sup>th</sup> January, 2014 as the final deadline after which the claimant will start enforcement proceedings (**Annex 3**).

#### **b) Bandwidth Network Project ( Universal Satspace)**

The litigation on this project is related to (a) above and the facts of the case are as follows:

- Universal Satspace signed an agreement with GoK for provision of bandwidth and network management for 10 years for all the Post Offices under project (a) above.
- As with the case of First Mercantile payments were similarly suspended. After suspension of payments on 12<sup>th</sup> August 2004, a suit

against GoK was filed in London in July 2006, seeking US\$12.3 million in compensation.

- Protracted suit terminated in the case being referred to mediation pursuant to the English civil rules of procedure to resolve the issue.
- Mediation in Nairobi in February 2013 agreed on payment of \$7.6 million (Ksh653 million) by GoK. After waiting for 10 months to be paid as agreed the claimant went to court in London on 20<sup>th</sup> December 2013 and judgement was upheld and Kenya was expected to pay \$7,874,431. (Ksh 677 million) being principal of \$ 7,600,000 and interest of \$ 274,431) by 17<sup>th</sup> January 2014 inclusive of costs of £60,000.
- This amount continues to attract interest at 8.75% per annum which translates to \$1,665 per day beginning 21<sup>st</sup> December 2013.

## II. DETAILS AND FINANCIAL IMPLICATIONS OF JUDGEMENT DEBTS

### 5. Details of amounts awarded against GoK in the two judgements

#### a) Universal Satspace (as of 28 February 2014)

Principal	:	\$7,600,000
Interest	:	\$ 393,321
Costs	:	\$ 98,100
		<u>\$8,091,421</u>

#### b) First Mercantile (as of 28 February 2014)

Principal	:	\$5,893,500
Interest	:	\$4,698,905
Costs	:	\$ 87,280
		<u>\$10,679,685</u>

c) Total award: (a)+(b)=\$18,771,106@86=Ksh1,614,315,116

## III. RISKS POSED BY THE JUDGEMENTS

6. These litigations pose various risks to the Republic, which include:-

**a) Enforcement of judgements/attachment of GoK assets**

The claimant has applied to international courts seeking to enforce the judgement in both cases and attach GoK assets.

**b) Stoppage of the Bond process**

These litigations have complicated the Government's plan to issue the first International Sovereign Bond to finance the Fiscal Year 2013/2014 budget. In both cases, the claimant's legal counsel, Travers Smith LLP, of London on 21<sup>st</sup> March 2014 has written to Arnold & Porter, the National Treasury's Lead Counsel for the Sovereign Bond, making a clear link between the two cases and the sovereign bond issuance. Specifically, their intention is to interfere with the bond process by disclosing to prospective investors that Kenya's continued breach of judgement orders is a demonstration of failure to comply with its contractual obligations and to adhere to the rule of law. This development in effect means that the bond issuance process is stalled unless GoK settles the litigation cases.

Arnold & Porter, the Republic's Lead Counsel for the Bond and SNR Dentons, counsel instructed to represent the Republic in the enforcement proceedings in the UK have both advised the Republic to resolve the judgements before the Bond transaction is launched. The Joint Lead Managers (JLMs) for the Bond transaction, aware of the litigations, have indicated their reluctance to support the bond issuance if the payments are not made.

**c) Fiscal risk**

The stalled bond process means that the proceeds of the bond, which are already factored in the 2013/2014 budget, will not be available and the budget cannot therefore be implemented including the repayment of the syndicated loan of US\$600 million contracted in 2012 falling due in May 2014. Such a scenario would result in serious macro-economic dislocations with a likely sharp increase in interest rates, which would have a serious adverse effect on the growth of the economy.

**d) Interest charges on the judgements**

It is also noted that whether GoK proceeds with the bond or not, interest charges on the judgement debts continue to accrue as follows.

- For the First Mercantile case @ US\$ 1,413 (Ksh 122,931) per day since 6<sup>th</sup> December 2012.
- For the Satspace case @ US\$ 1,665 (Ksh 144,855) per day since 20<sup>th</sup> December 2013.

The judgement debts therefore need to be paid to avoid further loss to GoK.

The annual costs on the interest is estimated at Ksh96 million and is shown in Table 1.1

**Table 1.1: Daily/annual interest cost on awards**

	Daily interest on non-payment	Annual interest on non-payment	Annual costs(Ksh)
<b>First Mercantile</b>	US\$1,413 (Ksh121,518)	US\$515,681	44,348,566
<b>Satspace</b>	US\$1,665 (Ksh143,190)	US\$607,725	52,264,350
<b>Total</b>	US\$3,078 (Ksh264,708)	US\$1,123,406	<b>96,612,916</b>

**e) Reputational Risk**

Stoppage of the bond process will cause a major setback and embarrassment to the GoK and transaction advisers. The stoppage would definitely injure Kenya's reputation as it prepares to launch its debut bond. It would also most likely negatively impact on GoK's access to financing by other creditors. It is also likely to adversely affect our rating by such international rating institutions as Standard and Poors, and Fitch Rating.

**f) Higher Costs**

- The annual costs on the interest is estimated at Ksh96 million (see (d) above).

ii) **Higher costs associated with domestic borrowing rather than issuing the Bond.** It is estimated that without the sovereign bond this cost component associated with domestic borrowing would amount to Ksh9.1 billion.

iii) **Higher costs on domestic borrowing due to upward movement of interest rates.** It is expected that the sovereign bond would drive domestic interest rates downward. However, in its absence domestic interest charges would rise in the next financial year leading to higher costs estimated at Ksh5.7 billion annually.

iv) **Cost to the economy of not issuing the ISB**

The issuance of the ISB is expected to act as a benchmark bond to catalyse the private sector to issue bonds in the international markets at favourable rates. In the absence of the ISB the private sector would not benefit from lower interest rates. **This would cost the economy an estimated Ksh6.0 billion annually.**

**Total annual costs without sovereign Bond=(i)+(ii)+(iii)+(iv) million**

**=Ksh96+Ksh9,100+Ksh5,700+Ksh6,000**

**=Ksh20,896 million/year**

This is the annual cost of non-settlement of the judgement. The benefits of settling the debts therefore outweigh the cost/risk of non-payment by about fifteen times, i.e.  $20.9/1.43=14.61$

#### **IV. CONSULTATIONS WITH PARLIAMENT**

7. The National Treasury sought and received audience with the Parliamentary Committee on Budget and Appropriations on 18<sup>th</sup> February 2014 and the joint Budget and Appropriations and Finance, Planning and Trade Committees on 19<sup>th</sup> February 2014.

Both committees were of the opinion that the debts should be settled on condition that the National Treasury provides to them the Legal Opinion of the Attorney General and evidence of approval by the executive.

## V. CABINET APPROVAL TO NEGOTIATE

8. A committee of the cabinet was formed to look at the issue. The National Security Council (NSC) meeting held on 25<sup>th</sup> April 2013 directed the Chief of Staff and Head of Public Service, the Cabinet Secretary National Treasury, the Attorney General, Cabinet Secretary Foreign Affairs and Cabinet Secretary for Defence to explore whether there were any other avenues that could be used to settle the matter, and to proceed on the basis of what they agree after briefing the President (**Annex 4**).

The Attorney General hired Dentons of UK, an International Law firm to advise on whether any other avenue exists that could be used. Dentons advised that there was no legal avenue left for GoK apart from settling the payments.

## VI. PUBLIC ACCOUNTS COMMITTEE(2006) RECOMMENDATION

9. The negotiations were also guided by the Public Accounts Committee titled “**Special Audit on Procurement of Passport Issuing Equipment**” tabled in Parliament on 30<sup>th</sup> March 2006 by the then chairman Hon. Uhuru Kenyatta. It was adopted by Parliament on 4<sup>th</sup> April 2006. It covered all the eighteen contracts and recommended, inter alia, that:
  - i) All contracts that had not been commenced should be terminated;
  - ii) Those which had commenced should be renegotiated with strict adherence to the procurement regulations and procedures;
  - iii) Investigation and prosecution of all implicated.

## VII. NEGOTIATIONS TO RESOLVE THE ISSUE

10. Following these complications and risks to the sovereign bond, threats to Kenyan assets, the fiscal risk involved, the continued loss to the Republic on account of accrued interest on the judgements as well as the Attorney General’s advice to reach a negotiated position, the Government, represented by the office of the Attorney General and the National Treasury held negotiation meetings with the claimant’s counsel on 28<sup>th</sup> March 2014 and on 1<sup>st</sup> April 2014 in an attempt to resolve the issue. (**Minutes of the meetings are attached as Annex 5**).

The following is a summary of the Republic’s and claimant’s positions during the negotiations:

Judgement debts (as at 28 <sup>th</sup> February 2014)		GoKs offer	Claimant's counter offer
Satspace	<ul style="list-style-type: none"> <li>• \$7.6 mn (mediation)</li> <li>• \$393,321(Interest)</li> <li>• \$98,100(costs)</li> </ul>	\$7.6 mn	<ul style="list-style-type: none"> <li>• \$7.6 mn (mediation)</li> <li>• \$393,321(Interest)</li> <li>• \$98,100 (costs)</li> </ul>
<b>Sub-Total</b>	<b>\$8.09 mn</b>	<b>\$7.6 mn</b>	<b>\$8.09 mn</b>
First Mercantile	<ul style="list-style-type: none"> <li>• \$5.89 mn (Principal)</li> <li>• \$4.69 mn (Interest)</li> <li>• \$87,280 (costs)</li> </ul>	\$5.9 million	<ul style="list-style-type: none"> <li>• \$5.89mn (Principal)</li> <li>• \$2.34 mn (Interest)</li> <li>• \$87,280 (costs)</li> </ul>
<b>Sub-Total</b>	<b>\$10.68mn</b>	<b>\$5.9 mn</b>	<b>\$8.33 mn</b>
<b>Total</b>	<b>\$18.77mn</b>	<b>\$13.5 million</b>	<b>\$16.42</b>

11. Following the second negotiation meeting held on 1<sup>st</sup> April, 2014 the Republic requested the claimant to reduce the interest further to US\$1,174,731 in the First Mercantile case, on the Republic's pledge to pay the Agreed Amount in one installment on or before 28<sup>th</sup> April, 2014. However, they came back to indicate that their position remains at US\$16.4 million as the final Agreed Amount. The Treasury is agreeable to this amount given that the Republic has negotiated a reduction of US\$2,349,461 from the initial claim of US\$18,771,106 to US\$16,421,662 translating to a discount of 13 percent (**Annex 6**).

#### VIII. ATTORNEY GENERAL'S LEGAL OPINION

12. The Attorney General was requested to give his final opinion on the issue and this was done vide his letter reference AG/CONF/6/D/109 VOL II dated 3<sup>rd</sup> April 2014. (**Attached as Annex 7**)

#### IX. CONSULTATION WITH ETHICS AND ANTICORRUPTION COMMISSION

13. The Secretary and Chief Executive Officer of Ethics and Anti-Corruption Commission has been briefed and he has given his opinion vide letter reference EACC.6/2/3/1 dated 3<sup>rd</sup> April 2014. (**Attached as Annex 8**)



## X. PAYMENT AUTHORITY

From the foregoing consultations and approvals, and in accordance with the Settlement Agreement Letters (*see Annex 6*), the National Treasury has prepared payment documentation to settle the judgement debts. However, the Controller of Budget has requested for Parliamentary approval to facilitate release of funds from the consolidated Fund to meet the payment obligations (*Annex 9*).

## XI. CONCLUSION / WAY FORWARD

14. Resolution of the pending issues on litigation is crucial to the successful issuance of the International Sovereign Bond. The Office of the Attorney General advises that it has exhausted further judicial action to forestall payment of the judgement debts and the way forward is for GOK to settle to minimize further loss to GOK as the outstanding awards continue to accrue interest.
15. The National Treasury jointly with the Attorney General has presented these cases to Parliament through the joint Budget and Finance Committee seeking a national solution. As indicated in (V) and (VIII) above the Cabinet and the Attorney General have given approval to settle the judgement debts.
16. GOK faces a difficult situation since the bond was factored in the 2013/2014 budget and the non-realization of the bond proceeds would leave a huge deficit, making it impossible to implement the budget.
17. As demonstrated above, the annual cost of non-settlement of the judgement debts is the equivalent of Ksh20.9 billion annually. The benefits of settling the debts therefore outweigh the cost/risk of non-payment by more than fourteen times.
18. Given the foregoing, it is therefore recommended that GoK pays off the judgement amounts in the two cases.

End

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## THE NATIONAL TREASURY

### ISSUES RELATED TO THE COURT AWARDS ON TWO SECURITY CONTRACTS

This is to provide the Joint Committee of Budget and Finance additional information regarding the proposed payment of two Judgment debts, namely the First Mercantile Securities Corporation and Universal Satspace LLC.

#### **Background:**

According to our records, the estimated total value of the 18 security contracts signed between 1997 and 2004—the so-called Anglo Leasing contracts—is Ksh 56.2 billion. Most of them are still under investigation, initially by KACA and now by the EACC.

The 18 contracts can be classified into three broad categories; (i) 4 cancelled contracts amounting to Ksh. 18.908 billion; (ii) 3 contracts fully delivered and paid for (Ksh. 6.795 billion); and (iii) 11 contracts partially completed amounting to Ksh. 30.554 billion).

Of the 11 contracts that were partially completed, 6 of them valued at Ksh 16.6 billion, efforts are ongoing to recover the funds. The rest of the 5 cases (valued at Ksh 13.9 billion) are partly completed contracts and have remained active as follows: (i) 2 contracts (valued at Ksh 7.9 billion) were successfully negotiated and paid off between 2008-2012; 1 contract is still in dispute; and 2 contracts (valued at Ksh 2.9 billion) were the subject of court process and judgement entered between 2012 (in Geneva court) and 2013 (in London court).

The court awards in the later 2 cases are the subject of the current debate and are associated with First Mercantile Securities Corporation and Universal

Satspace, excluding legal cost and interest accruing daily since the judgement date.

### **I. Allegations that the Government is to pay “Anglo Leasing” debt of Ksh 125 billion**

From the above, therefore, it is clear that the press statement that Government wants to pay Ksh 125 billion is NOT TRUE AND MISLEADING. The true position is that the amount awarded by the Court was Ksh. 1.6 billion and after negotiations this figure was reduced to Ksh 1.4 billion.

### **II. Court Awards—First Mercantile Securities Corporation and Universal Satspace (North America) LLC**

The Government of Kenya was taken to court in Switzerland and the United Kingdom on two contracts; Broadband Network Project (First Mercantile Securities Corporation) and Bandwidth Network Project (Universal Sat space). GOK lost both cases, appealed and lost the appeals as well. Payments on these cases had been suspended in August 2004.

The First Mercantile project involved supply of VSAT equipment by Spacenet to connect all the post offices in Kenya. Universal Sat Space signed an agreement with GoK for provision of bandwidth and network management for 10 years for all the Post Offices under the First Mercantile project. The courts awarded both cases to the complainants to the tune of US\$10.6 million and US\$7.8 million respectively plus costs. There are no legal avenues left for the government as all appeals have been exhausted, and the Attorney General has advised that these amounts be paid to avoid further loss.

These cases are accruing penalty interests at the rate of \$ 1,413 and \$ 1,665 per day respectively, which together, translates to US\$3,078 (or Ksh. 264,708) per day. On an annual basis, the Government would be liable to pay an additional US\$1.12 million or Ksh. 96.6 million.

### **III. Why it is important to comply with the Court Judgement**

It is important that the government honours court awards to forestall attachment of GOK assets abroad. Furthermore, the prompt payment of

these court awards will not only save the government Ksh. 96.6 million per year, but will also protect Kenya's hard-won international reputation as a country which meets its lawful obligations.

#### **IV. Why Pay now After all These Years**

The Government has appealed and re-appealed the two cases and the final judgement with no further recourse to appeal was made on December 20, 2013. This period also coincides with the issuance of the proposed issuance of the Sovereign Bond, whose issuance cannot take place unless all obligations related to the court awards are paid. This explains the timing of the proposed payment.

It is also important to note that the previous government resolved two cases, namely, the project Nexus (Ksh. 1.54 billion) and Naval Ship (Ksh. 3.74 billion). Both were successfully negotiated and payments made between 2008-2012. Therefore, the allegation that this is the only Government that is paying for the so-called "Anglo-Leasing" contracts is incorrect.

#### **V. Costs of not complying with the court order**

Including the annual penalty payments of Ksh. 96.6 million, we estimate that the cost of not paying could potentially reach Ksh 20 billion, arising from higher domestic interest rates. Without the issuance of the sovereign bond domestic interest rates are likely to be higher for both the private and public sector. In sum the potential benefits of paying amounting to Ksh. 20 billion far outweighs the cost of paying Ksh. 1.4 billion. Payment would be in line with the Constitutional requirement that public money be used in a prudent and responsible way.

It is important to note that the Government has already received a notification for the attachment of Government assets. Therefore, failure to pay the negotiated amounts will result in the attachment of government assets abroad.

#### **VI. Approval By parliament**

Following the PAC recommendations of March 2006, namely:

“The Attorney General should ensure that of the 18 projects, those which have not taken off are legally terminated to avoid accumulation of pending payments and penalties until investigations are complete, while those which have commenced should be re-negotiated with strict adherence to the laid down procurement procedures. The Attorney general should give the legal position of the status of the 18 project”

In light of the above recommendation, the two cases have been contested in the Courts and judgements have been made against the Government .(see attached Court Orders). In the absence of any further legal recourse, and in light of the Attorney General’s legal opinion on the two cases, negotiations have been completed and which achieved a 13% savings from the amounts of the court award.

#### **VII. Conclusion**

In response to the Joint Parliamentary Committee’s request, we have now provided to the Committees the Attorney General’s legal opinion and clarified the Government’s approval of the payments. We therefore seek Parliamentary approval for the payments of **the two court awards amounting to Ksh. 1.4 billion**, having complied with the recommendations of the Public Accounts Committee.



**HENRY K. ROTICH**  
**CABINET SECRETARY/NATIONAL TREASURY**

**April 29, 2014**



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL  
&  
DEPARTMENT OF JUSTICE

2

AG/CONF/6/D/109 VOL II

8th April 2014

Your Ref: NT/DMD/SEC/GN/A

Mr. Henry Rotich  
Cabinet Secretary  
The National Treasury  
Harambee Avenue  
NAIROBI

Dear

RE: LEGAL OPINION ON FOREIGN JUDGEMENTS – FIRST MERCANTILE  
SECURITIES CORPORATION (FMSC) VS. REPUBLIC OF KENYA AND  
UNIVERSAL SATSPACE (USS) VS. REPUBLIC OF KENYA

Reference is made to our letter dated 3rd April 2014 giving our final legal opinion and advice in the two cases currently pending with the execution proceedings to attach the assets of the Republic of Kenya before the High Court of Justice in England. We have given several opinions in the two cases and there have been several Cabinet resolutions directing that these matters be settled in the best interests of the Republic in accordance with the recommendations of the Public Accounts Report of May 2006.

Brief summary of the cases

The two cases arose from two contracts signed by the Ministry of Information and Transport on 11th July 2002 for the purchase and supply of equipments and VSAT communication network for Postal Corporation of Kenya (PCK), at a contract price of USD\$ 11,787,000.00. The purchase was to be financed through a Financing Agreement with FMSC which authorised FMSC to pay the suppliers on behalf of the Republic of Kenya in order to discharge its obligations under the purchase contract. The Contract provided a penalty annual interest rate of 8.75% for any delayed payment.

The Contracts were implemented until August 2004 when the Government suspended further payments in all security related contracts following the Anglo Leasing saga.

SHIRAZI HOUSE, HARAMBEE AVENUE  
P.O. BOX 40141, NAIROBI, KENYA TEL: +254 20 2337461/2337462/2337463/2337464  
E-MAIL: info@attorneygeneral.go.ke WEB SITE: www.attorneygeneral.go.ke

DEPARTMENT OF JUSTICE  
CO-OPERATIVE BANK HOUSE, HALELUSIA AVENUE  
P.O. Box 56057 00100, Nairobi Kenya TEL: Nairobi 2224029 / 2224030  
E-MAIL: legal@justice.go.ke WEB SITE: www.justice.go.ke

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After the suspension of the payments FMSC demanded the balance of payments from the Government under the terms of the contract. No payments were made and in January 2006 FMSC filed a claim against GOK in the Geneva Tribunal of First Instance claiming USD\$12,716.250 plus penalty interest at an annual rate of 8.75% for breach of contract.

The Republic was represented by the firm of Lalive Advocats of Geneva. In 2008 the Geneva Court of First Instance disallowed the Republic's plea to include the PWC report which had the allegations of corruption in the procurement of the contracts and awarded summary judgment in favour of FMSC. The Republic appealed against the decision. The Republic's appeal was allowed and the case was sent back to the Court of First Instance for full hearing. The Geneva lawyers obtained an opinion on English law on the question on the allegations of corrupt practices and bribery in the procurement of the contract from one Collin Nichols QC.

The case was heard fully with the claimant and the Republic presenting their respective evidence and witnesses. Mr. Henry Mwithia of the former KACC gave evidence on behalf of the Republic and referred to the PWC Report's findings. On 6<sup>th</sup> December 2012 the Court delivered its judgement in favour of the claimant and made the following findings: -

- a) FMSC had proved its claim for breach of contract as there was no dispute that all the goods and equipments purchased under the contract were supplied.
- b) There was no dispute that FMSC had performed its part of the contract and paid the supplier USD\$11,787,573.30, but the Republic had only repaid USD\$6,872,750 leaving a balance of USD\$ 5,936,910.10.
- c) The Republic did not discharge its burden of proving the allegations of corruption and dishonesty or that the contract was unduly influenced by the former PS Mr. Sammy Kyungu through payment of school fees for his children by the claimant's managing director.
- d) On the issue of overpricing as alleged in the PWC report the Court ruled under English Law, the same would not be a consideration for the Court but a matter between the Supplier and even if overpricing were to be proved it would not affect the validity or a defence to the claim.
- e) The Court awarded the annual interest rate of 8.75% pursuant to clause 7.1 of the deferred payment agreement.

After the judgement, our office and the external legal team having consulted and noted the earlier legal opinion by the QC took the view that any further appeal would be futile as it would only increase costs since there were no sufficient grounds in law for a successful Appeal. The Court had determined the case in favour of FMSC on two occasions. The judgement of the Court was correct in law, as the Republic could only have voided the contract if it had discharged the burden of proof on any acts of corruption or dishonesty, with cogent evidence.

We therefore advised the Treasury to settle the award and drew their attention to the escalation of costs and accrual of interests.

The second case was filed in the High Court of Justice in England in July 2006 by USS claiming US\$12,366.816 in respect of the contract for the supply of the PCK

Bandwidth for 980 VSAT communication systems in Post Offices throughout Kenya for 10 years. The claim was for balance of payments due under the contract plus interest. The Claimant applied for summary judgement on 22<sup>nd</sup> March 2007. The Republic filed a defence on 8<sup>th</sup> August 2008 denying liability on the basis of PWC's report claiming overpricing on the cost of the bandwidth and public policy bar due to allegation of corruption and bribery.

The case was referred to mediation pursuant to the English civil rules of procedure which requires all civil claims to be referred to mediation. The Republic proposed a reputable international mediator Mr. William Wood Q.C as the mediator of the dispute on advice of PWC, who was accepted by FMSC.

Mediation sessions were held in Nairobi on 19<sup>th</sup> and 20<sup>th</sup> February 2013 where we had the input and advice of the Treasury's technical consultants from PWC led by Mr. Jack Ward and MR. Andy Middleton, an expert on bandwidth, from the UK advising the Government on the fair value of the costs of bandwidth. Through the guidance and disclosure of the allegations of corruption in the contract to the Mediator in private sessions, it became clear that the defence could only succeed if there was cogent evidence to place before the English High Court other than the PWC report alone. The issue of over pricing in English law was a matter between the buyer and seller.

After protracted negotiations with the guidance of the Mediator, the claimant was willing to accept a settlement for USD\$7.6 million as opposed to its claim for USD\$28,106,40. During the mediation sessions in private with the mediator, the issues of allegations of corrupt practices in the procurement and public policy bar were discussed and the chances of successfully defending the claim. The proposed settlement was forwarded to the PS Treasury for approval.

Upon failure to agree on the proposed mediated amount, the claimant filed an application seeking to strike COK defence and counter-claim and a second application seeking summary judgement for the entire amount claimed. The matter came up for hearing on 20<sup>th</sup> December 2013 when the Court in England rejected the Republic's application for extension of time to approve the mediated agreement on the grounds that the case was an old matter and the Republic had delayed resolving the matter.

The Court entered judgement for \$7.6million the amount proposed in the mediation. The costs were reduced from £75,000 to £60,000. The amount due as at 10<sup>th</sup> January 2014 was \$8,007,496 which is incurring interest at the rate of \$1,665 per day and the deadline for payment was 17<sup>th</sup> January 2014.

#### Way Forward

These two litigations have affected the Sovereign Bond issue process. Upon disclosure of the two cases to the Lead Counsel and the Joint Lead Managers (JLMs) in the transaction the Republic has been advised that the judgements must be resolved before the transaction is launched and the JLMs have indicated that they would not initiate the Road Shows for the Bond if the litigations remains unresolved due to the risks of attachment against the proceeds of the Bond posed by the judgement creditors.

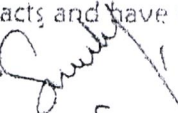
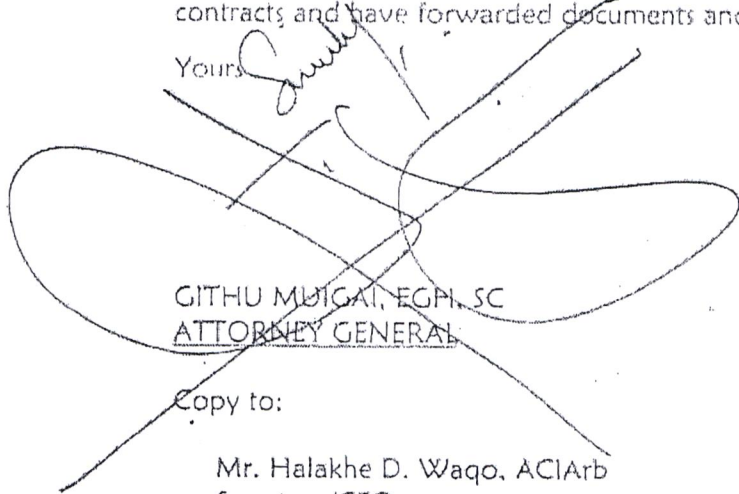
Our office sought advice from English Solicitors on the chances of appeal and stay of execution before the English Courts where the cases are pending. The advice from the English Solicitors, which is consistent with the advice of the firm of Arnold & Potter, who are the Lead Counsel in the sovereign bond transaction, is that it would be most unusual for litigation to be disclosed in Bond process and that the GOK must resolve the two matters with the judgement creditors for the Bond process to proceed.

Taking into account the legal risk posed by the cases, which will result in the judgement creditors proceeding with their enforcement proceedings for the full amount awarded in the judgements plus interest and in view of the advice that there are no further legal avenues available to the Republic to seek further remedies against the enforcement proceedings, our legal advice is that the Republic should accept the proposed settlement agreement, the negotiated amount is reasonable and favourable to the Republic and will save the Government from further losses.

Further note that the proposed settlement is in respect of civil law claims and not the criminal process relating to these two cases and which is still alive and EACC is handling that process. EACC has been informed of the proposed settlement.

These two cases are not part of the so called Anglo Leasing contracts which GOK has publicly stated were revoked and funds returned to the Treasury. We have received mutual legal assistance from a number of foreign Governments in respect of the other contracts and have forwarded documents and information to the EACC.

Yours

  
  
GITHU MUIGAI, EGH, SC  
ATTORNEY GENERAL

Copy to:

Mr. Halakhe D. Waqo, ACI Arb  
Secretary/CEO  
Ethics and Anti-Corruption Commission  
Integrity Centre  
NAIROBI

ANNEX 3:

3



REPUBLIC OF KENYA  
THE NATIONAL TREASURY

Telegraphic Address: 22921  
Finance – Nairobi  
FAX NO. 310833  
Telephone: 2252299  
When Replying Please Quote

THE NATIONAL TREASURY  
P O BOX 30007 - 00100  
NAIROBI

Ref: NT/DMD/SEC/GN "B"

29th April 2014

Mr. Justine Bundi  
The Clerk  
National assembly  
NAIROBI

Dear

*Clerk,*

**CLARIFICATION ON GOVERNMENT APPROVAL FOR THE  
SETTLEMENT OF THE TWO JUDGEMENT DEBTS, NAMELY, FIRST  
MERCANTILE SECURITIES CORPORATION AND UNIVERSAL  
SATSPACE**

1 Two judgements have been entered against the Government of Kenya in Geneva, Switzerland and in London, UK. The details of the cases are as follows:-

**a) Broadband Network Project (First Mercantile Securities Corporation)**

The project involved supply of VSAT equipment by Spacenet to connect all the post offices in ents for the supplied equipment.

**b) Bandwidth Network Project ( Universal Satspace)**



Universal SatSPACE signed an agreement with GoK for provision of bandwidth and network management for 10 years for all the Post Offices under project (a) above.

The payments for the two projects were suspended on 12<sup>th</sup> August 2004.

- 2 To resolve this issue, **the National Treasury sought and received audience with the Budget and Appropriations Committee on 18<sup>th</sup> February 2014 and the joint Budget and Appropriations and Finance, Planning and Trade Committees on 19<sup>th</sup> February 2014 and on 22<sup>nd</sup> April 2014.**
- 3 Both committees concurred that the judgement debts should be settled on condition that the National Treasury provides the Committees with:
  - a) Evidence of payment approval by the Executive; and
  - b) The Legal Opinion of the Attorney General on the way forward with regard to the judgements.
- 4 **The National Security Council (NSC) meeting held on 25<sup>th</sup> February 2014 directed** the Chief of Staff and Head of Public Service, the Cabinet Secretary for the National Treasury, the Attorney General, Cabinet Secretary for Foreign Affairs and Cabinet Secretary for Defence to explore whether there were any other avenues that could be used to settle the matter, **and to proceed on the basis of what they agree after briefing the President.**
- 5 The committee met on 28<sup>th</sup> Feb 2014 to discuss the strategy of resolving the issue. The two options discussed were
  - a. A stay of execution
  - b. Appeal on the judgments.

The meeting agreed that the Attorney General would engage lawyers from the UK to give guidance on whether this could be done.

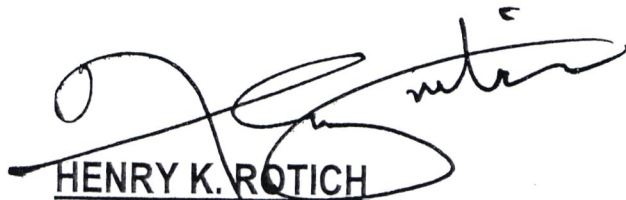


- 6 Pursuant to the above directive, the Attorney General hired Dentons of UK, an International Law firm to advise on whether there exists any other avenue to resolve the issue. **Dentons advised that there was no legal avenue left for GoK apart from settling the payments.**
- 7 Kenya's international Lead counsel on the sovereign bond issuance process also advised that there was no other legal avenue left for the GOKL apart from settling the judgement debts.
- 8 The Committee held a second meeting on 12<sup>th</sup> March 2014 and Attorney General reported that the lawyers had advised that there was no other legal avenue left apart from settlement. **The committee resolved that the judgement debts should be negotiated and a negotiated settlement made.**
- 9 Following this outcome, the Attorney General and the Cabinet Secretary/National Treasury engaged the counsel for the claimants in negotiations on 28<sup>th</sup> March and 1<sup>st</sup> April 2014 with the aim of reaching an agreement on the settlement of the debts.
- 10 The negotiations were also guided by the Public Accounts Committee (PAC) report titled "**Special Audit on Procurement of Passport Issuing Equipment**" tabled in Parliament on 30<sup>th</sup> March 2006 and adopted by Parliament on 4<sup>th</sup> April 2006. It recommended, inter alia, that projects which had commenced should be renegotiated with strict adherence to the procurement regulations and procedures.  
  
The two projects in these litigations fall under this recommendation since goods and services had been received.
- 11 The outcome of the negotiations is that the claimant agreed to forego 50% interest on the First Mercantile case, equivalent to \$2,349,264 (Ksh204 million). **This had the effect of reducing the total judgement debt from \$18,771,106 (Ksh. 1,633,086,222) to \$16,421,662. (Ksh. 1,428,684,594) which translates to a 13% discount.**



12 Both H.E the President and the Deputy President have been briefed as per the directive of the National Security Council.

13 The Attorney General has given his legal opinion indicating that GOK should settle the agreed amounts.



HENRY K. ROTICH

CABINET SECRETARY/NATIONAL TREASURY





4

REPUBLIC OF KENYA

**KENYA NATIONAL ASSEMBLY**

NINTH PARLIAMENT – FIFTH SESSION - 2006



**PUBLIC ACCOUNTS COMMITTEE**

REPORT ON

**SPECIAL AUDIT ON PROCUREMENT OF  
PASSPORT ISSUING EQUIPMENT**

**BY THE**

**DEPARTMENT OF IMMIGRATION,  
OFFICE OF THE VICE-PRESIDENT AND  
MINISTRY OF HOME AFFAIRS**

*Handwritten signature*

MARCH 2006

## GENERAL RECOMMENDATIONS

The Committee recommends that:-

- (i) The Director, Kenya Anticorruption Commission should liaise with the Attorney General, the Police Commissioner, and other relevant bodies with a view to prosecuting persons who were involved in negotiations and approval of the procurement of Passport Issuing Equipment project.
- (ii) The Attorney General should ensure that of the eighteen (18) projects, those which have not taken off are legally terminated to avoid accumulation of pending payments and penalties until investigations are complete, while those which have commenced should be renegotiated with strict adherence to the laid down procurement regulations and procedures. The Attorney General should give the legal position on the status of the 18 projects.
- (iii) In future, no financial agreement should be signed before the relevant Minister and the Accounting Officer of the procuring Ministry, the Attorney General and, Treasury are satisfied that due diligence has been done on the supplying/financing company. Equally no payment should be made before due diligence requirement is complied with.
- (iv) The use of promissory notes as a means of financing government expenditure should be restricted and vetted to avoid misuse. Government programmes, whether security related or otherwise should be included in the National Budget which is presented to Parliament. For security equipment and or services this will be done without necessarily disclosing the nature of goods/services planned to be procured.
- (v) The Accounting Officer, Office of the President in charge of Internal Security should ensure that security equipment is categorized in order to ascertain their degree of secrecy. Any equipment such as telecommunication materials and vehicles whose operations do not involve secrecy should be sourced through normal tendering.
- (vi) Since the Controller and Auditor General has audited the eighteen (18) security related projects, he should ensure that the audit reports are urgently tabled in Parliament as provided for in law.
- (vii) A Departmental Committee called a *Parliamentary Security Committee* should be formed to deal with National security related issues. It should