



*Rt. Hon. Speaker
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09/09/2020*

TWELFTH PARLIAMENT - FOURTH SESSION

REPORT

OF

THE SENATE STANDING COMMITTEE ON ROADS &
TRANSPORTATION

ON

THE CONSIDERATION OF A STATEMENT REGARDING
OPERATIONALIZATION OF THE NATIONAL CONSTRUCTION
AUTHORITY (DEFECTS LIABILITY) REGULATIONS, 2020.

PARLIAMENT
OF KENYA
LIBRARY

CLERK'S CHAMBERS

THE SENATE
P.O. BOX 41842-00100
NAIROBI

SEPTEMBER, 2020

THE SENATE

TWELFTH PARLIAMENT – FOURTH SESSION

ADOPTION OF THE REPORT OF THE SENATE STANDING COMMITTEE
ON ROADS & TRANSPORTATION ON THE CONSIDERATION OF A
STATEMENT REGARDING OPERATIONALIZATION OF THE NATIONAL
CONSTRUCTION AUTHORITY (DEFECTS LIABILITY) REGULATIONS,
2020.

Adopted by:

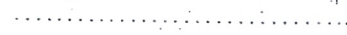
1. Sen. Wamatangi Kimani, M.P.



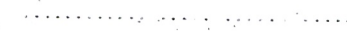
2. Sen. (Arch.) Sylvia Kasanga, M.P.



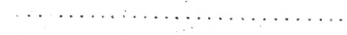
3. Sen. (Eng.) Hargura Godana, M.P.



4. Sen. (Eng.) Mohamed M. Mahamud, CBS, M.P.



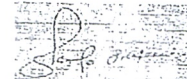
5. Sen. Moses Kajwang, M.P.



6. Sen. Mibika Linturi, M.P.



7. Sen. Okong'o Mogeni, SC, M.P.



8. Sen. Enoch Wambua, M.P.



9. Sen. Christine Zawadi, MP.



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Mr. Speaker Sir,

Committees are a creation of the Constitution through Article 124(1) of the Constitution which empowers each House of Parliament to establish Committees and make Standing Orders (SO) for the orderly conduct of its proceedings, including the proceedings of its Committees.

The Senate Standing Committee on Roads and Transportation is established under standing order 218(3) of the Senate Standing Orders and is mandated to consider all matters relating to transport, roads, public works, construction and maintenance of roads, rails and buildings, air and seaports.

Mr. Speaker Sir,

The membership of the Committee comprises of the following Senators-

1. Sen. Wamatangi Kimani, M.P.	Chairperson
2. Sen. (Arch.) Sylvia Kasanga, M.P.	Vice Chairperson
3. Sen. (Eng.) Hargura Godana, M.P.	Member
4. Sen. (Eng.) Mohamed M. Mahamud, CBS, M.P.	Member
5. Sen. Moses Kajwang', M.P.	Member
6. Sen. Mithika Lituuri, M.P.	Member
7. Sen. Okong'o Mogani, SC, M.P.	Member
8. Sen. Enoca Wambua, M.P.	Member
9. Sen. Christine Zawadi, MP.	Member

The Committee Secretariat comprises of the following officers-

1. Mr. Charles Ngatia	-Clerk Assistant II
2. Mr. Malcom Ngugi	-Clerk Assistant
3. Ms. Sharon Rotino	-Research Officer
4. Ms. Lucianne Limo	-Media Relations Officer II
5. Ms. Farhiya Ali	-Principal Serjeant-At-Arms II
6. Mr. Mr. Fredrick Ouma	-Serjeant-At-Arms
7. Ms. Joyce Chelagat	-Audio Recording Officer

Mr. Speaker Sir,

Following the adoption of new provisions on Statements by the Senate on 9th August, 2018, Committees are not compelled to report back in the Senate unless otherwise expressly stated. However, the observations and findings contained in this report, have necessitated the Committee to present this report for adoption and implementation.

ACKNOWLEDGEMENTS

The Committee wishes to acknowledge the support it received from the Office of the Speaker and the Clerk of the Senate during the consideration of the Statement and in the preparation of this Report.

My appreciation goes to the distinguished and dedicated members of the Committee who actively participated in the proceedings of the committee during consideration of the Statement.


The Compliments of the Committee go to all the stakeholders in the building and construction sector who participated in the hearings of the Committee.

Mr. Speaker Sir,

I wish to confirm that the resolutions of the Committee in this report were unanimous.

Mr. Speaker,

It is therefore my pleasant duty and privilege, on behalf of the Senate Standing Committee on Roads and Transportation to table this report and recommend it to the House for debate and adoption pursuant to the provisions of the Senate Standing Order 213(G).


SIGNED:

DATE: 7TH SEPTEMBER 2020

SEN. PAUL KIMANI WAMATANGI, M.P.
CHAIRPERSON,
ROADS & TRANSPORTATION COMMITTEE

On Tuesday, 9th June, 2020, Sen. Sylvia Kasanga, MP, requested for a Statement from the Standing Committee on Roads & Transportation regarding operationalization of the National Construction Authority (Defects Liability) Regulations, 2020.

In the Statement, the Committee was requested to-

1. Explain why public participation and adequate stakeholder engagement was not conducted during development and prior to gazettment of the Regulations;
2. Provide adequate information on the ambiguous and contradictory interpretations that potentially invalidate most construction contracts in Kenya;
3. Elaborate on the measures put in place to ensure the construction environments as well as ongoing projects at national and county levels will not stall unnecessarily due to these Regulations; and
4. Provide detailed plans and projects of what the Ministry intends to address by these Regulations.

The Committee held several sittings to consider the Statement and has made several observations and recommendations regarding the legality and process of developing and publishing of the National Construction Authority (Defects Liability) Regulations, 2020.

CONSIDERATION OF THE STATEMENT

The Committee held a meeting on Thursday, 11th June, 2020 to review the information requested in the Statement and established that-

1. The National Construction Authority (Defects Liability) Regulations, 2020 were published in the Kenya Gazette on 20th April, 2020; and
2. The Regulations were made pursuant to section 42 of the National Construction Authority Act, 2011.

On 29th June, 2020, the Committee held a meeting with the Cabinet Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works and several stakeholders representing the following organizations-

1. Joint Building and Construction Council (JBCC)
2. Architectural Association of Kenya (AAK)
3. Kenya Private Sector Alliance (KEPSA)
4. Institute of Engineers of Kenya (IEK)
5. Institution of Construction and Project Managers of Kenya (ICPMK)

During the meeting, the Committee was informed that-

1. The National Construction Authority (Defects Liability) Regulations, 2020 were in operation; and
2. Public participation on the Regulations had not been undertaken.

The Committee consequently sought for evidence from the Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works that public participation was undertaken prior to drafting of the Regulations.

OBSERVATIONS OF THE COMMITTEE

The Committee scrutinized the evidence and information provided on the National Construction Authority (Defects Liability) Regulations, 2020 and made the following observations and findings-

1. National Construction Authority (Defects Liability) Regulations, 2020 were published in the Kenya Gazette on 20th April, 2020 pursuant to section 42 of the National Construction Authority Act, 2011;
2. The National Construction Authority (Defects Liability) Regulations, 2020 were in operation despite provisions of Section 42(3) of the National Construction Authority Act, 2011 which requires the Regulations to be approved by Parliament before taking effect;
3. The Regulations were not transmitted to Parliament for consideration contrary to Section 11 (1) of the Statutory Instruments Act No. 23 of 2013, which obligates every Cabinet Secretary responsible for a regulation-making authority to transmit a copy of a statutory instrument to the responsible clerk within seven sitting days after publication;
4. The seven sitting days lapsed on 26th May, 2020 for the Senate and 11th June, 2020 for the National Assembly;
5. The Statutory Instruments Act, 2013 requires that each statutory instrument be considered on its own and not be combined with another in order to avoid confusion to stakeholders and so that adequate input is given to each instrument;
6. The process of drafting and implementation of the National Construction Authority (Defects Liability) Regulations, 2020 was rushed and not subjected to meaningful public participation contrary to Article 10 of the Constitution, Section 42(3) of the

RECOMMENDATIONS OF THE COMMITTEE

The Committee recommends as follows-

1. The Cabinet Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works withdraws the operationalization of the National Construction Authority (Defects Liability) Regulations, 2020 for failing to meet the legal threshold of Sections 5, 6 and 11 (1) of the Statutory Instruments Act No. 23 of 2013; and
2. The National Construction Authority initiates a fresh process of public participation and ensure that the process will be all inclusive, adequate and specific to the National Construction Authority (Defects Liability) Regulations.

MINUTES OF THE COMMITTEE ON ROADS AND TRANSPORTATION HELD VIRTUALLY ON ZOOM ONLINE PLATFORM ON THURSDAY 11TH JUNE 2020 FROM 8:30 A.M.

PRESENT

1. Sen. Paul Kimani Wamatangi, M.P.
2. Sen. (Dr.) Lelegwe Ltumbesi, M.P.
3. Sen. Enock Wambua, M.P.
4. Sen. Sylvia Kasanga, M.P.
5. Sen. Christine Zawadi Gona, M.P.

-Chairperson

ABSENT WITH APOLOGY

1. Sen. (Eng.) Hargura Godana, M.P.
2. Sen. (Prof.) Ekal Imana, M.P.
3. Sen. Philip Mpaayei, M.P.
4. Sen. Cleophas Malalah, M.P.

-Vice Chairperson

SENATE SECRETARIAT

1. Mr. Charles Ngatia
2. Ms. Sharon Rotino
3. Mr. Malcom Ngugi
4. Ms. Joyce Chelagat

-Clerk Assistant

-Research Officer

-Legal Counsel

-Audio Recording Officer

MIN/SCRT/031/2020: PRELIMINARIES

The meeting was called to order at 8:48 a.m. and there followed a word of prayer by Sen. Sylvia Kasanga, M.P.

MIN/SCRT/082/2020: ADOPTION OF AGENDA

The agenda of the meeting was adopted with amendments after it was proposed and seconded by Sen. Enock Wambua, M.P. and Sen. Christine Zawadi Gona, M.P. respectively as follows-

1. Prayers;
2. Adoption of Agenda;
3. Statement on Operationalization of the National Construction Authority (Defects and Liability) Regulations, 2020 requested by Sen. Sylvia Kasanga, M.P.;
4. Technical Assistance for the Committee (experts required);
5. Any Other Business;
6. Adjournment.

The Chairperson invited Sen. Sylvia Kasanga, M.P. to brief the Committee on the issues in the Statement.

The Committee was informed that-

1. The Regulations were published in the Kenya Gazette on 20th April, 2020 but were yet to be transmitted to the Senate pursuant to Section 11 (1) of the Statutory Instruments Act No. 23 of 2013, which obligates every Cabinet Secretary responsible for a regulation-making authority to transmit a copy of a statutory instrument to the responsible clerk within seven sitting days after publication;
2. Some of the definitions in the Regulations such as *commercial building* and *defects liability* should have borrowed from the National Construction Authority Act No. 23 of 2013;
3. The Regulations had the implication of being in conflict with the National Construction Authority Act No. 23 of 2013;
4. The Regulations were in conflict with the existing building contracts; and
5. The key stakeholders in the construction industry were not consulted in the development of the Regulations

**MIN/SCRT/084/2020: TECHNICAL ASSISTANCE FOR THE COMMITTEE
(EXPERTS REQUIRED)**

The chairperson informed the Members that there was need to have experts engaged to assist the Committee to analyze technical issues that are within the mandate of the Committee.

Members deliberated on the proposed and resolved that the Committee identify the experts required.

MIN/SCRT/085/2020: ADJOURNMENT

There being no other business, the meeting was adjourned at 9:33 a.m.

Signed: 

Date 7TH SEPTEMBER 2020

Sen. Paul Kimani Wamatangi, M.P.

Chairperson,
Roads & Transportation Committee

MINUTES OF THE NINETY SIXTH SITTING OF THE STANDING COMMITTEE ON ROADS AND TRANSPORTATION HELD VIRTUALLY ON ZOOM ONLINE PLATFORM ON MONDAY 29TH JUNE 2020 FROM 8:30 A.M.

PRESENT

1. Sen. Paul Kimani Wamatangi, M.P. -Chairperson
2. Sen. (Arch) Sylvia Kasanga, M.P. -Vice Chairperson
3. Sen. (Eng.) Mohamed M. Mahamud, CBS, M.P.
4. Sen. (Eng.) Hargura Godana, M.P.
5. Sen. Mithika Linturi, M.P.
6. Sen. Okong'o Mogeni, SC, M.P.

ABSENT WITH APOLOGY

1. Sen. Enock Wambua, M.P.
2. Sen. Moses Kajwang', M.P.
3. Sen. Christine Zawadi Gona, M.P.

SENATE SECRETARIAT

1. Mr. Charles Ngatia -Clerk Assistant
2. Mr. Malcom Ngugi -Legal Counsel
3. Ms. Lucianne Limo -Media Relations Officer
4. Ms. Joyce Chelagat -Audio Recording Officer

MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS

1. Mr. James Macharia, EGH -Cabinet Secretary
2. Eng. Maurice Akech -Executive Director, National Construction Authority (NCA)
3. Mr. Joe Mutugu -Special Advisor to the Cabinet Secretary
4. Mr. Samson Lukoba -Head of Legal Services, NCA

STAKEHOLDERS

1. Ms. Mugure Njendu (AAK) -President, Architectural Association of Kenya
2. Mr. Wilson Mugambi -Vice President, AAK
3. Mr. Jacob Mwangi -CEO, AAK
4. Mr. Alex Nyaga -Registrar, AAK

- | | |
|-----------------------------|--|
| 7. Mr. Gikonyo Gitonga | -Chairperson, JBCC |
| 8. Eng. Nathaniel Matalanga | -KEPSA |
| 9. Eng. Kiteme Shammah | -Institute of Engineers of Kenya (IEK) |
| 10. Mr. Tom Oketch | -IEK |
| 11. Mr. Nashon Okowa | -Institution of Construction and Project Managers of Kenya (ICPMK) |
| 12. Mr. Palkesh Shah | -ICPMK |
| 13. Mr. James Munene | -Kenya Property Developers Association |
| 14. Mr. Peter S. Kariuki | -Vive Chairperson, Institute of Quantity Surveyors of Kenya (IQSK) |
| 15. Mr. Rasungu Nyambok | -IQSK |
| 16. Mr. Nyaga Kithinji | -IQSK |
| 17. Mr. Mwai Mathenge | -Advocate, AAK |
| | -Advocate |

MIN/SCRT/099/2020: PRELIMINARIES

The meeting was called to order at 8:42 a.m. and there followed a word of prayer by Sen. Sylvia Kasanga, M.P.

MIN/SCRT100/2020: ADOPTION OF AGENDA

The agenda of the meeting was adopted after it was proposed and seconded by Sen. (Eng.) Mohamed M. Mahamud, CBS, M.P. and Sen. Okong'o Mogeni, SC, M.P. respectively as follows-

1. Prayers;
2. Adoption of Agenda,
3. Chairperson's introductory remarks
4. Meeting with Cabinet Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works and the Executive Director, National Construction Authority to respond to a Statement on operationalization of National Construction Authority (Defects & Liability) Regulations, 2020 requested by Sen. Sylvia Kasanga, M. P.,
5. Any Other Business;
6. Adjournment.

MIN/SCRT/101/2020: CHAIRPERSON'S INTRODUCTORY REMARKS

The Chairperson welcomed the new Members to the Committee following a reconstitution of the Committee through a Motion adopted by the Senate on Wednesday, 24th June, 2020.

- Authority (Defects & Liability) Regulations, 2020;
2. Why the Regulations were not transmitted to the Senate;
 3. How the contents of the Regulations would be considered by key stakeholders.

MIN/SCRT/102/2020: MEETING WITH CABINET SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS AND THE EXECUTIVE DIRECTOR, NATIONAL CONSTRUCTION AUTHORITY TO RESPOND TO A STATEMENT ON OPERATIONALIZATION OF NATIONAL CONSTRUCTION AUTHORITY (DEFECTS & LIABILITY) REGULATIONS, 2020 REQUESTED BY SEN. SYLVIA KASANGA, M. P.

The Chairperson invited the Cabinet Secretary, Mr. James Macharia, EGH, to table a response to the Statement by Sen. Sylvia Kasanga, MP, requested for a Statement from the Standing Committee on Roads & Transportation regarding operationalization of the National Construction Authority (Defects Liability) Regulations, 2020.

The Cabinet Secretary tabled the response and informed the Committee as follows-

1. Public participation on the Regulations was undertaken during a retreat on the presentation of Draft Building Code to professional bodies on 13th December, 2019 where the among others, the following professional bodies were represented:
 - a) Architectural Association of Kenya;
 - b) Institution of Construction and Project Managers of Kenya;
 - c) Institute of Engineers of Kenya; and
 - d) Institute of Quantity Surveyors of Kenya.
2. A validation meeting of the Regulations was held on 20th December, 2019;
3. A stakeholders meeting of County Executive Committee Members (CECMs) for Housing and Public Works Departments from the 47 County Governments was held in Naivasha to validate the Regulations; and
4. The Regulations were in force.

Representatives from the Architectural Association of Kenya, Institution of Construction and Project Managers of Kenya, Institute of Quantity Surveyors of Kenya and the Institute of Engineers of Kenya informed the Committee that they were present during the retreat on the presentation of Draft Building Code to professional bodies on 13th December, 2019 at Boma Hotel, in Nairobi but the retreat discussed Draft Building Code and not the National Construction Authority (Defects Liability) Regulations, 2020.

The Stakeholders informed the Committee that the Regulations were not clear on what problem they intended to solve.

Committee observations

The Committee observed that-

1. The response by the Cabinet Secretary on stakeholder engagement prior to the drafting of the Regulations was not correct since the meeting referred to discussed the Draft Building Code and not the Regulations;
2. The process of drafting the Regulations was in contravention of Section 42(3) of the National Construction Authority Act, 2011 and Sections 5, 6 and 11 (1) of the Statutory Instruments Act No. 23 of 2013


Committee resolution

The Committee resolved that-

1. The Cabinet secretary should submit evidence that adequate public participation and stakeholder engagement was undertaken prior to publishing of the National Construction Authority (Defects Liability) Regulations, 2020; and
2. The Stakeholders to submit a written response on the process and content of the Regulations.

MIN/SCRT/103/2020: ADJOURNMENT

There being no other business, the meeting was adjourned at 11:41 a.m.

Signed: 

Date 7TH SEPTEMBER 2020

Sen. Paul Kimani Wamatangi, M.P.

Chairperson,

Roads & Transportation Committee

MINUTES OF THE ONE HUNDRETH AND THIRD SITTING OF THE
STANDING COMMITTEE ON ROADS AND TRANSPORTATION HELD
VIRTUALLY ON ZOOM ONLINE PLATFORM ON TUESDAY 28TH
JULY 2020 FROM 8:30 A.M.

PRESENT

1. Sen. (Arch) Sylvia Kasanga, M.P.
2. Sen. Moses Kajwang', M.P.
3. Sen. Mithika Linturi, M.P.
4. Sen. Okong'o Mogeni, SC, M.P.

-Vice Chairperson.

ABSENT WITH APOLOGY

1. Sen. Paul Kimani Wamatangi, M.P.
2. Sen. (Eng.) Hargura Godana, M.P.
3. Sen. (Eng.) Mohamed M. Mahamud, CBS, M.P.
4. Sen. Christine Zawadi Gona, M.P.
5. Sen. Enock Wambua, M.P.

-Chairperson

SENATE SECRETARIAT

1. Mr. Charles Ngatia
2. Ms. Farhiya Ali
3. Ms. Lucienne Limb
4. Ms. Joyce Chelagat

-Clerk Assistant
-Principal Serjeant-At-Arms
-Media Relations Officer
-Audio Recording Officer

MIN/SCRT/135/2020: PRELIMINARIES

The meeting was called to order at 8:52 a.m. and there followed a word of prayer by Sen. Mithika Linturi, M.P.

MIN/SCRT/136/2020: ADOPTION OF AGENDA

The agenda of the meeting was adopted after it was proposed and seconded by Sen. Mithika Linturi, M.P. and Sen. Okong'o Mogeni, SC, M.P. respectively as follows-

1. Prayers;
2. Adoption of Agenda;
3. Consideration of additional response from the National Construction Authority in regard to stakeholder engagement on the National Construction Authority (Defects Liability) Regulations, 2020;

namely-

- a) Statement regarding ongoing reconstruction of the Makupa Causeway – Digo road, that leads to Jomvu area by Sen. Mohamed Faki, M.P.; and
 - b) Statement regarding Persons with Disabilities (PWDs) who have benefitted from the Kazi Mtaani Program by the National Government by Sen. Isaac Mwaura, M.P.
5. Any Other Business;
6. Adjournment.

MIN/SCRT/137/2020: CONSIDERATION OF BRIEF ON ADDITIONAL INFORMATION FROM THE NATIONAL CONSTRUCTION AUTHORITY IN RESPONSE TO A STATEMENT REGARDING OPERATIONALIZATION OF THE NATIONAL CONSTRUCTION AUTHORITY (DEFECTS LIABILITY) REGULATIONS, 2020.

The Committee was informed that following a meeting of the Committee with Cabinet Secretary, Ministry of Transport, Infrastructure, Housing and Urban Development & Public Works held on 29th June, 2020, the Committee requested for additional information from the Ministry to verify that public participation was done prior to the drafting of the National Construction Authority (Defects Liability) Regulations, 2020.

The Committee was further informed that the National Construction Authority submitted a voluminous response which the Secretariat analysed as follows-

1. Scrutiny of the voluminous response packaged in seven (7) bundles indicated that the National Construction Authority (Defects Liability) Regulations, 2020 was only mentioned within the broader context of the Draft Building Code and was not discussed contrary to the claims of the National Construction Authority;
2. In Bundle 2 (Annexure 4), the Report on the Draft Building Code review writing workshop held on 5th & 6th December, 2019 at the Boma Hotel, Nairobi indicated that –
 - a) A presentation was made on emerging issues and the draft Defect Liability Regulations;
 - b) The workshop resolved to incorporate the proposed Defects Liability Regulations as part of the Draft Building Code; and
 - c) Further stakeholder consultations on the Draft Building Code was scheduled for 13th December, 2019.
3. In Bundle 4 (Annexure 4), the Report of the presentation of the Draft Building Regulations to construction industry professionals held on 13th December, 2019 at Boma Hotel, Nairobi indicated that-
 - a) A presentation was made on the emerging issues on the draft Defect Liability Regulations; and

4. In Bundle 5 (Annexure 5), the Stakeholders Validation Report for the Draft Building Code of the Republic of Kenya held on 20th December, 2019 at Boma Hotel, Nairobi indicated that-
 - a) The Draft Building Code was unanimously adopted;
 - b) The Defects Liability Regulation were not discussed as per the resolution of the workshop held on 13th December, 2019.

The Committee made the following observations-

1. Article 10(1) of the Constitution states that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them enacts, applies or interprets any law; makes or implements public policy decisions. Article 10(2) lists participation of the people as a national value and a principal of governance;
2. The Statutory Instruments Act, 2013 requires that each statutory instrument should be considered on its own and not be combined with another in order to avoid confusion to stakeholders and so that adequate input is given to each instrument;
3. The processing of the National Construction Authority (Defects Liability) Regulations, 2020 was rushed and not subjected to meaningful public participation contrary to the law;
4. The process of drafting and implementation of the Regulations was in contravention of Article 10 of the Constitution, section 42(3) of the National Construction Authority Act, 2011 and sections 5, 6 and 11 (1) of the Statutory Instruments Act No. 23 of 2013; and
5. The Cabinet Secretary and the Executive Director, National Construction Authority should be reprimanded for giving incorrect information to the Committee.


MIN/SCRT/137/2020: REVIEW OF STATEMENTS REFERRED TO THE COMMITTEE ON TUESDAY 21ST JULY, 2020.

The Committee was informed that the following two Statements had been referred to the Committee on the Tuesday, 28th July, 2020-

1. Statement regarding ongoing reconstruction of the Makupa Causeway -- Digo road, that leads to Jomvu area by Sen. Mohamed Faki, M.P.; and
2. Statement regarding Persons with Disabilities (PWDs) who have benefitted from the Kazi Mtaani Program by the National Government by Sen. Isaac Mwaura, M.P.

MIN/SCRT/138/2020: ADJOURNMENT

There being no other business, the meeting was adjourned at 9:36 a.m.

Signed: 

Date 7TH SEPTEMBER 2020

Sen. Paul Kimani Wamatangi, M.P.
Chairperson,
Roads & Transportation Committee

MINUTES OF THE ONE HUNDRETH AND SIXTH SITTING OF THE
STANDING COMMITTEE ON ROADS AND TRANSPORTATION HELD
VIRTUALLY ON ZOOM ONLINE PLATFORM ON TUESDAY 4TH
AUGUST 2020, FROM 8:30 A.M.

PRESENT

- | | |
|-------------------------------------|-------------------|
| 1. Sen. Paul Kimani Wamatangi, M.P. | -Chairperson |
| 2. Sen. (Arch) Sylvia Kasanga, M.P. | -Vice Chairperson |
| 3. Sen. Mithika Linturi, M.P. | |
| 4. Sen. Enock Wambua, M.P. | |
| 5. Sen. Christine Zawadi Gona, M.P. | |
| 6. Sen. Okong'o Mogeni, SC, M.P. | |

ABSENT WITH APOLOGY

1. Sen. (Eng.) Hargura Godana, M.P.
2. Sen. Moses Kajwang', M.P.
3. Sen. (Eng.) Mohamed M. Mahamud, CBS, M.P.

SENATE SECRETARIAT

- | | |
|-----------------------|--------------------------|
| 1. Mr. Charles Ngatia | -Clerk Assistant |
| 2. Ms. Sharon Kotino | -Research Officer |
| 3. Mr. Malcom Ngugi | -Legal Counsel |
| 4. Ms. Lucianne Limo | -Media Relations Officer |
| 5. Ms. Joyce Chelagat | -Audio Recording Officer |

MIN/SCRT/148/2020: PRELIMINARIES

The meeting was called to order at 8:59 a.m. and there followed a word of prayer by Sen. Mithika Linturi, M.P.

MIN/SCRT/149/2020: ADOPTION OF AGENDA

The agenda of the meeting was adopted after it was proposed and seconded by Sen. Enock Wambua, M.P. and Sen. (Arch) Sylvia Kasanga, M.P. respectively as follows-

1. Prayers;
2. Adoption of Agenda;

- operationalization of National Construction Authority (Defects Liability) Regulations, 2020;
4. Any Other Business;
 5. Adjournment.

MIN/SCRT/150/2020: CONSIDERATION AND ADOPTION OF COMMITTEE REPORT ON STATEMENT REGARDING THE OPERATIONALIZATION OF NATIONAL CONSTRUCTION AUTHORITY (DEFECTS LIABILITY) REGULATIONS, 2020

The Committee considered a draft report on *the consideration of a Statement regarding the operationalization of National Construction Authority (Defects Liability) Regulations, 2020 that was requested in the Senate on 9th June, 2020.*

The Committee made the following amendments-

- a) Recommendation No. 2 – Should be refined and the censure action should more specific;
- b) Recommendation No. 3- Should be specific and a reporting timeline be included.

The Committee adopted the report with the above amendments after it was proposed and seconded by Sen. Okong'o Mogeni, SC, M.P. and Sen. Enock Wambua, M.P.

MIN/SCRT/151/2020: ADJOURNMENT

There being no other business, the meeting was adjourned at 9:28 a.m. until Wednesday, 5th August, 2020.

Signed: 

Date 7TH SEPTEMBER 2020

Sen. Paul Kimani Wamatangi, M.P.
Chairperson,
Roads & Transportation Committee

THE NATIONAL CONSTRUCTION AUTHORITY ACT

(No. 41 of 2011)

THE NATIONAL CONSTRUCTION AUTHORITY (DEFECTS
LIABILITY) REGULATIONS, 2020

Arrangement of Regulations

PART I—PRELIMINARY

1. Citation.
2. Interpretation.
3. Patents Defect Liability period.
4. Obligations of parties during the patent defects liability period.
5. Latent defects liability period.
6. Insurance cover for latent defects.
7. Insurance by owner.

THE NATIONAL CONSTRUCTION AUTHORITY ACT

(No. 41 of 2011)

IN EXERCISE of the powers conferred under section 42 of the National Construction Authority Act, 2011, the Cabinet Secretary for Transport, Infrastructure, Housing, Urban Development and Public Works, makes the following Regulations—

THE NATIONAL CONSTRUCTION AUTHORITY (DEFECTS

LIABILITY) REGULATIONS, 2020

PART I—PRELIMINARY

PART II—DEFECTS LIABILITY

3. (1) Every contract for the construction of a commercial building shall prescribe a patent defects liability period. Patent defects liability period.
- (2) The patent defects liability period under sub regulation (1) shall be a minimum period of twelve months after practical completion.
- (3) A contractor shall be liable for the rectification of patent defects that become apparent during the patent defects liability period.
- (4) A relevant professional shall be liable for the rectification of patent defects that become apparent during the patent defects liability period.
- (5) A sub-contractor shall be liable for the rectification of patent defects that become apparent during the patent defects liability period.
4. (1) During the patent defects liability period, the owner and the contractor, relevant professional or sub-contractor, shall jointly prepare a schedule specifying the patent defects identified.
- (2) The contractor, relevant professional or sub-contractor, shall rectify the respective defects specified in the schedule made under sub regulation (1) after which the owner shall certify that the contractor, relevant professional or sub-contractor, has made good the defects identified. Obligations of parties during the patent defects liability period.
5. (1) Every contract for the construction of a commercial building shall prescribe a latent defects liability period. Latent defects liability period.
- (2) The latent defects liability period under sub regulation (1) shall be a minimum period of six years from completion of the patent defects liability period.
- (3) A contractor shall be liable for the rectification of patent defects that become apparent during the latent defects liability period. Insurance cover for latent defects.
- Insurance by owner.

7. Every owner of a commercial building shall at all times insure the commercial building against structural damage attributable to the owner.

Dated the 8th April, 2020.

JAMES MACHARIA,

*Cabinet Secretary for Ministry of Transport, Infrastructure, Housing,
Urban Development and Public Works.*

REPUBLIC OF KENYA

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Clerk's Chambers
National Assembly
Parliament Buildings
P.O. Box 41842-00100
NAIROBI, Kenya

THE NATIONAL ASSEMBLY

Ref: NA/DCS/CDL/CORR/2020/025

17th June, 2020

QS Kairu Bachia
Chairman, Joint Building and Construction Council (JBCC)

Arch. Mugure Njendu
President, Architectural Association of Kenya

QS Peter Kariuki
President, Institute of Quantity Surveyors of Kenya

Eng. Henry Ndugah
Chairperson, Association of Consulting Engineers of Kenya

Mr. Nahashon Okowa
Chairman, Association of Construction Managers of Kenya

QS Tom Oketch
Chairman, Institution of Construction Project Managers of Kenya

Eng. Nathaniel Mutalanga,
President, Institution of Engineers of Kenya

Eng. Maurice Awiti
Chairman, Kenya Federation of Master Builders

Mr. Ramesh Mishra
Kenya Association of Building & Civil Engineering Contractors

Mr. Palkesh Shah
Chairman, Kenya Property Developers Association

Mr. Samuel, Nderitu
Chairman, Chartered Institute of Arbitrators (Kenya Branch)

Dear Sir

RE: MEMORANDUM OF CONSOLIDATED CONSTRUCTION INDUSTRY
STAKEHOLDERS DISSENT TO THE NATIONAL CONSTRUCTION AUTHORITY
(DEFECTS LIABILITY) REGULATIONS, 2020

We acknowledge receipt of your unreferenced letter dated 8th June, 2020 on the above matter.

The purpose of this letter is to inform you that the National Construction Authority (Defects Liability) Regulations, 2020 are yet to be submitted to the National Assembly for scrutiny in accordance with section 11 of the Statutory Instruments Act, 2013.

The Committee on Delegated Legislation will consider your Memorandum during scrutiny of the said Regulations and may contact you for further clarification.

Our liaison officers for purposes of this matter are Ms. Susan Maritim whom may be contacted on Tel. No. 0722-677817 and Mr. Mohammed Jimale, Tel. No. 0711324212.

Yours Sincerely,


SERAH M. KIOKO

For: CLERK OF THE NATIONAL ASSEMBLY

Copy to:- Hon. Justice (Rtd.) Kihara Kariuki, EGH, SC
Attorney General
Office of the Attorney General and Department of Justice
Sheria House
NAIROBI

Hon. Adan Mohammed, EGH
Cabinet Secretary
Ministry of EAC and Regional Development
NAIROBI

Mr. James Macharia, EGH
Cabinet Secretary
Ministry of Transport, Infrastructure,
Housing, Urban Development & Public Works
NAIROBI

Maj. Gen. (Rtd.) Dr. Gordon Kihalang'wa, CBS
Principal Secretary
State Department for Public Works
Ministry of Transport, Infrastructure,
Housing, Urban Development & Public Works
NAIROBI

Eng. Maurice Akech
Executive Director
National Construction Authority
11th Floor, KCB Towers, Upper Hill
NAIROBI

Annexure 4 –Letters from Stakeholders



July 21, 2020

Hon. Senator Kimani Wamatangi Paul,
Chairman of the Senate Committee on Energy, Road and Transportation,
The Senate of the Republic of Kenya,
NAIROBI.

Dear Sir,

SENATE PRESENTATION BY THE CONSTRUCTION INDUSTRY STAKEHOLDERS ON DISSENT TO THE NATIONAL CONSTRUCTION AUTHORITY (DEFECTS LIABILITY) REGULATIONS, 2020.

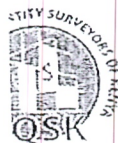
We wish to start by thanking you immensely for according us the privilege to appear before the Senate Committee on Energy, Road and Transportation on Monday June 29, 2020 to make a presentation on the construction industry's dissent to the National Construction Authority (Defects Liability) Regulations, 2020 (herein after referred to as the Regulations) which were gazetted in the Special Issue of The Kenya Gazette Supplement No. 51 of April 20, 2020.

For the record, the stakeholders who have prepared this presentation represent the interests of professional consultants, general and specialists building contractors, and property developers and owners who belong to the following respective organizations:

1. Architectural Association of Kenya (AAK)
2. Association of Consulting Engineers of Kenya (ACEK)
3. Association of Construction Managers of Kenya (ACMK)
4. Chartered Institute of Arbitrators (CIArb)
5. Institution of Construction Project Managers of Kenya (ICPMK)
6. Institution of Engineers of Kenya (IEK)
7. Institute of Quantity Surveyors of Kenya (IQS)
8. Kenya Association of Building and Civil Engineering Contractors (KALCEC)
9. Kenya Federation of Master Builders (KFMB)
10. Kenya Property Developers Association (KPDA)

We the stakeholders became aware of the existence of these Regulations after they were gazetted, and being dissatisfied with them, on June 8, 2020 we wrote a fairly comprehensive Memorandum of Dissent (copy of the Memorandum attached herewith for ease of reference) to Mr. James W. Macharia, the Cabinet Secretary Ministry of Transport, Infrastructure, Housing & Urban Development and Public Works

Page





(MoTIHUD & PW), but we are yet to receive a response from him. The Memorandum was copied to the following people:

1. Hon. Adan Mohamed EGH
Cabinet Secretary
Ministry of East Africa Community and Regional Development
2. Justice (Rtd.) Paul Kihara Kariuki, EGH
Attorney General
Office of the Attorney General
3. Mr. Michael Sialai, EBS
Clerk of the National Assembly
4. Maj. Gen. (Rtd) Dr. Gordon Kihalangwa, CBS
Principal Secretary
State Department for Public Works,
Ministry of Transport, Infrastructure, Housing Urban Development & Public Works
5. Eng. Maurice Akech,
Executive Director
National Construction Authority

During the Senate Committee proceedings of June 29, 2020, you directed the CS of MoTIHUD & PW to present the committee with evidence that adequate stakeholder consultations took place, and thereafter that we make a presentation on the same. Having perused the evidence presented by the CS, we wish to state as follows:

1.0 INTRODUCTION

For the record, as professionals and patriotic Kenyans, we wish to state unequivocally that, in principle, we support any government and/or private sector initiative that will improve the ease of doing business in Kenya because the Kenyan economy in general and the construction industry specifically will be a beneficiary of the initiative.

2.0 PRELIMINARY ISSUES OF PROCESS AND PROCEDURE

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- 2.1 We note that the thrust of the CS's evidence revolves around five (5) meetings that took place on diverse dates between December 3, 2019 and March 10, 2020 in various venues whose primary agenda was to discuss The Draft Building Regulations (Building Code) for Kenya (hereafter referred to as the Building Code).
- 2.2 We wish to confirm that as stakeholders, we were invited to all the above meetings to discuss the Draft Building Code, and we actively participated in the deliberations.
- 2.3 The professionals who represented us in these meetings have stated that, and they are willing to attest to the same under oath or affirmation if need arise, that the National Construction Authority (Defects Liability) Regulations, 2020 (hereafter referred to as the Regulations), which are now the subject matter, were never presented as a substantive agenda in any of the meetings.
- 2.4 Contrary to what the CS's evidence is alluding to, and at the risk of appearing to be making insinuations, they have clarified that the factual position was as follows:

- 2.4.1 In the first meeting held in Naivasha on December 03 & 04, 2019 there was no reference whatsoever to the Regulations.
- 2.4.2 Similarly, in the second meeting held in Nairobi at Boma Hotel on December 05 & 06, 2019 there was no reference whatsoever to the Regulations.
- 2.4.3 In the third meeting held in Nairobi at Boma Hotel on December 13, 2019 the Regulations were mentioned for the first time through a presentation by a representative from the Ministry of East Africa Community & Regional Development (hereafter referred to as MBEAC&RD). Thereafter, as evidenced by Bundle 3, Item 6.2 (A,B,C&D), which stated:
- A. The Regulations should be clear and should not interfere with standard contract documents.
 - B. The Regulations require more consultations and copies should be shared with all stakeholders.

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C. The Regulations should be designed in such a way that they do not cause conflict among professionals working in a particular project.

D. The Regulations should be harmonized with the existing contract documentation and should distribute risks effectively and efficiently.

Item 7.0 of the same meeting recommended that the proposed Regulations be subjected to further engagement with other stakeholders.

We wish to state categorically that none of the recommendations stated in item 2.4 have taken place to date.

2.4.4 In the fourth meeting held in Nairobi at Boma Hotel on December 20, 2019 the Regulations were not mentioned at all.

2.4.5 In the fifth meeting held in Nairobi at Delta on March 10, 2020 the Regulations were not mentioned at all.

2.5 From the chronology of events highlighted in item 2.4 above, and observations made therein, it is glaring that the process of stakeholder consultation has never been completed.

2.6 Non-conformity with the Statutory Instruments Act 2018

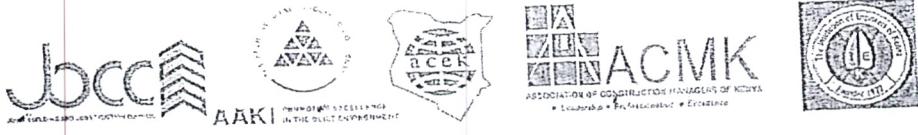
2.6.1 We are aware that the Statutory Instruments Act, 2013, amongst other things, has prescribed the procedure that are supposed to be followed by persons or bodies, other than Parliament, that wishes to make any subsidiary legislation before the said legislation can have the force of law.

2.6.2 It is our considered view that the prerequisite outlined in the Statutory Instruments Act, 2013, were not followed, and therefore the Regulations are not in conformity with the Act.

2.6.3 Our statements in this regard are as follows:

2.6.3.1 Consultation with stakeholders





From the narrative that we have given above, we have demonstrated that no specific stakeholder consultations took place, specifically in regard to the Regulations, as alleged by the CS.

2.6.3.2 Preparation of Regulatory Impact Statement

We are not aware of the existence of this statement.

2.6.3.3 Preparation of Explanatory Memorandum

We are not aware of the existence of Explanatory Memorandum and if at all it exists, we would appreciate if we were given a copy.

2.6.3.4 Tabling of Statutory Instruments in the House

To the best of our knowledge, the Regulations were not tabled in Parliament. Indeed, the Clerk of the National Assembly, through their letter Ref: NA/DCS/CDL/CORR/2020/025 of June 17, 2020, informed us that the Regulations were yet to be submitted to the National Assembly for scrutiny in accordance with Section II of the Statutory Instruments Act, 2013 (copy of the letter attached herewith for ease of reference).

2.6.4 Considering the observations that we have made above, we can state, without fear of contradiction, that the Regulations did not meet the threshold of the Statutory Instruments Act, 2013, and if your honorable committee is persuaded to agree with us, we pray that it declares the Regulations unlawful and direct their withdrawal/suspension.

3.0 STAKEHOLDERS' CONCERNS ON SUBSTANCE OF THE REGULATIONS

The stakeholders' concerns on the substance of the Regulations were detailed in the Memorandum sent to the CS. Macharia but they can be summarized as follows:

3.1 Implications of the Regulations as gazetted

3.1.1 Upon perusal of the NCA (DL) Regulations, it became apparent that although the spirit





of the regulations is positive, the drafters of the Regulations were not versed with the operations of the Construction Industry, and therefore, they disregarded the well-known global principles that govern construction contracts, as well as the custom and trade usages of the industry. To a very large extent, the Regulations have offended many construction industry standard forms of contracts that have been developed from best practice over a long period by knowledgeable and respected industry institutions.

3.1.2 It is our considered view that there is no need to have local regulations on the matter of defects and liability arising thereof, as these are technical and contractual issues that have been adequately addressed in the various standard forms of contract.

3.1.3 The Regulations have attempted to deal with the symptoms of the challenges arising from the issues related with defects instead of addressing the root cause of the problems, which are poor workmanship by the Contractor/Subcontractor, and sometimes lack of effective supervision by the relevant professionals.

3.1.4 This subsection is defective as it contravenes the basics of the Laws of Contract.

Suffice to say that as the Regulations stand, they have introduced a lot of confusion in the industry, and they will be a recipe for disputes between contractors and developers, contractors and consultants, contractors and sub-contractors, and consultants and developers.

3.2 Definitions / Interpretations and their Implications
Many of the definitions used are outrightly incorrect and/or inconsistent with construction industry terminologies, while others are ambiguous.

4.0 OUR PRAYER AND CONCLUSION

From the observations made in Items 1 to 3 above, we can infer as follows.

4.1 Although the spirit of the Regulations may have been positive, depending on the intended objective, as they stand, they will bring a lot of confusion in the construction industry in Kenya, and they will be a recipe for numerous disputes.

4.2 We believe that the process used to make these Regulations did not conform with the Statutory Instruments Act, 2013. We have no evidence that the key requirements of the Act, including but not limited to, Consultations with stakeholders, Preparation of a Regulatory Impact Statement and Preparation of an Explanatory Memorandum were adhered to.

