

Our Ref: KACC/CON.9 (61)

6th August 2007

Dear Chairman,

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2007

You will be aware that in the Year 2003, the Government introduced two main statutes to spearhead the war on corruption. These were *The Anti-Corruption and Economic Crimes Act 2003*, and *The Public Officer Ethics Act 2003*. *The Anti-Corruption and Economic Crimes Act 2003* establishes the Kenya Anti-Corruption Commission (KACC) and the Advisory Board as the primary instruments of Kenya's war on corruption.

Weaknesses in the anti-corruption laws

When the Director and Assistant-Directors of the KACC took office in September 2004, several weaknesses in the anti-corruption legislation were identified, some of which are the following;

- 1) The system of wealth declarations of public officers is not transparent or effective as they were kept secret and could only be accessed through court order.
- 2) There was no mechanism of investigating breaches of Codes of Conduct and Ethics by public officers.
- 3) Recovery of looted public property was not possible because of time limits imposed by *The Limitation of Actions Act (Cap.22)*. The time limit for actions based on breach of contract, breach of trust and unjust enrichment is six years, while the time limit for actions based on tort such as theft or fraud is three years. This means that much of the misappropriated public funds could not be recovered unless *The Limitation of Actions Act* was amended to remove these time limits.
- 4) *The Anti-Corruption and Economic Crimes Act 2003* did not criminalize the offences of Aiding, Abetting, Counselling, Conspiring, Inciting or Attempting corruption or economic crime, meaning accomplices were beyond the reach of the anti-corruption laws.

- 5) Cases of grand corruption filed in court were not progressing as they were all stalled by "Stay of proceedings".
- 6) There was no provision to protect the Commission from paralysis of its operations through attachment of vehicles, bank accounts and other Commission property if, in its endeavour to recover looted public property, it lost a court case.
- 7) There was no provision to ensure continuity of the Commission between the period when the terms of office of the Director, Assistant Director or a member of the Advisory Board expire and the appointment or reappointment of the Director, Assistant Director or Board member.
- 8) Sentences for corruption offences and economic crimes under *The Anti-Corruption and Economic Crimes Act 2003* were much stiffer than the sentences for corruption and economic crimes under other statutes. To address this disconnect, there was a need to harmonise the penalties and punishments as the offences are of the same nature.
- 9) There was uncertainty as to what offences of *The Penal Code* could be investigated by the Commission.
- 10) There was uncertainty as to the status of the Commission's premises with regard to summoning of witnesses, arrest and detention of suspects and signing of charge sheets.
- 11) Civil recovery of public property is essentially an action in the public interest, and costs ought not to be awarded for or against the Commission in respect of suits to recover public property alleged to have been embezzled. There is a distinction between actions brought against the Commission in its corporate capacity, as for example, if a Commission vehicle causes an accident or other damage, and actions brought by the Commission in the public interest to recover stolen or misappropriated assets and money. While costs and/or damages may be awarded in the former case, they should not be awarded in the latter case when the Commission is pursuing the public interest.

When the Commission identified those weaknesses, it made recommendations to Government for the introduction of necessary amendments to the law. The Government, through the Ministry of Justice and Constitutional Affairs and the Office of the Attorney General, accepted the Commission's proposals for statutory change to address these lacunae. Consequently, several working retreats for technical officers from the Commission, the Ministry of Justice and Constitutional Affairs and the Attorney General's Chambers were held to craft proposed amendments to the anti-corruption legislations.

The outcome of these consultations were several amendment proposals contained in *The Statute Law (Miscellaneous Amendments) Bill 2007* touching on *The Anti-Corruption and Economic Crimes Act 2003* and *The Public Officer Ethics Act 2003* which sought to introduce several changes including the following:

- 1) Removal of time limits for recovery of looted public property. This would open the way for recovery of funds looted in the past, including the Goldenberg affair;
- 2) To introduce offences of Aiding, Abetting, Counselling, Procuring, Attempting, Conspiring and Inciting the commission of corruption offences and economic crimes;
- 3) To clarify the offences in *The Penal Code* which can be investigated by the Commission;
- 4) To prevent the attachment of property of the Commission and the award of costs either for or against the Commission;
- 5) To make wealth declarations of public officers accessible to members of public; and
- 6) To enable KACC investigate unethical behaviours under *The Public Officer Ethics Act 2003*.

Reaction by the Parliamentary Committee on Administration of Justice and Legal Affairs

After publication and the First Reading of *The Statute Law (Miscellaneous Amendments) Bill 2007*, the Bill was committed to the Committee on Administration of Justice and Legal Affairs. The Committee studied the Bill and made a Report to the National Assembly in July 2007.

In its Report, the Committee rejected most of the proposed amendments to strengthen the anti-corruption legislation as proposed by the Commission, the Attorney General and the Ministry of Justice and Constitutional Affairs. Specifically, the Committee rejected proposals to;

- 1) Remove time limits imposed by *The Limitation of Actions Act* for recovery of public property looted before 2nd May 2003 when *The Anti-Corruption and Economic Crimes Act 2003* was enacted into law. The effect of this is that all major economic crimes in the past, including the Goldenberg affair, will become beyond the reach of the law, amounting to an effective immunity;
- 2) Make wealth declarations of public officers accessible by the public;
- 3) Clarify the offences which can be investigated by the Commission, and to clarify the police powers of the Commission. This means that the cases investigated by the Commission will continue to be dogged by delays in court caused by the lack of clarity in the law;
- 4) Empower KACC to investigate unethical conduct of public officers under *The Public Officer Ethics Act 2003*;
- 5) Remove the award of costs in cases instituted in the public interest for recovery of looted public property;
- 6) Introduce the offences of Aiding, Abetting, Procuring and Counselling the commission of offences of corruption and economic crimes. This amounts to an immunity to persons who assist others in corruption;
- 7) Harmonise the punishment of corruption offences in *The Anti-Corruption and Economic Crimes Act 2003* and *The Penal Code*.

Amendments to weaken the anti-corruption fight

Besides rejecting the proposals to strengthen anti-corruption legislation, the Parliamentary Committee proposed other amendments whose effect is to further weaken the anti-corruption legislation and the war on corruption. In particular:-

- 1) The Committee has proposed an amendment to the effect that the Commission should not investigate any case of corruption or economic crime which took place before 2nd May 2003. The effect of this amendment is to give a blanket immunity to all corruption and economic crimes that was perpetrated before 2nd May 2003. It also has the effect of stopping ongoing investigations by the Commission in cases such as the Anglo leasing security contracts, most of which were executed before the current administration took over on 30th December 2002.
- 2) The Committee has also proposed an amendment to further weaken, through removal, the investigative powers of the Commission contained in Sections 26, 27 and 28 of *The Anti-Corruption and Economic Crimes Act 2003*. These are the sections which enable the Commission to obtain evidence in complex corruption offences and economic crimes. The reasoning of the Parliamentary Committee is that the sections are unconstitutional. However, and to the knowledge of the Parliamentary Committee, the Constitutional and Judicial Review Division of the High Court of Kenya in the case of *Dr. Christopher Ndarathi Murungaru vs The Kenya Anti-Corruption Commission & The Attorney General, High Court of Kenya Miscellaneous Application No. 54 of 2006, OS*, has **already** found and declared that Sections 26, 27 and 28 of *The Anti-Corruption and Economic Crimes Act 2003* are **not** unconstitutional. The Parliamentary Committee is therefore seeking to further weaken the Commission and its powers of investigation on a non-existent ground that has already been adjudicated on by the High Court of Kenya. The effect of the Committee's proposal will be to prevent the Commission from obtaining evidence in complex corruption and economic crimes, especially those with an international dimension.

The overall effect of the Committee's proposals

The Committee's proposed amendments will severely weaken the legislative platform upon which the war on corruption in Kenya is hinged, as well as further compromise the capacity of the Kenya Anti-Corruption Commission to fight corruption effectively.

This will have grave ramifications to implementation of the Ndung'u Report on Illegal and Irregular Allocation of Public Land, implementation of the National Anti-Corruption Plan at its current crucial mid-stream point, and will also compromise Kenya's international obligations under the United Nations Convention Against Corruption (UNCAC), to which Kenya was the first signatory in the entire world in Mexico in Year 2003. The signal sent out to Kenyans and to the international community will be extremely damaging.

Moreover, the blanket immunity for offences of corruption and economic crime committed before 2nd May 2003 that is proposed by the Parliamentary Committee is a major policy and public interest issue that is best dealt with at Cabinet-level.

For the Commission, all investigations of corruption offences that occurred prior to 2nd May, 2003 will have to cease forthwith

The Advisory Board and the Commission of the Kenya Anti-Corruption Commission are appalled by this turn of events that will certainly reverse all the gains made in the war on corruption since the Government took the reins of power on 30th December 2002. Worse, the Parliamentary Committee's proposals will roll back even the small gains that existed before enactment of *The Public Officer Ethics Act 2003* and *The Anti-Corruption and Economic Crimes Act 2003*.

From the explanations given above, it is evident that whatever the Parliamentary Committee's agenda is, it is not in the public interest; nor is it in the interest of business and investment, both of which thrive only in a climate where corruption, when it rears its head, is effectively suppressed and penalised.

This is therefore to request your organisation to take any necessary steps and measures, involving your membership if possible, to lobby against the amendments proposed by the Parliamentary Committee on the Administration of Justice and Legal Affairs as described herein. We ourselves are seeking an appointment with the Committee, at which we intend to demonstrate to the members how extremely damaging were their proposals, in the fight against corruption in this country.

The Director and I would be pleased to meet with you to explain further the issues stated above, should you deem it necessary.

Yours Truly

Allan N. Ngugi, OGW

CHAIRMAN

KENYA ANTI-CORRUPTION COMMISSION ADVISORY BOARD

Copy to: The Director & Secretary to the Advisory Board
Kenya Anti-Corruption Advisory Board
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Chief Executives of listed organisations