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THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT- FIFTH SESSION (2021)

COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE CONSIDERATION OF THE PUBLIC
FINANCE MANAGEMENT (DROUGHT MANAGEMENT
EMERGENCY FUND) REGULATIONS, 2021

(Legal Notice No. 27 of 2021)

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 13 MAY 2021	DAY.
TABLED BY:	
CLERK-AT THE-TABLE:	

MAY, 2021

*The Directorate of Audit, Appropriations
And Other Select Committees
The National Assembly
Parliament Buildings
NAIROBI.*

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ABBREVIATIONS

ASAL	Arid and Semi Arid Land
CEC	County Executive Committee
L.N.	Legal Notice
NDEF	National Drought and Emergency Fund
PFM	Public Finance Management
SI	Statutory Instrument
SO	Standing Order

CHAIRPERSON'S FOREWORD

The Public Finance Management (National Drought Emergency Fund) Regulations, 2021 were made by the Cabinet Secretary for National Treasury and Planning pursuant to Sections 24(4) of the Public Finance Management Act (*No. 18 of 2012*).

The Regulations were published in the Gazette on 5th March, 2021, vide Legal Notice No. 27 of 2021, submitted to the Clerk of the National Assembly on 17th March, 2021 and laid before the House on 23rd March, 2021, being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act.

The Regulations seek to establish the National Drought Emergency Fund with an initial capital of Kshs. 2 billion to cushion the drought affected areas from the effects of the famine and also manage the famine situation in the country. The Fund will be managed by the National Drought Management Authority with various governance structures including a National Steering Committee, Inter-Governmental Technical Committee and County Drought Committees.

Having examined the Regulations against the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap 2*), the Public Finance Management Act (*No. 18 of 2012*), the National Drought Management Authority Act (*No. 4 of 2016*) and the Statutory Instruments Act (*No. 23 of 2013*), the Committee was satisfied that the Regulations were submitted to the National Assembly within the statutory timelines stipulated in section 11 of the Statutory Instruments Act, 2013.

The Committee was also satisfied with the extent of public participation undertaken as required by Articles 10 and 118 of the Constitution and sections 5, 5A and the Schedule to the Statutory Instruments Act, read together with Standing Order 210.

The Fund is a timely intervention for parts of the country experiencing the ravages of famine amid COVID-19 challenges.

With the foregoing, therefore, the Committee approved the Regulations in accordance with Standing Order 210 (4) (a) and section 24(4) of the Public Finance Management Act (*No. 18 of 2012*) which requires the approval of the National Assembly.

In conclusion, I wish to most sincerely thank the Speaker and the Office of the Clerk of the National Assembly for the invaluable support accorded to the Committee in the discharge of its mandate.

On behalf of the Members of the Select Committee on Delegated Legislation and pursuant to section 24(4) of the Public Finance Management Act (*No. 18 of 2012*) and Standing Order No.199, it is my pleasure and duty to present to the House, the Committee's **Report on the Consideration of the Public Finance Management (National Drought Emergency Fund) Regulations, 2021 (L.N. No. 27 of 2021)**.

HON. WILLIAM KASSAIT KAMKET, M.P.

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Select Committee on Delegated Legislation is established pursuant to *Standing Order No. 210* and is mandated to consider statutory instruments submitted to Parliament for consideration. The Committee is expected to consider in respect of any statutory instrument, whether it is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws.
2. The Committee is mandated to consider in respect of any statutory instrument, whether it:
 - a) is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws;
 - b) infringes on fundamental rights and freedoms of the public;
 - c) contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
 - d) contains imposition of taxation;
 - e) directly or indirectly bars the jurisdiction of the court;
 - f) gives retrospective effect to any of the provision in respect to which the Constitution does not expressly give any such power;
 - g) it involves expenditure from the consolidated fund or other public revenues;
 - h) is defective in its drafting or for any reason form or part of the statutory instrument calls for any elucidation;
 - i) appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;
 - j) appears to have had unjustifiable delay in its publication or laying before Parliament;
 - k) makes rights, liberties or obligations unduly dependent upon non-renewable decisions;
 - l) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
 - m) inappropriately delegates legislative powers;
 - n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
 - o) appears for any reason to infringe on the rule of law;
 - p) inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and
 - q) accords to any other reason that the Committee considers fit to examine.

1.2 Committee Membership

3. The Committee membership comprises –

The Hon. William Kassait Kamket, M.P. (Chairperson)

Tiaty Constituency

KANU

The Hon. Muriuki Njagagua, M.P. (Vice Chairperson)

Mbeere North Constituency

Jubilee Party

COMMITTEE MEMBERS

The Hon. Waihenya Ndirangu, M.P.

Roysambu Constituency

Jubilee Party

The Hon. Ronald Tonui, M.P.

Bomet Central Constituency

Jubilee Party

The Hon. William Cheptumo, M.P.

Baringo North Constituency

Jubilee Party

The Hon. William Kamoti, M.P.

Rabai Constituency

Orange Democratic Movement

The Hon. Cecily Mbarire, MGH, M.P.

Nominated

Jubilee Party

The Hon. Martha Wangari, M.P.

Gilgil Constituency

Jubilee Party

The Hon. Alice Wahome, M.P.

Kandara Constituency

Jubilee Party

The Hon. Gideon Mulyungi, M.P.

Mwingi Constituency

Wiper Democratic Movement – Kenya

The Hon. Robert Mbui, M.P.

Kathiani Constituency

Wiper Democratic Movement -Kenya

The Hon. (Dr.) Wilberforce Oundo, M.P.

Funyula Constituency

Orange Democratic Movement

The Hon. Daniel Maanzo, M.P.

Makueni Constituency

Wiper Democratic Movement -Kenya

The Hon. George G. Murugara, M.P.

Tharaka Constituency

Democratic Party

The Hon. Timothy Wanyonyi, M.P.

Westlands Constituency

Orange Democratic Movement

The Hon. Jennifer Shamalla, M.P.

Nominated

Jubilee Party

The Hon. Munene Wambugu, M.P.
Kirinyaga Central Constituency

Jubilee Party

The Hon. Patrick Mariru, M.P.
Laikipia West Constituency

Jubilee Party

The Hon. Sammy Seroney, M.P.
Nominated

Wiper Democratic Movement – Kenya

The Hon. Tindi Mwale, M.P.
Butere Constituency

Amani National Congress

The Hon. Edith Nyenze, M.P.
Kitui West Constituency

Wiper Democratic Movement – Kenya

The Hon. Abdi Koropu Tepo, M.P.
Isiolo South Constituency

Kenya Patriots Party

The Hon. Robert Gichimu, M.P.
Gichugu Constituency

Jubilee Party

1.3 Committee Secretariat

4. The secretariat facilitating the Committee comprises -

Ms. Cherotich Maritim
Senior Clerk Assistant (Team Leader)

Mr. Mohamed Jimale
Clerk Assistant II

Mr. Wilson Dima Dima
Principal Legal Counsel

Mr. Josphat Motonu
Fiscal Analyst I

Ms. Noelle Chelagat
Media Relations Officer II

Mr. Anthony Wamae
Assistant Serjeant at Arms

Mr. Charles Ayari
Superintendent of Electronics

Ms. Mary Otieno
Office Superintendent

2.0 CONSIDERATION OF THE PUBLIC FINANCE MANAGEMENT (NATIONAL DROUGHT EMERGENCY FUND) REGULATIONS, 2021

2.1 Introduction

5. The Public Finance Management (National Drought Emergency Fund) Regulations, 2021, were made by the Hon. (Amb) Ukur Yattani, EGH, Cabinet Secretary of the National Treasury & Planning, pursuant to section 24(4) of the Public Finance Management Act, 2012 which empowers the Cabinet Secretary to make Regulations establishing public Funds.
6. The Regulations were published in the Kenya Gazette on 5th March, 2021, vide Legal Notice No. 27 of 2021, submitted to the Clerk of the National Assembly on 17th March, 2021 and subsequently laid in the House on 23rd March, 2021.

2.2 Legislative Context

7. Section 24(4) of the Public Finance Management Act, 2012 provides for the establishment of the Public Finance Management (National Drought Emergency Fund) Regulations, 2021 with the approval of the National Assembly for matters relating to drought.
8. The Fund is already established under Section 18 of the National Drought Management Authority Act, 2016. The Public Finance Management Act, 2012, however, is the principal law guiding the establishment administration, management and oversight of public funds including the establishment of national public funds.
9. The National Drought Management Authority Act, 2016 was therefore amended to align to the prevailing Government policies that all national public funds to be established under Section 24(4) of the Public Finance Management Act (No.18 of 2012).

2.3 Purpose of the Regulations

10. The object and purpose for the establishment of the National Drought Emergency Fund are –
 - (i) to improve the effectiveness and efficiency of the drought risk management symptoms in the country;
 - (ii) to facilitate resilience building, preparedness and timely response to drought during its different stages in order to reduce and minimise the negative effects of drought;
 - (iii) to receive financial resources from different partners who support government on drought risk management interventions; and
 - (iv) to provide for a common basket emergency Fund in order to facilitate faster, transparent, predictable and accountable release of funds for drought risk management. The Fund will be utilised for capacity and technical expertise development to improve on drought risk management systems and also provide for the establishment, management and coordination of programmes, projects or activities to further the forgoing objects and purposes.
11. The Regulations further provide for sources of the Fund, including initial capital of the Fund appropriated by Parliament of Kshs. 2 billion.

2.4 Overview of the Regulations

12. **Part I (Preliminaries)** of the Regulations provides for citation and interpretation.
13. Regulation 3 establishes the National Drought Emergency Fund.
14. **Capital (Regulation 4):** The initial capital of the Fund is Kshs. 2 billion appropriated by Parliament as provided for in Regulation 4. The Fund will also be financed through annual appropriations by the National Assembly and may include grants, donations and contributions from well-wishers including donors and the private sector.
15. **Oversight Board (Regulation 9):** The Board of the National Drought Management Authority established under section 18 (1) of the National Drought Management Authority Act, 2016 will oversight the administration of the Fund. The Functions of the Board are specified in Regulation 9.
16. **The Secretariat (Regulation 14):** The Secretariat of the Fund is the National Drought Management Authority established under section 13 (1) of the National Drought Management Authority Act, 2016 as reiterated under Regulation 14.
17. **The National Drought and Food Security Steering Committee (Regulation 17):** Regulation 17 establishes the National Drought and Food Security Steering Committee chaired by the Deputy President, deputised by the Chairperson of the Council of Governors. Other Members of the Committee include Cabinet Secretaries responsible for drought risk management, devolution, planning, finance, water, health, education, defence, national government coordination, agriculture, livestock and fisheries, social protection, environment, energy, wildlife and meteorology.
18. The Cabinet Secretary responsible for drought risk management is the Secretary to the Committee.
19. The functions of the Steering Committee are as follows –
 - i) provide policy recommendations on drought response interventions;
 - ii) provide leadership and oversight on drought and food security interventions during the alarm and emergency stages;
 - iii) receive, consider and make decisions based on reports from the Inter-Governmental Technical Committee; and
 - iv) mobilise resources for drought response interventions during alarm and emergency stages.
20. The Steering Committee reports to the Cabinet.
21. **Inter-Governmental Technical Committee on Drought and Food Security (Regulation 18):** The Inter-governmental Technical Committee comprises of principal secretaries responsible for drought risk management, devolution, planning, finance, water, health, education, defence, national government coordination, agriculture, livestock and fisheries, social protection, environment, energy, wildlife and meteorology. It also includes five (5) nominees of the Council of Governors, being county executive committee (CEC) members responsible for matters drought, water, health, agriculture and finance, preferably from drought-prone areas. The Technical Committee will be chaired by the Principal Secretary for matters relating to drought risk management. The Secretary to the Committee is the Administrator of the Fund.

- 22. County Drought Committee (Regulation 19):** Each drought-prone County will establish a County Drought Committee which will be co-chaired by the Governor and the County Commissioner. It will comprise of various officers from both National and County Government, on matters responsible for drought risk management, planning, finance, water etc. The Regulations also establish the County Drought Committee the regulations have assigned the Cabinet Secretary / National Treasury and Planning the responsibility to prescribe a framework for consultation with development partners;
- 23.** The Regulations also provide for the criteria for project identification, submission of project proposals, allocation of funds among various components of the drought risk management to facilitate posterity of the Fund and where necessary, co-financing by county governments and non-state actors.
- 24.** The Regulations further provide for –
- i. oversight by Parliament through annual reporting to the Auditor General and quarterly reporting on projects financed by the Fund,
 - ii. maintenance of proper records in the management and administration of the Fund including reporting requirements to comply with the provisions of the Public Finance Management Act, 2012;
 - iii. provides for the administrative costs of running the Fund at a maximum of five per centum (5%),
 - iv. offences and penalty of misappropriation of the Fund as provided for under Section 199 of the Public Finance Management Act; and
 - v. procedure for winding-up of the Fund.

2.5 Conferring with the Regulation Making Authority

- 25.** In accordance with section 16 of the Statutory Instruments Act, 2013, the Committee held pre-publication consultations with the regulation making authority, i.e. the National Treasury & Planning and the Ministry of Devolution and ASALs on 1st February, 2021 in Mombasa. The delegation was led by Hon. (Amb.) Ukur Yattani, EGH, the Cabinet Secretary responsible for the National Treasury and Planning and Hon. Eugene Wamalwa, EGH, Cabinet Secretary responsible for the Ministry of Devolution and ASALs.
- 26.** The regulation making authority informed the Committee that the Regulations are intended to cushion the drought affected areas from the effects of the famine and also manage the famine situation in the country.
- 27.** The establishment of the Fund was necessitated by the National Drought Management Authority (Amendment) Act, 2020 which commenced on 27th July, 2020 and had the effect of repealing sections of the Act establishing and operationalizing a Fund, paving way for the establishment of the National Drought Emergency Fund under Section 24 (4) of the Public Finance Management Act.
- 28.** The two ministries adequately responded to Members’ concerns after which it proceeded to publish the Regulations.

3.0 COMMITTEE OBSERVATIONS

29. Having examined the Public Finance Management (Drought Management Emergency Fund) Regulations, 2021 in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (Cap. 2), the Public Finance Act (No 18 of 2012), the National Drought Management Authority Act (No. 4 of 2016) and the Statutory Instruments Act (No 23 of 2013), the Committee made the following observations –

3.1 Statutory Timelines

1) THAT, the Regulations were published in the Gazette on 5th March, 2021, vide Legal Notice No. 27 of 2021, submitted to the Clerk of the National Assembly on 17th March, 2021 and laid in the House on 23rd March, 2021 being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act.

3.2 Public Participation

2) THAT, Articles 10 and 118 of the Constitution, section 5, 5A and the Schedule to the Statutory Instruments Act, read together with Standing Order 210 requires the regulation-making authority to conduct public participation and sufficient consultation with the stakeholders and persons likely to be affected by the Regulations.

3) During consultations with the regulation making authority, the National Treasury jointly with the Ministry of Devolution and ASAL demonstrated to the Committee that extensive consultations were undertaken during preparation of the Regulations. Various key stakeholders including County Governments, line ministries, development partners among others were consulted and their input taken into account before finalization of the Regulations.

4) The Ministry submitted an Explanatory Memorandum with a schedule of persons who appeared in various forums to give their input to the draft Regulations.

3.3 Regulatory Impact Statement

5) The Regulations do not require a Regulatory Impact Statement within the meaning of sections 6, 7 and 8 of the Statutory Instruments Act, as they are not likely to impose significant costs on the community.

4.0 COMMITTEE RECOMMENDATION

30. Having examined the Public Finance Management (Drought Management Emergency Fund) Regulations, 2021 in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (Cap 2), the Public Finance Act (No 18 of 2012), the National Drought Management Authority Act (No. 4 of 2016) and the Statutory Instruments Act (No 23 of 2013), **the Committee recommends that the House approves the said statutory instrument in accordance with section 24(4) of the Public Finance Management Act (No. 18 of 2012).**

Signed.....

Date.....

THE HON. WILLIAM KASSAIT KAMKET, M.P.
(CHAIRPERSON)

ANNEXURES

- 1. Adoption Schedule**
- 2. Legal Notice No. 27 of 2021 and the Explanatory Memorandum**
- 3. Committee Minutes**

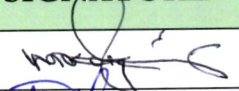


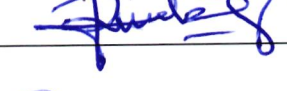
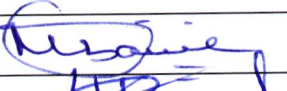

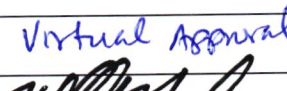
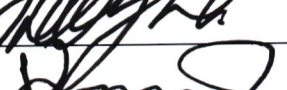
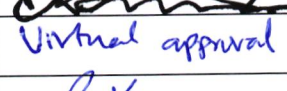
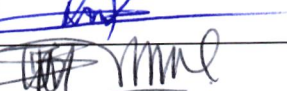
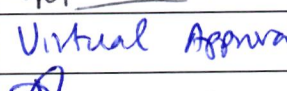
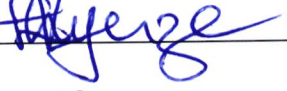
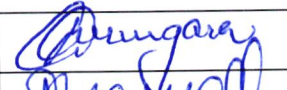
COMMITTEE ON DELEGATED LEGISLATION

ADOPTION SCHEDULE

Report on the Consideration of the Public Finance Management (National Drought Emergency Fund) Regulations, 2020 (LN 27 of 2021)

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

DATE: 12 May 2021

	HON. MEMBER	SIGNATURE
1.	Hon. Kassait Kamket, MP (Chairperson)	
2.	Hon. Muriuki Njagagua, MP (Vice Chairperson)	
3.	Hon. Waihenya Ndirangu, MP	
4.	Hon. Robert Mbui, MP	
5.	Hon. Alice Wahome, MP	
6.	Hon. Cecily Mbarire, MGH, MP	
7.	Hon. Daniel Maanzo, MP	
8.	Hon. William Cheptumo, MP	
9.	Hon. Martha Wangari, MP	Virtual Approval
10.	Hon. Timothy Wanyonyi, MP	
11.	Hon. William Kamoti, MP	
12.	Hon. Patrick Mariru, MP	Virtual approval
13.	Hon. Ronald Tonui, MP	
14.	Hon. Munene Wambugu, MP	
15.	Hon. Gideon Mulyungi, MP	Virtual Approval
16.	Hon. Edith Nyenze, MP	
17.	Hon. Abdi Tepo, MP	
18.	Hon. George Murugara, MP	
19.	Hon. Jennifer Shamalla, MP	
20.	Hon. (Dr.) Wilberforce Oundo, MP	
21.	Hon. Robert Gichimu, MP	
22.	Hon. Sammy Seroney, MP	Virtual approval
23.	Hon. Tindi Mwale, MP	

THE NATIONAL ASSEMBLY
PAPERS LAID

DATE: 23 MAR 2021 DAY: _____

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

TABLED BY: _____
CLERK OF THE TAB: _____

Telegraphic Address: 22921
Finance-Nairobi

Fax No.: 310833
Telephone: 2252299



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17/03/21

THE NATIONAL TREASURY
P.O. Box 30007
NAIROBI

When Replying Please Quote;
Ref. No. TNT/CONF 356/02 "D (29)

Mr. Michael Sialai, CBS
Clerk of the National Assembly
Parliament Buildings
P.O. Box 41842 - 00100
NAIROBI

③ M/L/M/M
Registers and CDC
please with CDC
for processing. 12th March, 2021
To Head, Table and office
7 regional cause Tabling
accounts to receipt
19/03/21
22.3.21

Dear *Sialai,*

RE: THE PUBLIC FINANCE MANAGEMENT (NATIONAL DROUGHT EMERGENCY FUND) REGULATIONS, 2020

The Public Finance Management (National Drought Emergency Fund) Regulations, 2021 have been published vide Legal Notice No. 27 (Kenya Gazette Supplement No. 21) of 5th March, 2021.

Towards this end, the National Treasury is submitting the following documents in accordance with the Statutory Instruments Act, 2013 to the National Assembly for further necessary action:-

- a. The published Public Finance Management (National Drought Emergency Fund) Regulations, 2021 Legal Notice No. 27 (Kenya Gazette Supplement No. 21) of 5th March, 2021; and
- b. A signed Explanatory Memorandum;

The purpose of this letter, therefore, is to submit the above mentioned documents to the National Assembly for approval.

Your prompt attention and action on this matter will be highly appreciated.

Yours *Sincerely,*

**HON. (AMB.) UKUR YATANI
CABINET SECRETARY/NATIONAL TREASURY & PLANNING**

NATIONAL ASSEMBLY
RECEIVED
17 MAR 2021
DEPUTY CLERK
J.W.N
P.O. Box 41842 - 00100, NAIROBI

Encl.

Copy to: Hon. Eugene Wamalwa, EGH
Cabinet Secretary
Ministry of Devolution and ASALS,
NAIROBI

Julius Muia, PhD, CBS
Principal Secretary
National Treasury
NAIROBI

Micah Powon, CBS
Principal Secretary
State Department of ASALS
Ministry of Devolution and ASALS
NAIROBI

Kennedy Ogetto, EBS
Solicitor General
Office of the Attorney General
Sheria House
NAIROBI

James Oduor, EBS
Chief Executive Officer
National Drought Management Authority
NAIROBI

EXPLANATORY MEMORANDUM TO THE PUBLIC FINANCE MANAGEMENT (NATIONAL DROUGHT EMERGENCY FUND) REGULATIONS, 2021

1. The Purpose of The Public Finance Management (National Drought Emergency Fund) Regulations, 2021

The objectives of the proposed National Drought Emergency Fund are to: -

- a. improve the effectiveness and efficiency of the drought risk management system in the country;
- b. facilitate resilience building, preparedness and timely response to drought during its different stages in order to reduce and minimise the negative effects of droughts;
- c. to receive financial resources from development partners who support government on drought risk management interventions;
- d. provide for—
 - i. a common basket emergency Fund in order to facilitate faster, transparent, predictable and accountable release of funds for drought risk management;
 - ii. funds for capacity and technical expertise development to improve on drought risk management systems; and
 - iii. the establishment, management and coordination of programmes, projects or activities to further the foregoing objects and purposes.

In this regard, the Public Finance Management (National Drought Emergency Fund) Regulations, 2021 seek to make provisions for:

- (i) the interpretation, objects and purpose of the Fund;
- (ii) the establishment of the Fund under Section 24 (4) of the Public Finance Management Act;
- (iii) provide for the sources of the Fund including the initial capital of the Fund appropriated by parliament of Kenya Shillings two billion;
- (iv) the oversight and supervision of the Fund to be done by the National Drought Management Authority Board;
- (v) the administration of the Fund has been delegated to the Chief Executive Officer as the Administrator of the Fund and staff of the National Drought Management Authority to save administrative costs and avoid duplication of functions;
- (vi) retention of receipts and accruals at the end of each financial year for use to further the object and purpose for which the Fund is established for;
- (vii) provide for the application of Government Financial Regulations and procedure in the administration of the Fund.

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THE NATIONAL ASSEMBLY	
DATE: 23 MAR 2021	
TABLED BY:	HON. AMBE KIMUNYA
CLERK AT THE TABLE:	M. Lemuna

- (viii) provide for the establishment of coordination structures that provides for the representation of the two levels of Government, their composition and roles;
- (ix) the regulations have assigned the Cabinet Secretary responsible for matters relating to drought to be the policy Cabinet Secretary, where this Fund will be domiciled;
- (x) the regulations have assigned the Cabinet Secretary / National Treasury and Planning the responsibility to prescribe a framework for consultation with development partners;
- (xi) provide for the criteria for Project identification, submissions of project proposals, allocation of funds among various components of the drought risk management to facilitate posterity of the Fund and where necessary, co-financing by county governments and non-state actors;
- (xii) provide for oversight of Parliament through annual reporting to the Auditor General and quarterly reporting on projects financed by the Fund;
- (xiii) provide for the maintenance of proper records in the management and administration of the Fund including reporting requirements to comply with the provisions of the Public Finance Management Act, 2012; and
- (xiv) provides for the administrative costs of running the Fund at a maximum of five per centum (5%),
- (xv) offences and penalty of misappropriation of the Fund as provided for under Section 199 of the Public Finance Management Act; and
- (xvi) provides for the procedure for winding-up of the fund.

2. The Legislative Context

The National Assembly delegated the duty to establish national public funds to the Cabinet Secretary responsible for finance with the approval of the National Assembly. This is provided for under Section 24 (4) of the Public Finance Management Act, 2012.

Article 43 (1) of the Constitution provides that, every Kenyan has a right to be free from hunger and have adequate food of acceptable quality, to clean and safe water in adequate quantities, to education and highest attainable standards of health which includes the right to health care services and reasonable standards of sanitation. Additionally, Paragraph 24 of Part I and paragraph 12 of Part 2 of the Fourth Schedule of the Constitution has assigned disaster management to both levels of Government and therefore it is a concurrent function.

Therefore, the National Treasury has complied with the provisions of the Statutory Instruments Act, 2013 on the requirement for public consultations while preparing these Regulations.

3. Policy Background

The Constitution assigned the duty of disaster management to both levels of Government and therefore it is a concurrent function under Paragraph 24 of Part I and paragraph 12 of Part 2 of the Fourth Schedule of the Constitution.

Over the past eight years, Kenya's GDP growth rate has been rising. Growth has been broad based, which has contributed to lowering poverty levels and helped move Kenya towards the attainment of the Sustainable Development Goals. To date, more than ever before, more resources are being channeled to lower levels of government through the County Governments, the National Government Constituency Development Fund, the National Government Affirmative Action Fund among others. Overall, Kenyans acknowledge the significant positive change in the country but much remains to be done to reduce poverty on a sustained basis. One of the key interventions to ensure the significant positive change is not lost is to put in place sustainable climate change adaptation and drought risk reduction measures.

The National Drought Management Act, 2016 established the National Drought Management Authority to exercise coordination over all matters relating to drought management including implementation of policies and programmes. In order to complement the activities of the National Drought Management Authority and mobilize resources from development partners towards drought preparedness, response and recovery management in Kenya, it is imperative to establish a Fund to receive these resources and assure the highest level of accountability to the Kenyans as well as our development partners.

In the past four decades, droughts have become more frequent, more widespread, and more intense. For example, in the last 100 years, the country has experienced more than 28 major droughts and the most recent droughts experienced in Kenya were in 1983/1984, 1991/1992, 1996/1997, 1999-2001, 2005/06, 2009-11 and 2016 /2017. The Government responded to the 2016/2017 drought through reallocation and re-assignment of expenditures worth Kshs. 12.6 billion to various sectors to address this drought challenge. In addition, Kenya has been experiencing severe droughts that have been declared a national disaster.

It is estimated that drought in Kenya directly affects the household food security of more than 10 million people, mainly in arid and semi-arid areas. However intense droughts have also affected non-drought prone counties or areas. For example, the 1999-2001 drought affected most parts of the country, including some high rainfall areas and at its peak, 4.5 million people depended entirely on relief food.

Climate change is likely to make drought impacts more intense and less predictable. The country's key economic sectors, such as water, agriculture and livestock as well as

tourism, are all vulnerable to the impacts of climate change. Drought emergencies have had a negative impact on Kenya's economic performance. The 2008-11 drought period reduced GDP by an average of 2.8% per annum, and caused damages and losses totaling Kshs. 969 billion.

Emergency response also diverts expenditure from development programmes and priorities, which impacts negatively on the implementation of medium term plan and vision 2030 programmes and projects. For example, during the drought period of 2016 - 2017, an annual average of 4.6 million people received emergency food and non-food relief, at an average cost of Kshs. 12.8 billion per year. This excludes other drought response interventions which were being done concurrently in other sectors such as water, health, agriculture and livestock among others.

In order to meet the Jubilee policy of ensuring no Kenyan shall suffer extreme hunger in line with the provisions of the Constitution; such a Fund comes at the most opportune time given its diverse components that touch on most vulnerable groups.

4. Public Consultations

Extensive consultations were done while preparing the Public Finance Management (National Drought Emergency Fund) Regulations, 2021 with key stakeholders and their input taken into account before finalization of these Regulations. Some of the key stakeholders consulted are the County Governments, line ministries and development partners among others (*See Appendix Attached*). The National Treasury & Planning, the Ministry of Devolution and ASALS, the Office of the Attorney General and Department of Justice and the National Drought Management Authority held pre-publication scrutiny with Parliament.

5. Regulatory Impact Assessment

The National Drought Emergency Fund was established under Section 16 of the National Drought Management Authority Act, 2016 by Parliament, which has now been deleted to pave way for its establishment under the Public Finance Management Act, 2012. Towards this end, the establishment of this Fund under the Public Finance Management Act, 2012 was to align the Fund to existing Government policy, which is the Public Finance Management Act, 2012. Accordingly, therefore an impact assessment was not necessary given that Parliament had already established the National Drought Emergency Fund under Section 16 of the National Drought Management Act, 2016, which has been amended.

6. Guidance

The National Drought Management Authority in consultation with the National Treasury & Planning, the Ministry of Devolution and ASALS will sensitize stakeholders including

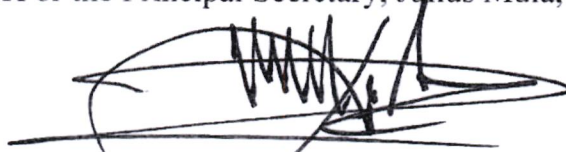
Parliament, and the general public, on the provisions of the Public Finance Management (National Drought Emergency Fund) Regulations, 2021.

7. Performance Monitoring and Evaluation of the Fund

The National Treasury & Planning, Ministry of Devolution and ASALS and National Drought Management Authority shall monitor the application of the National Drought Emergency Fund resources. This will be done through quarterly reports submitted by the Administrator of the Fund. In addition, National Drought Management Authority Board shall be responsible for implementing the Fund and will also carry out regular monitoring and evaluation of the specific programmes, projects and develop policies relating to the general administration and management of the Fund.

8. National Treasury Contact Person.

The contact person at the National Treasury & Planning is the Cabinet Secretary, Hon. (Amb) Ukur Yatani, EGH or the Principal Secretary, Julius Muia, PhD, CBS.



UKUR YATANI, EGH

CABINET SECRETARY TO THE NATIONAL TREASURY AND PLANNING

Date.....*12th March, 2021.*.....

(Legislative Supplement No. 13)

LEGAL NOTICE NO. 27

THE PUBLIC FINANCE MANAGEMENT ACT, 2012

(No. 18 of 2012)

THE PUBLIC FINANCE MANAGEMENT (NATIONAL DROUGHT EMERGENCY
FUND) REGULATIONS, 2021.

ARRANGEMENT OF REGULATIONS

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THE PUBLIC FINANCE MANAGEMENT ACT, 2012

(No. 18 of 2012)

IN EXERCISE of the powers conferred by section 24 (4) of the Public Finance Management Act, 2012, the Cabinet Secretary for the National Treasury makes the following Regulations—

THE PUBLIC FINANCE MANAGEMENT (NATIONAL DROUGHT EMERGENCY FUND) REGULATIONS, 2021

PART I—PRELIMINARY

1. These Regulations may be cited as the Public Finance Management (National Drought Emergency Fund) Regulations, 2021.

Citation.

2. In these Regulations, unless the context otherwise requires—

Interpretation.

“Act” means the Public Finance Management Act, 2012;

No. 18 of 2012.

“accounting officer” has the meaning assigned to it under section 2 of the Public Finance Management Act, 2012;

“Board” means the Board of the National Drought Management Authority constituted under section 8 of the National Drought Management Authority Act, 2016;

No. 4 of 2016.

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to finance;

“County Drought Committee” means the County Committee on Drought and Food Security constituted under regulation 19;

“disaster” means disruption of the functioning of a community or society causing widespread human, material, economic or environmental losses which exceed the ability of the affected community or society to cope using its own resources;

“drought” means a predictable and slow-onset disruption of the functioning of a community or society caused by periods of lower-than-normal precipitation;

“drought contingency plan” means a management process that analysis emerging drought risks and establishes arrangements in advance to enable timely, effective and appropriate preparedness and responses;

“financial year” means the period of twelve months ending on the thirtieth day of June in each year;

“financing agreement” means any document signed by the Government of Kenya and any development partner or such other person, which provides for grant or other financing to the Fund;

“Fund” means the National Drought Emergency Fund established under regulation 3;

“Inter-governmental Technical Committee” means the Intergovernmental Technical Committee on Drought and Food Security established under regulation 18;

“National Steering Committee” means the National Drought and Food Security Steering Committee established under regulation 17;

“officer administering the Fund” means an officer designated as the administrator of the fund under regulation 10;

“Secretary” means the Secretary of the National Drought Management Authority appointed under section 12 of the National Drought Management Authority Act, 2016.

No. 4 of 2016.

PART II— ESTABLISHMENT AND ADMINISTRATION OF THE FUND

3. There is established a Fund to be known as the National Drought Emergency Fund which shall be administered by the officer designated under regulation 10.

Establishment of the Fund.

4. (1) The initial capital of the Fund shall be two billion shillings appropriated by Parliament.

Capital of the Fund.

(2) The Fund shall be financed through the annual appropriations by the National Assembly which appropriations may include contributions from the private sector, donor support and global climate change and disaster risk financing facilities.

(3) All receipts, savings and accruals to the Fund and the balances thereof at the end of each financial year shall be retained by the Fund.

5. The sources of the Fund shall consist of—

Sources of the Fund.

- (a) such monies as may be appropriated by the National Assembly;
- (b) grants and donations;
- (c) global climate change and disaster risk financing facilities;
- (d) income generated from the proceeds of the Fund; and
- (e) any monies accruing to or received by the Fund from any other lawful source.

6. The object and purpose for which the Fund is established is to—

Object and purpose of the Fund.

- (a) improve the effectiveness and efficiency of the drought risk management system in the country;
- (b) facilitate resilience building, preparedness and timely response to drought during its different stages in order to reduce and minimise the negative effects of droughts;
- (c) to receive financial resources from development partners who support government on drought risk management interventions;
- (d) provide for—
 - (i) a common basket emergency fund in order to facilitate faster, transparent, predictable and accountable release of Funds for drought risk management;

- (ii) funds for capacity and technical expertise development to improve on drought risk management systems; and
- (iii) the establishment, management and coordination of programmes, projects or activities to further the foregoing objects and purposes.

7. (1) There shall be paid out of the Fund payments in respect of any expenses incurred pursuant to the object and purpose for which the Fund is established.

Expenditure of the Fund.

(2) The expenditure on the Fund shall be on the basis of and limited to annual work programmes, contingency plans and cost estimates which shall be prepared by the administrator of the Fund and approved by the Board before the beginning of the financial year to which they relate.

(3) Any revision of the approved annual work programme, contingency plans and of any cost estimates shall be referred to the Board for approval.

(4) The expenditure of this Fund shall be based on projects and programmes approved by the Board.

(5) The Fund shall not be used for the purpose of supporting political parties or entities.

8. The Board of the National Drought Management Authority established under section 18 (1) of the National Drought Management Authority Act, 2016 shall oversee the administration and management of the Fund.

Oversight role of the Board.

No. 4 of 2016.

9. (1) The functions of the Board relating to the oversight role and administration of the Fund shall be to —

Functions of the Board.

- (a) formulate policies to achieve the objects and purpose of the Fund;
- (b) provide oversight on the administration and management of the Fund;
- (c) approve estimates of revenue and expenditure of the Fund for each financial year;
- (d) receive, review and approve statutory and management reports of the Fund before submission to third parties;
- (e) approve the opening of any bank account of the Fund;
- (f) oversee timely and efficient disbursement of funds from the Fund to finance approved projects and programmes or interventions by the Fund; and
- (g) perform such other duties as may be considered necessary by the Cabinet Secretary responsible for matters relating to drought from time to time, for the proper administration and management of the Fund and such a duty shall be assigned in writing.

(2) The Board shall conduct its business and affairs in the manner provided under section 11 of the National Drought Management Authority Act, 2016.

No. 4 of 2016.

10. (1) The Secretary of the National Drought Management Authority Board shall be the administrator of the Fund.

Administrator of the Fund.

(2) Despite paragraph (1), in the absence of the Secretary, the Cabinet Secretary may designate a person who has satisfied the criteria set out under regulation 11 and upon recommendation by the Cabinet Secretary responsible for matters relating to drought in consultation with the Board as the administrator of the Fund and shall be a member of the Board.

(3) The administrator of the Fund shall—

- (a) open and operate a bank account at the Central Bank of Kenya or a bank to be approved by the Board and the National Treasury;
- (b) supervise and control the administration of the Fund;
- (c) consult with the Board and the Cabinet Secretary responsible for matters relating to drought on matters relating to the administration of the Fund;
- (d) cause to be kept proper books of accounts and other books and records of all activities and undertakings financed from the Fund;
- (e) prepare, sign and submit to the Board in respect of each financial year and within three months after the end thereof, a statement of accounts relating to the Fund for approval;
- (f) transmit to the Auditor-General the statement of accounts under paragraph (e), with a copy to the National Treasury and such a statement shall be prepared in the manner prescribed by the Public Sector Accounting Standards Board and audited in accordance with the Public Audit Act, 2015;
- (g) furnish additional information which is proper and sufficient for the purpose of examination and audit by the Auditor General in accordance with the provisions of the Public Audit Act, 2015; and
- (h) prepare a quarterly report on the receipts into and issues out of the Fund and submit it to the Cabinet Secretary for gazettelement by the 21st of every fourth month.

No. 34 of 2015.

(4) Every statement of account shall include details of the balance between the assets and liabilities of the Fund, and shall indicate the financial status of the Fund as at the end of the financial year concerned.

11. (1) Where the Cabinet Secretary designates a person as the administrator of the Fund under regulation 10 (2), that person shall be designated as provided under this regulation.

Designation of administrator of the Fund.

(2) A person shall be designated as the administrator of the Fund under this regulation if that person—

- (a) holds a degree from a university recognized in Kenya;
- (b) has at least ten years' post-qualification experience;
- (c) has at least five years' experience in the relevant field; and
- (d) satisfies the requirements of Chapter Six of the Constitution.

(3) A person designated as the administrator of the Fund under this regulation, shall serve for a term of three years, renewable once.

(4) Where the Cabinet Secretary does not intend to designate the administrator of the Fund after the first term, the Cabinet Secretary shall notify the administrator of the Fund of such a decision at least three months before the expiry of the incumbent's term.

(5) The administrator of the Fund shall only be subject to the directions of the Board and shall be responsible for the day to day administration of the affairs of the Fund including the staff of the secretariat of the Fund.

12. The office of the administrator of the Fund shall become vacant if the holder—

- (a) dies;
- (b) by notice in writing addressed to the Board resigns from office;
- (c) is convicted of an offence and sentenced to imprisonment for a term of more than six months without the option of a fine;
- (d) is absent from three consecutive meetings of the Board without good cause; or
- (e) is removed in accordance with the provisions of the Constitution.

Vacancy in the office of the administrator of the Fund.

13. (1) The administrator of the Fund may be removed from office by the Board only on grounds of—

- (a) inability to perform the functions of the office arising out of physical or mental incapacity;
- (b) gross misconduct;
- (c) bankruptcy; or
- (d) incompetence.

Removal of the administrator of the Fund.

(2) Prior to removal under paragraph (1), the administrator of the Fund shall be—

- (a) informed, in writing, of the reasons for the intended removal; and
- (b) given an opportunity to put in a defence against any such allegations either in person or through an advocate.

14. (1) The secretariat of the National Drought Management Authority established under section 13 (1) of the National Drought Management Authority Act, 2016 shall be the secretariat of the Fund.

Secretariat of the Fund.

No. 4 of 2016.

(2) Subject to paragraph (1), the Board may designate the staff of the National Drought Management Authority to be the secretariat of the Fund or recruit staff of the Fund as are necessary for the proper discharge of the functions of the Fund.

(3) Where, the Board recruits staff under paragraph (2), the Board shall ensure that in the appointment of the staff—

- (a) is done competitively subject to the provisions of Article 234 (5) of the Constitution;
- (b) not more than two-thirds of the staff shall be of the same gender;
- (c) the regional and other diversity of the people of Kenya is taken into account; and
- (d) persons with disabilities are afforded adequate and equal opportunities.

(4) For the avoidance of doubt, the Secretariat of the Fund shall also comprise of the administrator of the Fund.

15. (1) The secretariat shall—

Functions of the secretariat.

- (a) be responsible for the day to day administration and management of the Fund;
- (b) develop a transparent and accountable financial internal control systems for the Fund;
- (c) prepare and submit for approval by the Board estimates of revenue and expenditure, annual work programmes and costs estimates, annual procurement plans and annual cash flow plans;
- (d) implement projects, programmes and coordinate with other national government ministries, county governments and non-state actors at the national and county level in the realization of the objectives and purpose of the Fund;
- (e) prepare statutory and management reports and submit them to the Board for approval;
- (f) monitor and provide reports to the Board, on a quarterly basis or as need arises, on efficiency and effectiveness of drought risk management supported by the Fund;
- (g) implement the decisions of the Board;
- (h) undertake any other duty as the Board may assign through a resolution

(2) In addition to the functions assigned under paragraph (1), the secretariat shall—

- (a) receive investment and contingency plans for review and recommendation to the Board for approval;
- (b) receive and review drought early warning information for early action;
- (c) propose to the Board the triggers for the funds flow to the various drought stages to be financed from the Fund;
- (d) propose to the Board the triggers for response plans for the activation of the response plans;
- (e) oversee projects and programmes implemented through financing of the Fund;
- (f) with the approval of the Board, establish prudent public financial management systems for the administration of the Fund;
- (g) coordinate monitoring and evaluation of projects financed from the Fund;
- (h) prepare regular communication messages regarding drought risk management with regard to the Fund; and
- (i) maintain proper records of the Fund.

16. The coordination mechanism for the Fund shall be through—

Coordination mechanism.

- (a) the National Drought and Food Security Steering Committee established under regulation 17;
- (b) the Inter-Governmental Technical Committee on Drought and Food Security established under regulation 18; and
- (c) the County Committee on Drought and Food Security established under regulation 19;
- (d) development partner engagement forums as may be determined by the Cabinet Secretary from time to time.

17. (1) There is established the National Drought and Food Security Steering Committee comprised of—

Establishment of the National Steering Committee.

- (a) the Deputy President who shall be the chairperson;
- (b) the cabinet secretaries responsible for—
 - (i) drought risk management;
 - (ii) devolution;
 - (iii) planning;
 - (iv) finance;
 - (v) water;
 - (vi) health;
 - (vii) education;

- (viii) defence
- (ix) national government coordination;
- (x) agriculture, livestock and fisheries;
- (xi) social protection;
- (xii) environment;
- (xiii) energy;
- (xiv) wildlife; and
- (xv) meteorology

(c) the chairperson, Council of Governors.

(2) The Chairperson, Council of Governors shall be the Vice-Chair of the National Steering Committee.

(3) The Cabinet Secretary responsible for matters relating to drought risk management shall be the Secretary of the Steering Committee.

(4) The functions of the National Steering Committee shall be to—

- (a) provide policy recommendations on drought response interventions;
- (b) provide leadership and oversight on drought and food security interventions during the alarm and emergency stages;
- (c) receive, consider and make decisions based on reports from the Inter-governmental Technical Committee; and
- (d) mobilize resources for drought response interventions during alarm and emergency stages.

(5) The National Drought and Food Security Steering Committee shall report to the Cabinet.

(6) The quorum at the meeting of the National Steering Committee shall be one-third of the members of the Committee, and decisions at a meeting of the Committee shall be by consensus.

(6) The Secretariat of the Fund shall keep proper records of the meetings of the National Steering Committee.

(7) The decisions of the National Steering Committee shall be communicated to the members of the Committee and relevant government agencies within fourteen days after the meeting.

18. (1) There is established the Inter-Governmental Technical Committee on Drought and Food Security comprised of—

- (a) the principal secretaries responsible for—
 - (i) drought risk management;

Establishment of the
Intergovernmental
Technical
Committee.

- (ii) devolution;
 - (iii) planning;
 - (iv) finance;
 - (v) water;
 - (vi) health;
 - (vii) education;
 - (viii) defence
 - (ix) national government coordination;
 - (x) agriculture and livestock;
 - (xi) social protection;
 - (xii) environment;
 - (xiii) energy;
 - (xiv) wildlife; and
 - (xv) meteorology
- (b) five nominees of the Council of Governors, who shall be county executive committee members responsible for matters relating to drought, water, health, agriculture and finance.
- (2) In making the nominations under paragraph (1) (b), the Council of Governors shall consider representation from drought prone areas.
- (3) The Inter-governmental Technical Committee shall be chaired by the Principal Secretary for matters relating to drought risk management.
- (4) The quorum at the meeting of the Intergovernmental Technical Committee shall be one-third of the members of the Committee, and decisions at a meeting of the Committee shall be by consensus.
- (5) The administrator of the Fund shall be the Secretary of the Inter-governmental Technical Committee.
- (6) The functions of the Inter-governmental Technical Committee shall be to—
- (a) prepare the agenda of the National Steering Committee;
 - (b) receive, consider and make appropriate recommendations to the national steering committee on the optimal drought response interventions;
 - (c) receive, consider and identify resources available in various ministries, state departments and agencies and county governments for drought interventions and make appropriate recommendations;

- (d) oversee the implementation of the decisions of the National Steering Committee;
- (e) receive, consider and make appropriate recommendations on intervention measures being undertaken by various government agencies, development partners, faith based organizations and other non-governmental organizations; and
- (f) mobilize resources towards the fulfilment of the objective of the Fund.

(7) The secretariat of the Fund shall keep proper records of the meetings of the Intergovernmental Technical Committee.

(8) The decisions of the Intergovernmental Technical Committee shall be communicated to the members of the Committee and relevant government agencies within fourteen days after the meeting.

19 (1) There is established the County Committee on Drought and Food Security comprised of—

Establishment of the
County Drought
Committee

- (a) the officer responsible for coordination of national government functions at the county level;
- (b) the national government officer responsible for drought risk management at the county level;
- (c) the national government officer responsible for education at the county level;
- (d) the national government officer responsible for social protection at the county level;
- (e) the county executive committee member responsible for drought risk management;
- (f) the county executive committee member responsible for planning;
- (g) the county executive committee member responsible for water;
- (h) the county executive committee member responsible for finance;
- (i) the county executive committee member responsible for health;
- (j) the county executive committee member responsible for agriculture, livestock and fisheries;
- (k) the county executive committee member responsible for early childhood education;
- (l) the county executive committee member responsible for social protection;
- (m) two representatives nominated by the caucus of faith based organizations involved in matters related to drought and food security at the county level;

- (n) two representatives of non-governmental organizations and community based organizations working on matters related to drought and food security in the respective county; and
- (o) two persons nominated by the Board to represent the marginalised areas who shall have knowledge on drought and food security in the respective county and shall be residents of that county.

(2) The officers specified under paragraphs (1) (b) to (l) may in writing nominate a representative to attend and participate in the meetings of the County Drought Committee on their behalf.

(3) The County Drought Committee shall be co-chaired by the Governor and the County Commissioner.

(4) The Secretariat of the Fund shall be the Secretariat to the County Drought Committee.

(5) The functions of the County Drought Committee shall be to—

- (a) consider drought and food security early warning information and make recommendation to the Board;
- (b) coordinate drought risk management plans and ensure their integration into the national and county planning and budgeting processes;
- (c) consider and recommend to the Board for approval projects to be financed by the Fund under the investments in resilience building and drought preparedness;
- (d) consider and recommend to the Board, for approval, drought response plans and appropriate interventions;
- (e) ensure projects recommended for funding under paragraph (c) and (d) are not duplicated;
- (f) coordinate and communicate drought interventions measures and share drought risk management information with the public;
- (g) provide recommendations to the Board to inform policy formulation and strategy of the Fund;
- (h) oversee the monitoring and evaluation of projects and programmes funded under the Fund;
- (i) oversee drought and food security interventions;
- (j) coordinate actors on drought risk management at the county level;
- (k) implement decisions of the National Steering Committee and the Inter-governmental Technical Committee;
- (l) consider and make recommendations on the level of government that should intervene on drought and food security matters;

(m) co-ordinate resource mobilization at the county level.

(6) The quorum at the meeting of the County Drought Committee shall be one-third of the members of the Committee, and decisions at a meeting of the Committee shall be by consensus.

(7) The County Drought Committee may co-opt upto a maximum of three experts in order to facilitate the Committee in making an informed decision.

(8) A person appointed under paragraph (1)(m), (n) and (o) shall cease to be a member of the County Drought Committee—

- (a) if the person resigns from office;
- (b) dies;
- (c) is absent from three consecutive meetings of the Committee without permission from the chairperson;
- (d) is convicted of an offence and sentenced to imprisonment for a term of more than six months without the option of a fine;
- (e) is removed from office by the vote of at least two thirds of the members of the Committee on any one or more of the following grounds—
 - (i) lack of integrity;
 - (ii) gross misconduct;
 - (iii) embezzlement of public funds;
 - (iv) physical or mental infirmity.

(9) Whenever a vacancy occurs in the County Drought Committee by reason of resignation, incapacitation or death of a member appointed pursuant to paragraph (1)(m) (n) and (o), then the vacancy shall be filled from the same category of persons where the vacancy has occurred.

(10) Members of the County Drought Committee shall be appointed by notice in the *Gazette* by the Cabinet Secretary responsible for matters relating to drought risk management.

(11) A member of the County Drought Committee appointed under paragraph 1(m) (n) and (o), other than *ex-officio* member, shall hold office for a term of three years renewable once.

(12) The Secretariat of the Fund shall keep proper records of the meetings of the County Drought Committee.

(13) The decisions of the County Drought Committee shall be communicated to the members of the Committee and relevant government agencies within fourteen days after the meeting.

(14) The secretariat shall prepare and submit reports on the activities of the County Drought Committee to the Board with a copy to the county executive committee responsible for matters relating to drought risk management.

(15) The Secretariat of the Fund shall keep proper records of the meetings of the County Drought Committee, which records shall be

shared within fourteen days after confirmation with the county committee members with a copy to the Board.

20. (1) The Committees established under regulations 17,18 and 19 and the Board shall mobilize resources through—

Resource mobilization.

- (a) engagement with the communities, development partners and private sector;
- (b) engagement with the global disaster risk and climate change funds or entities that finance drought risk management programmes;
- (c) development of bankable proposals for drought early warning, preparedness and resilience.

(2) Any engagement with the development partners, private sector or global funds shall be done within the framework specified by the Cabinet Secretary and shall be in line with the Kenya external resources mobilization policy.

21. (1) The National Government shall be responsible for policy formulation, setting norms and standards for drought risk management through public participation.

Standard setting and norms.

(2) The secretariat of the Fund shall consolidate various policies, norms and standards and disseminate them to national government agencies, counties and development partners to facilitate their implementation.

(3) County governments shall prepare their drought risk management plans and reports based on national policies, norms and standards set by the National Government including Guidelines which may be issued from time to time.

(4) The national norms and standards shall set sector specific quantifiable indicators for the outputs for each strategic objective, which shall form the basis of reporting on drought and food security for both national and county governments.

PART III—PROJECTS

22. The Fund may finance interventions in the following areas to complement existing government programmes, in accordance with the Guidelines under these Regulations —

Intervention areas.

- (a) water and sanitation;
- (b) agriculture, livestock and fisheries;
- (c) education;
- (d) health, sanitation and nutrition;
- (e) cash transfers scale ups;
- (f) conflict management and resolution; and
- (g) drought coordination.

23. The Fund shall not finance hazards which may include floods, epidemics, wild fires, terrorism and armed conflict.

Emergencies not handled by the Fund.

24. (1) The Secretariat of the Fund may, from time to time, request the Board to approve drought recovery interventions.

Drought recovery.

(2) Where the Board has approved drought recovery interventions to be undertaken by the Secretariat, the Secretariat shall prepare and submit monthly progress reports to the Board.

25. (1) The criteria for prioritising access to drought resilience and preparedness component funds shall be as follows—

Criteria for accessing drought resilience and preparedness component funds.

- (a) the projects shall be either aligned to national development priorities or be included in the county integrated development plan;
- (b) projects contributing significantly to sustainable development to enhance resilience of communities against drought and climate change risks;
- (c) evidence of community participation in drought risk reduction project identification;
- (d) projects sustainability framework after completion;
- (e) satisfy all statutory requirements relating to design and implementation of such projects;
- (f) proof that a county government shall contribute a per centum agreed under regulation 27 on co-financed projects;
- (g) proof that a faith based organization, non-governmental organization or community based organization shall contribute a per centum agreed under regulation 28 on co-financed projects; and
- (h) is supported by a recommendation of the County Drought Committee or the Secretariat of the Fund.

(2) The Secretariat shall submit to the Board for approval the scores of the projects evaluated against the criteria set out under paragraph (1).

26. (1) The secretariat of the Fund shall—

Project planning.

- (a) coordinate the development of community drought risk reduction plans;
- (b) receive, review and prioritise project proposals from the communities which are aligned to national development goals or county integrated development plan;
- (c) initiate project proposals to address drought and food insecurity and submit the proposals to the Board for approval;
- (d) prepare and submit prioritised projects to the County Drought Committees for review and make recommendations to the Board;

- (e) monitor implementation of approved projects and submit quarterly reports to the County Drought Committee and the Board.
- (f) evaluate and document approved completed projects and submit reports to the County Drought Committee and the Board.

(2) Any project proposals to be implemented by the Fund shall be approved by the Board prior to implementation.

(3) The project proposals under this regulation shall relate to resilience and preparedness stages of drought risk management.

27. (1) A project relating to a devolved function may be designed by the secretariat of the Fund or a county government or a national government agency.

Projects designed by the Fund, county governments or national government entities.

(2) The project designed under paragraph (1) shall be submitted to the Board, a county government or a national government agency for consideration and financing.

(3) Where the secretariat of the Fund has designed a project relating to a devolved function, the secretariat may engage a county government for co-financing.

(4) Where a project has been designed under paragraph (3), the county government shall contribute a per centum to be agreed between the county government and the Board in form of a matching grant, from time to time.

(5) Where a county government has accepted to co-finance a project under paragraph (4) that county government shall signify in writing to the administrator of the Fund not later than 31st January of each year.

(6) Where projects are financed under this regulation, the Secretariat of the Fund shall use that project to build the capacity of that county on drought risk management.

(7) The secretariat of the Fund shall enter into an inter-governmental agreement pursuant to Article 187 of the Constitution and the Intergovernmental Relations Act, 2012 with the respective county government for any project financed under this Regulation.

28. (1) The secretariat of the Fund in collaboration with a county government may design a project relating to a devolved function and submit it to a faith based organization or non-governmental organization or community based organization for consideration and co-financing.

Projects financed jointly with faith based organization or non-governmental organization or community based organization.

(2) Where a project is co-financed by a faith based organization or non-governmental organization or community based organization, such an institution shall contribute a per centum to be agreed between the organization and the Board.

(3) The Secretariat of the Fund shall enter into an inter-governmental agreement pursuant to Article 187 of the Constitution and the Intergovernmental Relations Act, 2012 with the respective county government for any project financed under this Regulation.

No. 2 of 2012

(4) The Secretariat of the Fund shall carry out joint monitoring and evaluation with a faith based organization or non-governmental organization or community based organization, as agreed between the parties in the memorandum of understanding for any project financed under this regulation.

29. (1) Pursuant to section 146 of the Public Finance Management Act, 2012, the Secretariat of the Fund may in collaboration with the respective county governments, prepare a project design relating to a devolved function as a joint infrastructure project to be financed by more than one county or a joint infrastructure project between one county and the Fund .

Joint infrastructure projects by counties.

No. 18 of 2012.

(2) Any projects designed under paragraph (1) shall be submitted to the Board for approval and after approval it shall be submitted to the respective county executive committee member responsible for matters relating to drought risk management for co-financing, with a copy to the County Governor.

(3) The Secretariat of the Fund shall coordinate meetings among the counties undertaking the joint infrastructure project.

(4) The Board shall enter into an inter-governmental agreement pursuant to Article 187 of the Constitution and the Intergovernmental Relations Act, 2012 with the respective county governments for any project financed under this Regulation.

No. 2 of 2012.

30. (1) The Secretariat of the Fund shall prepare a rapid assessment report for the affected county during alert stage or alarm stage as informed by drought early warning information for—

Drought response.

- (a) determining the resource requirements for alert, alarm or emergency stages of the drought;
- (b) proposing the agencies to be involved in responding to the drought and food security interventions to be financed by the Fund;
- (c) recommending the funds flow mechanism to the Board for approval which may include flow of funds to county governments or various agencies and the accountability framework by each agency to the Fund; or
- (d) liaising with the county governments or other agencies approved by the Board to undertake various response interventions in a timely manner.

(2) The Secretariat of the Fund shall receive sectoral reports from the relevant national government agencies to facilitate preparation of the drought and food security reports

(3) The Secretariat of the Fund shall prepare and submit drought and food security report to the Inter-governmental Technical Committee—

- (a) on a monthly basis and before the tenth day of the succeeding month during the alert stage; and

- (b) every fourteen days during the alarm and emergency stages, on receipt of the early warning information of the drought and food security.

(4) Where drought and food security response interventions require financial resources beyond the capital of this Fund, the Board shall submit a proposal to the National Steering Committee on the financing gap and a request to mobilise more resources to respond to drought and food insecurity.

31. To access drought response funds the Board shall consider the —

Rules to access drought response funds.

- (a) alert stage of drought cycle as per the Authority's drought phase classifications guided by vegetation condition index and other social economic indicators;
- (b) request received from County Drought Committees or the Secretariat of the Fund on drought response plans;
- (c) evidence of drought rapid assessment by the affected sectors based on early warning trigger indicators;
- (d) response plan based on drought rapid assessment reports and other drought risk secondary data;
- (e) recommendation by the county or national coordination structure;
- (f) procurement plans based on drought and food security response intervention measures; and
- (g) cash flow plans supporting the procurements plans on drought and food security response intervention measures.

32. (1) A community may at any time submit project proposals through the county government, national government agency, community based organization or faith based organization, to the Secretariat of the Fund.

Submission of project proposals.

(2) Project proposals received by the Secretariat of the Fund by thirtieth November of each year shall be reviewed and appropriate recommendations made by the County Drought Committee to the Board for financing from the Fund.

(3) Any project approved for financing by the Board, which has a co-financing arrangement shall be communicated to the relevant county government or agency co-financing that project by the thirtieth day of January each year for incorporation in their respective budgets.

(4) Any project submitted for approval under this regulation shall be identified through a drought risk management participatory process.

(5) The Secretariat of the Fund shall publish and publicise the list of approved projects by the Board for each financial year.

PART IV—FINANCIAL PROVISIONS

33. (1) The resources of the Fund shall be allocated to the various drought risk management components as follows—

Allocation of resources among drought risk management components

- (a) resilience and preparedness shall be allocated up to fifty per centum (50%) of the total budget of the Fund in each financial year;
- (b) response interventions shall be allocated up to forty per centum (40%) of the total budget of the Fund in each financial year; and
- (c) recovery interventions shall be allocated up to five per centum (5%) of the total budget to be funded every financial year.

(2) Where no recovery interventions are required under paragraph (1) (c), the amount of money thereof may be allocated to either resilience and preparedness or response interventions.

(3) Notwithstanding paragraphs (1) and (2), at least twenty five per cent (25%) of the total Government of Kenya funds allocated to response are earmarked for cash transfers through the National Safety Net Programme.

(4) Despite paragraph (1), the National Steering Committee may increase the proportion of the Fund allocated to drought response.

(5) Despite paragraphs (1), (2), (3) and (4), a grant or donation to the Fund may be earmarked for the purpose agreed between the government and the development partner in line with the objectives of the Fund.

34. (1) The Board shall, from time to time, formulate guidelines for disbursements of funds.

Procedures of disbursement and accountability.

(2) Where the Board intends to use the county governments or faith based organizations, non-governmental organizations or community based organizations, it shall ensure that the guidelines for disbursement of funds to the county government or institution have clear roles and responsibilities for reporting and accounting of the resources disbursed to the county governments or the institution.

35. (1) The Board shall, on a quarterly basis, submit a report to the Cabinet Secretary responsible for matters relating to drought affairs with a copy to the National Treasury and the National Steering Committee, detailing—

Quarterly reports on projects and disbursements.

- (a) a summary of the project proposals approved by the Board in the preceding quarter as recommended by the County Drought Committee or the Secretariat of the Fund and indicating the funding status of such projects, if any;
- (b) a summary of the status of disbursements from the Fund to the respective county governments or any agency involved in implementation of any projects financed from the Fund;

- (c) a summary of the status of disbursements of funds to the various projects and implementation progress;
- (d) a summary of outputs and outcomes of each project, where applicable; and
- (e) any restriction imposed on a county government or any agency involved in the implementation of the projects of the Fund.

(2) The Board shall prepare and submit quarterly monitoring and evaluation reports to the Cabinet Secretary responsible for matters relating to drought affairs in line with the guidelines issued by the Board from time to time.

36. (1) All bank accounts of the Fund shall be opened in accordance with the provisions of section 28 of the Public Finance Management Act, 2012 and the Regulations thereof.

Fund bank accounts.

(2) Any bank account of the Fund shall be opened upon approval of the Board and the National Treasury and shall be in the name of the Fund and the name of the county to which it relates.

(3) The main Fund bank account shall be opened and maintained at the Central Bank of Kenya.

(4) The signatories to the main Fund account under paragraph (3) shall be the administrator of the Fund and at least two other persons authorized by the Board from amongst the staff of the Secretariat of the Fund.

(5) The signing instructions shall be such that the signature of the administrator of the Fund shall be mandatory on all payment cheques or electronic instructions intended for actual release of money from the main Fund account, plus any one of the other two Fund account signatories.

(6) The signatories of any other bank accounts shall be at least two, one of whom shall be mandatory and all the signatories shall be approved by the Board.

(7) The signing instructions of any other bank account of the Fund under paragraph (6) shall be such that the signature of the technical officer designated by the administrator of the Fund, shall be mandatory on all payment cheques or electronic instructions intended for actual release of money from that account, plus any one of the other bank account signatories of that account designated as such.

(8) Every payment or instruction for payment out of the respective bank account shall be fully supported in line with the provisions of the Public Finance Management Act, 2012 and the Regulations thereof.

No. 18 of 2012.

37. (1) An accurate record of all disbursements from the Fund Account for financing approved projects shall be kept and updated every month by the Secretariat of the Fund.

Record of disbursements to be kept.

(2) The administrator of the Fund shall submit to the Board, quarterly and annual reports on all projects approved and financed from the Fund.

38. (1) The Board shall prepare financial and non-financial reports in accordance with the provisions of the Public Finance Management Act, 2012 and as may be prescribed from time to time by the Public Sector Accounting Standards Board.

Financial reporting.

(2) The Board shall prepare an annual general performance report of the Fund to be submitted together with the report under paragraph (1).

(3) The annual financial and non-financial statements prepared under paragraph (1) shall be submitted to the Auditor-General for audit in accordance with the Public Audit Act, 2015.

No 34 of 2015.

39. (1) The Board shall prepare a management report on a monthly basis, which report shall contain details on—

Management reports.

- (a) the severity of the drought prevailing in the country and by county;
- (b) the status report on drought interventions measures undertaken during the preceding month and the cumulative drought period;
- (c) status report on county drought and food security intervention measures undertaken during the preceding month and the cumulative drought period;
- (d) the resources required for drought risk management under each of the following stages—
 - (i) resilience and preparedness stage, if any;
 - (ii) response stage; or
 - (iii) recovery stage.

(2) The report prepared under paragraph (1) shall be submitted to the Cabinet Secretary for matters relating to drought risk management with a copy to the National Steering Committee and the Chairperson Council of Governors, with clear recommendations from the Board by the tenth day of the succeeding month.

(3) A county government experiencing drought and food insecurity shall by the fifth day of each month submit a report to the secretariat of the Fund for review and the making of recommendations by the County Drought Committee.

(4) The report under paragraph (3) shall contain the following details—

- (a) the county drought response plan;
- (b) interventions made by the county to mitigate against drought impacts;
- (c) interventions made in partnership with a county government against drought impacts by development partners;

- (d) resources available by the county government and development partners partnering with the county government to finance the response plan; and
- (e) financing gap per sector, if any.

PART V—MISCELLANEOUS PROVISIONS

40. Subject to the provisions of the Public Finance Management Act, 2012, any existing relevant legislation and existing Government Financial Regulations and Procedures shall apply in the administration of the Fund.

Application of Government Financial Regulations and Procedures. No. 18 of 2012.

41. (1) The administration costs for running the Fund shall not be more than three per centum (3%) of the total budgetary provision for the Fund.

Costs of running the Fund.

(2) Despite the provisions under paragraph (1), each year, three (3%) per centum of the annual budget of the Fund shall be set aside for the Fund Secretariat, of which not more than two (2%) per centum shall be allocated to all County Secretariat's and Committees expenditure in accordance with the set criterion by the Board.

42. (1) Any person who misappropriates any funds or assets from the Fund, or assists or causes any person to misappropriate or apply the funds otherwise than in the manner provided for in the Act and these Regulations, commits an offence and shall, upon conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings or to both.

Offence and penalty.

(2) In addition to the penalty prescribed under paragraph (1) and subject to the existing relevant laws, the Court may order for the recovery of the monies or assets acquired as a result of the commission of the offence thereof.

43. The Board shall through participatory process and in consultation with the Cabinet Secretary, develop guidelines for the proper management of the Fund.

Guidelines on the Fund.

44. (1) In the event of winding up of the Fund, the net cash balances shall be transferred to the National Exchequer Account while other assets of the Fund shall be transferred to the Ministry for the time being responsible for matters relating to drought.

Winding-up of the Fund.

(2) The term of the Fund shall be for an initial period of ten (10) years, beyond which the approval of the Cabinet and Parliament shall be sought.

Made on the 16th February, 2021.

UKUR YATANI,
Cabinet Secretary for the National Treasury
and Planning.

(LN. 17 of 2021)

MINUTES OF THE 22ND SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD VIRTUALLY ON WEDNESDAY, 12TH MAY, 2021 AT 10.30 A.M.

PRESENT

1. **The Hon. Kassait Kamket, M.P.** - **Chairperson**
2. **The Hon. Muriuki Njagagua, M.P.** - **Vice Chairperson**
3. The Hon. Waihenya Ndirangu, M.P.
4. The Hon. Cecily Mbarire, MGH, M.P.
5. The Hon. Kamoti Mwamkale, M.P.
6. The Hon. Ronald Tonui, M.P.
7. The Hon. Daniel Maanzo, M.P.
8. The Hon. Martha Wangari, M.P.
9. The Hon. Gideon Mulyungi, M.P.
10. The Hon. Abdi Tepo, M.P.
11. The Hon. Edith Nyenze, M.P.
12. The Hon. George Murugara, M.P.
13. The Hon. Jennifer Shamalla, M.P.
14. The Hon. Munene Wambugu, M.P.
15. The Hon. Robert Gichimu, M.P.
16. The Hon. Sammy Seroney, M.P.

ABSENT WITH APOLOGY

1. The Hon. Alice Wahome, M.P.
2. The Hon. William Cheptumo, M.P.
3. The Hon. Robert Mbui, M.P.
4. The Hon. Timothy Wanyonyi, M.P.
5. The Hon. (Dr.) Wilberforce Oundo, M.P.
6. The Hon. Patrick Mariru, M.P.
7. The Hon. Nicholas Tindi Mwale, M.P.

IN-ATTENDANCE

National Assembly Secretariat

1. Ms. Susan Maritim - Senior Clerk Assistant
2. Mr. Mohamed Jimale - Clerk Assistant II
3. Mr. Wilson Dima Dima - Principal Legal Counsel
4. Ms. Sophie Otieno - Senior Legal Counsel (Litigation & Compliance)
5. Mr. Charles Ayari - Superintendent of Electronics (Audio)
6. Ms. Peris Kaburi - Serjeant-at-Arms

MIN.NO. /NA/CDL/2021/111 PRAYERS AND PRELIMINARIES

The Chairman the meeting to order at half past ten o'clock with Prayer by Hon Martha Wangari, MP.

MIN.NO. /NA/CDL/2021/112 ADOPTION OF THE AGENDA

The Committee unanimously adopted the Agenda as presented having been proposed by Hon. Muriuki Njagagua, MP and seconded by Hon. Martha Wangari, MP.

MIN.NO. /NA/CDL/2021/113 CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

Minutes of the previous sittings were read and confirmed as follows –

- i. Minutes of the 20th Sitting held on 27th April, 2021 were confirmed as a true record of the proceedings having been proposed by Hon. George Murugara, M.P. and seconded by Hon. Jennifer Shamalla, M.P.
- ii. Minutes of the 21st Sitting held on 4th May, 2021 were confirmed as a true record of the proceedings having been proposed by Hon. Muriuki Njagagua, M.P. and seconded by Hon, Cecily Mbarire, MGH,MP.

MIN.NO. /NA/CDL/2021/114 MATTERS ARISING

No matter arose.

MIN.NO. /NA/CDL/2021/115 ADOPTION OF THE PUBLIC FINANCE MANAGEMENT (NATIONAL DROUGHT EMERGENCY FUND) REGULATIONS, 2021

The Committee Members unanimously adopted the Report on the Consideration of the Public Finance Management (National Drought Emergency Fund) Regulations, 2021 (Legal Notice No. of 27 of 2021) as proposed and seconded by Hon. Martha Wangari, M.P and Hon. Gideon Mulyungi, M.P., respectively.

MIN.NO. /NA/CDL/2021/116 CONSIDERATION OF EXEMPTION FROM INCOME TAX FOR JAPANESE COMPANIES, CONSULTANTS & EMPLOYEES (L.N. NO. 15 OF 2021)

The Committee Members unanimously adopted the Report on the Consideration of the Exemption From Income Tax For Japanese Companies, Consultants & Employees (L.N. No. 15 of 2021) as proposed and seconded by Hon. Muriuki Njagagua, M.P and Hon. George Murugara, M.P., respectively.

CONSIDERATION OF EXEMPTION FROM INCOME TAX BY AN AIRLINE IN WHICH THE GOVERNMENT OF KENYA OWNS AT LEAST 45% OF ITS SHARES AND ITS SUBSIDIARIES (L.N. NO. 27 OF 2021)

- i. The Directorate of Litigation and Compliance Services informed the Committee about Constitutional Petitions No. E001 of 2021 and E005 OF 2021 filed in the High Court of Kenya in Machakos in respect to the validity and constitutionality of section 12(D) of the Income Tax Act (Cap 470).
- ii. The Petitions are instituted by separate Petitioners namely: registered officials of the Isinya Sub-County Bar Owners Association being the Petitioners of Petition E005 of 2021 and the Kenya Association of Manufacturers, the Retail Trade Association of Kenya and the Kenya Flower Council being the Petitioners in petition No. E001 of 2021 (formally Pet. No. E079 of 2021)
- iii. The National Assembly, the Commissioner General of the Kenya Revenue Authority and the Attorney General are joined in both Petitions as 1st, 2nd and 3rd Respondents, respectively. The Institute of Certified Public Accountants, the Law Society of Kenya and Robert Kamwara are joined as interested parties in the matters.
- iv. The Petitioners contend that the amendments introduced into the Income Tax Act (Cap 470) in 2020, through the Tax Laws (Amendment) (No. 2) Act, 2020 introduces the minimum tax chargeable at the rate of 1% of the gross revenue, does not amount to Value Added Tax, custom duties nor excise tax and should therefore not be included in the Income Tax Act. The Petitioners, therefore, argue that the imposition of this tax is unlawful, unconstitutional and unreasonable, therefore should be declared as such by the constitutional court.
- v. The Committee was further informed that the Court issued Conservatory Orders in an interlocutory ruling, pending the hearing and determination of the matter. The Ruling issued restrains the Commissioner General of Kenya Revenue Authority from implementing section 12(D) of the Income Tax Act which is the subject matter of Legal Notice No. 27 of 2021, under consideration by the Committee.

Way Forward

On the matter of Standing Order No. 89 on sub judice and its implications on considering the matter in view of the court cases, the Committee in the last meeting suspended further consideration of the matter owing to the fact that the National Assembly is party to the suit, being

the 1st Respondent and the conservatory orders issued being at the core and touches on the substantive aspect of the suit.

However, a further legal opinion presented to the Committee by the Directorate of Litigation and Compliance, who are representing the National Assembly in the matter in court, indicated that there would be no prejudice suffered by the National Assembly if the Committee proceeded to consider the matter, despite the conservatory orders issued by the court.

The Committee, therefore, proceeded to consider the said Legal Notice and made its determination.

Committee Observations

i. Statutory Timelines

Legal Notice No. 27 of 2021 was published on 17th March, 2021, submitted to the Clerk of the National Assembly on 30th March, 2021 and laid before the House on 28th April, 2021 in accordance with section 11 of the Statutory Instruments Act, 2013. This was done without unreasonable delay as contemplated in section 13 (2) of the Income Tax Act.

ii. Public Participation

On public participation, the regulation making authority informed the Committee that after the enactment of the Finance Act, 2020 that introduced minimum tax, the National Treasury received various presentations from stakeholders on the impact of the new tax on several classes of businesses including public entities that are facing challenges. The Committee was satisfied with this justification.

iii. Regulatory Impact Statement

The Exemption does not require a Regulatory Impact Statement within the meaning of sections 6, 7 and 8 of the Statutory Instruments Act as it is not likely to impose significant costs on the community.

Committee Recommendation

Having examined Legal Notice No. 27 of 2021 in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (Cap. 2), the Income Tax Act (Cap 470) and the Statutory Instruments Act (No. 23 of 2013), the Committee resolved to **approve** it as proposed by Hon. George Murugara, M.P and seconded by Hon. Munene Wambugu, M.P.

MIN.NO. /NA/CDL/2021/118 ANY OTHER BUSINESS

- 1) **Consultative retreat with regulation making authorities - Thursday, 27th May to Monday, 31st May, 2021, Diani:** The Committee was informed that logistical arrangements for the retreat are on course and Members would be updated on the progress accordingly.
- 2) **Foreign travel:** The secretariat reported that progress on foreign travel would be availed in the next meeting.

MIN.NO. /NA/CDL/2021/119 ADJOURNMENT

There being no other meeting, the meeting was adjourned at 11.30 a.m. The next meeting will be called on notice.

Signed:..........

Date.....13/5/20.....

HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)

MINUTES OF THE 21ST SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD VIRTUALLY ON TUESDAY, 4TH MAY, 2021 AT 11.50 A.M.

PRESENT

- 1) **The Hon. Kassait Kamket, M.P.** - **Chairperson**
- 2) **The Hon. Muriuki Njagagua, M.P.** - **Vice Chairperson**
- 3) The Hon. Alice Wahome, M.P.
- 4) The Hon. Cecily Mbarire, MGH, M.P.
- 5) The Hon. Kamoti Mwamkale, M.P.
- 6) The Hon. Daniel Maanzo, M.P.
- 7) The Hon. Ronald Tonui, M.P.
- 8) The Hon. Cecily Mbarire, MGH, M.P.
- 9) The Hon. Alice Wahome, M.P.
- 10) The Hon. Daniel Maanzo, M.P.
- 11) The Hon. Abdi Tepo, M.P.
- 12) The Hon. Edith Nyenze, M.P.
- 13) The Hon. George Murugara, M.P.
- 14) The Hon. Jennifer Shamalla, M.P.
- 15) The Hon. Munene Wambugu, M.P.
- 16) The Hon. Patrick Mariru, M.P.
- 17) The Hon. Robert Gichimu, M.P.
- 18) The Hon. Sammy Seroney, M.P.

ABSENT WITH APOLOGY

- 1) The Hon. Waihenya Ndirangu, M.P.
- 2) The Hon. William Cheptumo, M.P.
- 3) The Hon. Martha Wangari, M.P.
- 4) The Hon. Robert Mbui, M.P.
- 5) The Hon. Timothy Wanyonyi, M.P.
- 6) The Hon. (Dr.) Wilberforce Oundo, M.P.
- 7) The Hon. Gideon Mulyungi, M.P.
- 8) The Hon. Nicholas Tindi Mwale, M.P.

IN-ATTENDANCE

National Assembly Secretariat

- 1) Ms. Susan Maritim - Senior Clerk Assistant
- 2) Mr. Mohamed Jimale - Clerk Assistant II
- 3) Mr. Wilson Dima Dima - Principal Legal Counsel
- 4) Mr. Anthony Wamae - Serjeant-at-Arms
- 5) Mr. Charles Ayari - Superintendent of Electronics (Audio)

MIN.NO. /NA/CDL/2021/103 PRAYERS AND PRELIMINARIES

The Chairman the meeting to order at fifty minutes past eleven o'clock with Prayer.

MIN.NO. /NA/CDL/2021/104 ADOPTION OF THE AGENDA

The Committee unanimously adopted the Agenda as presented having been proposed by Hon. Abdi Tepo, MP and seconded by Hon. Edith Nyenze, MP.

MIN.NO. /NA/CDL/2021/105 CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

Confirmation of Minutes of the previous sitting was deferred.

MIN.NO. /NA/CDL/2021/10/6 CONSIDERATION OF THE PUBLIC FINANCE MANAGEMENT (DROUGHT MANAGEMENT EMERGENCY FUND) REGULATIONS, 2021

The Committee was informed that the Public Finance Management (National Drought Emergency Fund) Regulations, 2021, was made by the Cabinet Secretary for National Treasury and Planning pursuant to Sections 24(4) of the Public Finance Management Act, (*No. 18 of 2012*) and was published in the gazette *vide* Legal Notice No.27 of 2021.

Overview of the Regulations

- 1) Part I (Preliminaries) provides for citation and interpretation.
- 2) Regulation 3 establishes the National Drought Emergency Fund.
- 3) Capital (Regulation 4): The initial capital of the Fund is Kshs. 2 billion appropriated by Parliament as provided for in Regulation 4. The Fund will also be financed through annual appropriations by the National Assembly and may include grants, donations and contributions from well-wishers including donors and the private sector.
- 4) Oversight Board (Regulation 9): The Board of the National Drought Management Authority established under section 18 (1) of the National Drought Management Authority Act, 2016 will oversight the administration of the Fund. The Functions of the Board are specified in Regulation 9.
- 5) The Secretariat (Regulation 14): The Secretariat of the Fund is the National Drought Management Authority established under section 13 (1) of the National Drought Management Authority Act, 2016 as reiterated under Regulation 14.
- 6) The National Drought and Food Security Steering Committee (Regulation 17): Regulation 17 establishes the National Drought and Food Security Steering Committee chaired by the Deputy President, deputised by the Chairperson of the Council of Governors. Other Members of the Committee include cabinet secretaries responsible for drought risk management, devolution, planning, finance, water, health, education, defence, national government coordination, agriculture, livestock and fisheries, social protection,

environment, energy, wildlife and meteorology.

- 7) The Cabinet Secretary responsible for drought risk management is the Secretary to the Committee.
- 8) The functions of the Steering Committee are as follows –
- 9) provide policy recommendations on drought response interventions;
- 10) provide leadership and oversight on drought and food security interventions during the alarm and emergency stages;
- 11) receive, consider and make decisions based on reports from the Inter-Governmental Technical Committee; and
- 12) mobilise resources for drought response interventions during alarm and emergency stages.
- 13) The Steering Committee reports to the Cabinet.
- 14) Inter-Governmental Technical Committee on Drought and Food Security (Regulation 18): the Inter-governmental Technical Committee comprises of principal secretaries responsible for drought risk management, devolution, planning, finance, water, health, education, defence, national government coordination, agriculture, livestock and fisheries, social protection, environment, energy, wildlife and meteorology. It also includes five (5) nominees of the Council of Governors, being county executive committee (CEC) members responsible for matters drought, water, health, agriculture and finance, preferably from drought-prone areas. The Technical Committee will be chaired by the Principal Secretary for matters relating to drought risk management. The Secretary to the Committee is the Administrator of the Fund.
- 15) County Drought Committee (Regulation 19): Each drought-prone County will establish a County Drought Committee which will be co-chaired by the Governor and the County Commissioner. It will comprise of various officers from both National and County Government, on matters responsible for drought risk management, planning, finance, water etc. The Regulations also establish the County Drought Committee the regulations have assigned the Cabinet Secretary / National Treasury and Planning the responsibility to prescribe a framework for consultation with development partners;
- 16) The Regulations also provide for the criteria for project identification, submission of project proposals, allocation of funds among various components of the drought risk management to facilitate posterity of the Fund and where necessary, co-financing by county governments and non-state actors.
- 17) The Regulations further provide for –
 - i. oversight by Parliament through annual reporting to the Auditor General and quarterly reporting on projects financed by the Fund,
 - ii. maintenance of proper records in the management and administration of the Fund

- including reporting requirements to comply with the provisions of the Public Finance Management Act, 2012;
- iii. provides for the administrative costs of running the Fund at a maximum of five per centum (5%);
 - iv. offences and penalty of misappropriation of the Fund as provided for under Section 199 of the Public Finance Management Act; and
 - v. procedure for winding-up of the Fund.

Conferring with the Regulation Making Authority

The Committee held a republication scrutiny meeting with the National Treasury & Planning on the 1st February, 2021 in Mombasa, in which the following concerns were raised:

- 1) The Committee observed that in most instances, Members of Parliament are often among the first people to respond in times of crises. However, the Regulations are silent on the place and role of the members of Parliament.
- 2) Under Regulation 20 on resource mobilization, the Committee inquired about the justification for the allocation of resources to the affected areas in the country.
- 3) It was noted that there were drafting errors contrary to section 13(m) of the Statutory Instruments Act relating to numbering of Regulation 20 and Reg.21 that the Ministry was to attend to before publication.
- 4) That Regulation 23 deals with emergencies not handled by the Fund which were not clearly defined in Regulation 2.
- 5) The Committee sought clarity on why certain ministries such as the Ministry of Energy and the Ministry of Environment and Natural Resources, were excluded as stakeholders.
- 6) It was the view of the Committee that there is no clear outline of operationalization of the Fund and more so accountability of the management of the Funds in order to curb improper management of public finances by the persons in charge.
- 7) It was brought to the attention of the Committee that Counties that are prone to drought have been identified and will benefit from the proposed Fund.

Committee Observations

The Committee made the following observations –

1) Statutory Timelines

The Regulations were published in the gazette on 5th March, 2021, vide Legal Notice No. 27 of 2021, submitted to the Clerk of the National Assembly on 17th March, 2021 and laid in the House on 23rd March, 2021 being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act.

2) Consultation / Public participation

Articles 10 and 118 of the Constitution, section 5, 5A and the Schedule to the Statutory Instruments Act, read together with Standing Order 210 requires the regulation-making authority to conduct public participation and sufficient consultation with the stakeholders and persons likely to be affected by the Regulations.

During consultations with the regulation making authority, the National Treasury jointly with the Ministry of Devolution and ASAL demonstrated to the Committee that extensive consultations were undertaken during preparation of the Regulations. Various key stakeholders including County Governments, line ministries, development partners among others were consulted and their input taken into account before finalization of the Regulations.

The Ministry submitted an Explanatory Memorandum with a schedule of persons who appeared in various forums to give their input to the draft Regulations.

Committee Resolution

Having examined the Public Finance Management (Drought Management Emergency Fund) Regulations, 2021 in line with the Constitution of Kenya, the Interpretations and General Provisions Act (Cap 2), the Public Finance Act (No 18 of 2012), the National Drought Management Authority Act (No. 4 of 2016) and the Statutory Instruments Act (No 23 of 2013), the Committee resolved to **approve** them as proposed by Hon. Alice Wahome, M.P. and seconded by Hon. Abdi Tepo, M.P.

MIN.NO. /NA/CDL/2021/107

CONSIDERATION OF EXEMPTION FROM INCOME TAX FOR JAPANESE COMPANIES, CONSULTANTS & EMPLOYEES (L.N. NO. 15 OF 2021)

The Committee was informed that section 13(2) of the Income Tax Act (Cap 470) mandates the Cabinet Secretary, by notice in the Gazette, to provide that any income or class of income which accrued in or was derived from Kenya shall be exempt from tax to the extent specified in such notice and that any such exemption shall cease to have effect either generally or to the extent specified in the notice. Further, that where the Cabinet Secretary issues such a notice it has to be laid before the National Assembly without unreasonable delay.

The Committee conferred with the Cabinet Secretary, National Treasury & Planning on 15th April, 2021 whereby he briefed the Committee on the contents of the Legal Notice No. 15 of 2021 being the various agreements signed between the Government of Kenya and the Government of Japan.

The said Legal Notice seeks to exempt from income tax, the Japanese consultants, Japanese companies and Japanese employees involved in the implementation of the projects listed in the second column of the Schedule to the Notice.

The Cabinet Secretary then reiterated that the overall benefits derived from the effective and efficient implementation of the projects outweigh the taxes foregone and that the income from the jobs created from these projects and incomes derived from the expenditure on the projects generate tax revenue that is far above the tax foregone as a result of the exemptions.

Committee Observations

1. Statutory Timelines

Legal Notice No. 15 of 2021 was published on 26th February 2021, submitted to the Clerk of the National Assembly on 9th March, 2021 and laid before the House on 23rd March, 2021 in accordance with section 11 of the Statutory Instruments Act, 2013. This was done without unreasonable delay as contemplated in section 13 (2) of the Income Tax Act.

The Act also provides that if a resolution is passed by the Assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice.

The Notice was laid in the House on the 23rd March, 2021 and the House was on recess where the twenty day statutory timeline would lapse on the 18th May, 2021.

The House has to pronounce itself within the statutory timelines and if the notice expressly approved or [is not annulled] then it shall be deemed to have been impliedly approved.

2. Public Participation

The Ministry submitted both before the Committee and in its documentation forwarded to the National Assembly that the Legal Notice is an understanding between the two Governments and that public participation may, therefore, not apply.

Having considered the above averment, the Committee subjected the Notice to the test specified in the Statutory Instruments Act, 2013, in respect thereto and noted that –

Section 13(2) does allow the Cabinet Secretary to exempt certain activities from taxation, save that if he so exempts then the Notice must be published in the Gazette (for the public to know) without delay and that it must be submitted to the National Assembly.

It may, therefore, not be a statutory instrument within section 2 of the Statutory Instruments Act, 2013 and may, therefore, not be subjected to public participation in the manner contemplated in sections 5 and 5A of the SI Act.

Committee Resolution

Having considered the Legal Notice No 15 of 2021, relating to the Exemption from Income Tax of the Japanese Companies, Japanese Consultants and Japanese Employees involved in the implementation of the projects listed in the second column of the Schedule to the Notice, the Committee resolved to **approve** it as proposed by Hon. Abdi Tepo, M.P and seconded by Hon. Kamoti Mwamkale, M.P.

MIN.NO. /NA/CDL/2021/108

CONSIDERATION OF EXEMPTION FROM INCOME TAX BY AN AIRLINE IN WHICH THE GOVERNMENT OF KENYA OWNS AT LEAST 45% OF ITS SHARES AND ITS SUBSIDIARIES (L.N. NO. 27 OF 2021)

The attention of the Committee was drawn to a case filed in High Court of Kenya at Machakos in respect to the validity and constitutionality of section 12(D) of the Income Tax Act as amended in **Constitutional Petition No. E005 of 2021** and in which the National Assembly is the first Respondent sued with the Commissioner General of Kenya Revenue Authority and the Attorney General.

The Court issued Conservatory Orders in an interlocutory ruling, pending the hearing and determination of the matter. The Ruling issued restrains the Commissioner General of Kenya Revenue Authority from implementing section 12(D) of the Income Tax Act which is the subject matter of Legal Notice No 27 of 2021, currently under consideration by the Committee.

The Committee was further informed that National Assembly is party to the suit, being the first respondent and that the conservatory orders so issued, is at the core and touches on the substantive aspect of the suit.

Way Forward

As result of the aforementioned matter, consideration of the Exemption from Income Tax by an Airline in which the Government of Kenya owns at Least 45% of its shares and its subsidiaries (*L.N. No. 27 of 2021*) was further **deferred** owing to the fact that the Committee could not make any determination on the matter of *sub judice*, in which the National Assembly is party to the suit.

MIN.NO. /NA/CDL/2021/109

ANY OTHER BUSINESS

Consultative retreat with regulation making authorities: The Committee resolved to undertake the retreat with various regulation making authorities including the Public Service Commission and the National Treasury & Planning from Thursday, 27th May to Monday, 31st May, 2021 in Mombasa County.

MIN.NO. /NA/CDL/2021/110

ADJOURNMENT

The meeting was adjourned at 12.40 p.m. until Wednesday, 12th May, 2021 at 10.00 a.m.

Signed:.....

Date.....12/5/21.....

HON. KASSAIT KAMKET, M.P.

(CHAIRPERSON)

MINUTES OF THE 20TH SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD VIRTUALLY ON TUESDAY, 27TH APRIL, 2021 AT 10.00 A.M.

PRESENT

1. The Hon. Muriuki Njagagua, M.P. - Vice Chairperson (Chaired meeting)
2. The Hon. Waihenya Ndirangu, M.P.
3. The Hon. Cecily Mbarire, MGH, M.P.
4. The Hon. Waihenya Ndirangu, M.P.
5. The Hon. Alice Wahome, M.P.
6. The Hon. Daniel Maanzo, M.P.
7. The Hon. Martha Wangari, M.P.
8. The Hon. Ronald Tonui, M.P.
9. The Hon. Timothy Wanyonyi, M.P.
10. The Hon. (Dr.) Wilberforce Oundo, M.P.
11. The Hon. Patrick Mariru, M.P.
12. The Hon. Abdi Tepo, M.P.
13. The Hon. Edith Nyenze, M.P.
14. The Hon. George Murugara, M.P.
15. The Hon. Munene Wambugu, M.P.
16. The Hon. Robert Gichimu, M.P.

ABSENT WITH APOLOGY

1. The Hon. Kassait Kamket, M.P. - Chairperson
2. The Hon. William Cheptumo, M.P.
3. The Hon. Kamoti Mwamkale, M.P.
4. The Hon. Jennifer Shamalla, M.P.
5. The Hon. Robert Mbui, M.P.
6. The Hon. Gideon Mulyungi, M.P.
7. The Hon. Sammy Seroney, M.P.
8. The Hon. Nicholas Tindi Mwale, M.P.

IN-ATTENDANCE

National Assembly Secretariat

- 1) Ms. Susan Maritim - Senior Clerk Assistant
- 2) Mr. Mohamed Jimale - Clerk Assistant II
- 3) Mr. Wilson Dima Dima - Principal Legal Counsel
- 4) Mr. Anthony Wamae - Serjeant-at-Arms
- 5) Mr. Charles Ayari - Superintendent of Electronics (Audio)
- 6) Mr. Thomas Ogwel - Fiscal Analyst

MIN.NO. /NA/CDL/2021/093 PRAYERS AND PRELIMINARIES

The meeting commenced at 10.15 a.m. with the Prayers and preliminary remarks by the Vice Chairman.

MIN.NO. /NA/CDL/2021/094 ADOPTION OF THE AGENDA

The Committee unanimously adopted the Agenda as presented having been proposed by Hon. Abdi Tepo, MP and seconded by Hon. Edith Nyenze, MP.

MIN.NO. /NA/CDL/2021/095 CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

Minutes of the previous sittings were read and confirmed as follows –

Minutes of the 19th Sitting held on 15th April, 2021 were confirmed as a true record of the proceedings having been proposed by Hon. Patrick Mariru, M.P. and seconded by Hon. George Murugara, M.P.

MIN.NO. /NA/CDL/2021/096 MATTERS ARISING

Under **MIN.NO. /NA/CDL/2021/089**, the Committee was informed that the National Treasury was yet submit the documents and information requested regarding the consideration of Legal Notices 15 and 27 of 2021. The information was to be submitted by close of business on 27th April, 2021.

MIN.NO. /NA/CDL/2021/097 CONSIDERATION OF EXEMPTION FROM INCOME TAX FOR JAPANESE COMPANIES, CONSULTANTS & EMPLOYEES (L.N. NO. 15 OF 2021)

Consideration of the Exemption from Income Tax for Japanese Companies, Consultants & Employees (L.N. No. 15 of 2021) was deferred to the next meeting to allow for submission of additional documentation from the regulation making authority.

MIN.NO. /NA/CDL/2021/098 CONSIDERATION OF EXEMPTION FROM INCOME TAX BY AN AIRLINE IN WHICH THE GOVERNMENT OF KENYA OWNS AT LEAST 45% OF ITS SHARES AND ITS SUBSIDIARIES (L.N. NO. 27 OF 2021)

Consideration of the Exemption from Income Tax by an Airline in which the Government of Kenya owns at Least 45% of its shares and its subsidiaries (L.N. No. 27 of 2021) was deferred to the next meeting to allow for submission of additional documentation from the regulation making authority.

MIN.NO. /NA/CDL/2021/099

**CONSIDERATION OF THE PUBLIC
FINANCE MANAGEMENT (DROUGHT
MANAGEMENT EMERGENCY FUND)
REGULATIONS, 2021**

Consideration of the Public Finance Management (Drought Management Emergency Fund) Regulations, 2021 was also deferred to the next meeting.

MIN.NO. /NA/CDL/2021/100

**CONSIDERATION OF THE STATEMENT
REQUESTED BY HON. ABDULSWAMAD
NASSIR, MP ON PETROLEUM PRICING
PARAMETERS**

The Vice Chairperson informed the Committee that pursuant to Standing Order 218(2), the Speaker approved the Statement by the Hon. Abdulswamad Sheriff Nassir, MP, Member for Mvita Constituency. The matter was referred for consideration jointly by the Committee on Delegated Legislation and the Departmental Committee on Energy and to undertake a joint inquiry on the pricing parameters used by the Energy and Petroleum Regulatory Authority (EPRA) in determining the maximum wholesale and retail petroleum prices in the country.

1) LEGAL BRIEF ON PETROLEUM PRICING PARAMETERS

The Prayers sought in the Statement are for the Joint Committee to urgently inquire into the matter, including engaging EPRA to explore avenues of revising the petroleum pricing parameters that are anchored on the Energy (Petroleum Pricing) Regulations 2010 and the Energy (Petroleum Pricing) (Amendment) Regulations 2012 and for the Joint Committee to report back to the House on the findings of the inquiry and their recommendations within thirty days.

Legal Framework

- i) Section 9 of the Energy Act establishes the Energy and Petroleum Regulatory Authority (“the Authority”), the functions of which as stipulated under section 10 of the said Act include to regulate importation, refining, exportation, transportation, storage and *sale of petroleum and petroleum products* with the exception of crude oil.
- ii) Section 101(y) of the Petroleum Act (*No. 2 of 2019*) empowers the Cabinet Secretary responsible for petroleum on recommendation of the Authority to *make regulations for determining the maximum wholesale and retail prices of petroleum and petroleum products*.
- iii) Section 224(2)(e) of the Energy Act provides that any subsidiary legislation issued before the commencement of the Energy Act shall remain in force until repealed or revoked.
- iv) The Energy (Petroleum Pricing) Regulations, 2010, published *vide LN No. 196 of 2010* and the Energy (Petroleum Pricing) (Amendment) Regulations, 2012 published *vide LN No. 26 of 2012* seek to regulate the pricing of petroleum and petroleum products.

- v) The Energy (Petroleum Pricing) Regulations, 2010, aforementioned, and the 2012 amendments were not subjected to the Statutory Instrument Act, 2013.
- vi) Regulation 1 provides that the maximum wholesale prices and the retail pump prices of petroleum products at a wholesale depot or retail dispensing site shall be determined in accordance with the formula set out in regulation 4.
- vii) Regulation 2 provides that the prices determined using the formula set out in Regulation 4 of these Regulations shall be the maximum wholesale and retail pump prices of petroleum products which a person carrying on petroleum business shall sell at a wholesale depot or a retail dispensing site.
- viii) Regulation 3 provides that the maximum determined prices shall become effective on the 15th day of every calendar month and shall remain in force until the 14th day of the following calendar month.
- ix) Regulation 4 provides for the maximum wholesale and retail pump prices of petroleum products in shillings per litre.
- x) Regulation 5 provides for the weighted, average cost in shillings per litre ex the Kenya Petroleum Refineries Limited (KPRL) and ex the Kipevu Oil Storage Facility (KOSF).
- xi) Regulation 6 provides that the unit cost of imported refined petroleum products [C] shall be determined in accordance with the calculation used in the open tender system for importation of petroleum products.
- xii) Regulation 7 provides that the unit cost of petroleum products obtained from crude oil refined at the Kenya Petroleum Refineries Limited *If: 'crp* _ shall be the sum of landed cost of crude oil, refinery fees, inventory financing costs and insurance costs for the crude imports allocated to the refinery approved product yields, benchmarked to the cost of importation of the same refined products.
- xiii) Regulation 7 as amended and Regulation 8 of Regulations, provides that the average mean exchange rate of leading commercial banks selected by the Commission on the last discharge date shall be used in converting the imported refined petroleum products and crude oil costs determined under Regulations 6 and 7 from foreign currency to Kenya Shillings.

2) BRIEF BY THE PARLIAMENTARY BUDGET OFFICE

Background

Petroleum pricing in Kenya is undertaken in accordance with the Energy (Petroleum Pricing) Regulations, 2010 (Legal Notice No. 196 of 2010). Currently, all petroleum products for local consumption are imported in refined form. On a monthly basis Kenya Consumes 160,000,000 litres of Super Petrol; 220,000,000 litres of Diesel; 75,000,000 litres of Jet A1 and 13,000,000 of Kerosene.

The computation of petroleum pump prices takes into account the following key cost components:

- a) The landed cost - The weighted average costs (per product) of imported Super Petrol, Diesel and Kerosene;
- b) Storage and distribution costs;
- c) Gross Margins; and
- d) Applicable taxes and Levies;

The Committee was further presented with the trend of Super Petrol, Diesel and Kerosene pump price breakdown from January 2019 to March 2021 and that importation of Super Petrol, Diesel and Kerosene into Kenya is undertaken through the Open Tender System (OTS) in accordance with Legal Notice No. 24 of 2012. The OTS mirrors the prevailing prices of petroleum products in the international markets.

For the period January to March 2021, the average landed cost of imported Super Petrol increased by 38.41% from KES 36.01 per litre to KES 49.84 per litre, that of Diesel increased by 26.68% from KES 36.96 per litre to KES 46.82 per litre while that of Kerosene increased by 27.97% from KES 33.57 per litre to KES 42.96 per litre.

The Table 1 below compares the pump price components between January and March 2021 while table 2 compares pump prices between selected countries in the world.

Table 1: Comparison between pump price components in January 2021 and March 2021

Product	Super Petrol (Kshs/Litre)			Diesel (Kshs/Litre)			Kerosene (Kshs/Litre)		
	Jan-21	Mar-21	Change	Jan-21	Mar-21	Change	Jan-21	Mar-21	Change
Landed Cost	36.01	49.84	38.41%	36.96	46.82	26.68%	33.57	42.96	27.97%
Storage and Distribution	3.17	3.25	2.52%	2.97	3.01	1.35%	2.94	2.98	1.36%
Margins	12.39	12.39	-	12.36	12.36	-	12.36	12.36	-
Taxes & Levies	55.42	57.33	3.45%	44.11	45.47	3.08%	38.25	39.55	3.40%
Nairobi Price	106.99	122.81	14.79%	96.40	107.66	11.68%	87.12	97.85	12.32%

Table 2: Comparison of pump prices in Kenya with selected countries in the world

No.	Country	Super Petrol (Kshs/Litre)	Diesel (Kshs/Litre)
1.	Kenya - Nairobi	122.81	107.66
2.	Tanzania - Dodoma	96.50	93.19
3.	Uganda - Kampala	118.64	110.85
4.	Rwanda - Kigali	120.18	116.34
5.	South Africa - Inland	117.87	118.42
6.	China	116.01	101.43
7.	Germany	187.67	168.97
8.	United Kingdom	190.57	194.96
9.	France	198.46	184.98

Source: www.globalpetrolprices.com [accessed on 15th March 2021]

Petroleum Taxes and Levies

On the Petroleum Taxes and Levies, The Committee was informed the breakdown of taxes and levies as at March, 2021 and the table below provides for the trend in taxes and levies for petroleum products from December, 2010.

Table 3: Breakdown of the taxes and levies in Kenya, March 2021

Product	Super Petrol	Diesel	Kerosene
Unit	Kshs/litre	Kshs/litre	Kshs/litre
Excise Duty Tax	21.95	11.37	11.37
Road Maintenance Levy	18.00	18.00	-
Petroleum Development Levy	5.40	5.40	0.40
Petroleum Regulatory Levy	0.25	0.25	0.25
Railway Development Levy	0.95	0.89	0.82
Anti-adulteration Levy	-	-	18.00

Merchant Shipping Levy	0.03	0.03	0.03
Import Declaration Fee Levy	1.65	1.56	1.44
Value Added Tax (VAT)	9.10	7.97	7.25
Taxes and levies	57.33	45.47	39.55

Table 4 below provides the percentage contribution of taxes and levies to the petroleum pump price in selected jurisdictions.

Country	Contribution of Taxes and Levies Petroleum Pump prices
India	69%
Italy	64%
France	63%
Germany	63%
Britain	62%
Spain	53%
Japan	47%
Canada	33%
United State of America	19%

Figure 6: Global petroleum taxes [Source: Petroleum Planning and Analysis Cell, IOC]

Table 5 tabulates the percentage contribution of taxes and levies in the March 2021 petroleum pump price.

Table 5: Contribution of taxes and levies in the March 2021 pump price

Products	Super Petrol		Diesel		Kerosene	
	Kshs/litre	% Contribution	Kshs/litre	% Contribution	Kshs/litre	% Contribution
Product Costs	49.84	40.58%	46.82	43.49%	42.96	43.90%

Products	Super Petrol		Diesel		Kerosene	
Storage and distribution	3.25	2.65%	3.01	2.80%	2.98	3.05%
Margins	12.39	10.09%	12.36	11.48%	12.36	12.63%
Taxes and Levies	57.33	46.68%	45.47	42.23%	39.55	40.42%
Retail Prices in Nairobi	122.81	100.00%	107.66	100.00%	97.85	100.00%

The comparison of petroleum taxes in the region is tabulated in table 6.

Table 6: Comparison of Petroleum Taxes in the region

Product	Super Petrol	Diesel	Kerosene
Country	Kshs/Litre	Kshs/Litre	Kshs/Litre
Kenya	57.33	45.47	39.55
Uganda ¹	40.37	30.80	5.98
Tanzania ²	37.45	31.59	29.08

Notes: Kshs/ UGX exchange rate @ UGX 33.42 per Kshs [source: www.cbk on 16th March 2021]

Kshs/ TZshs exchange rate @ TZshs 21.14 per Kshs [source: www.cbk on 16th March 2021]

Legal Basis of the Taxes and Respective Revisions of Tax Rates

The legal basis of petroleum taxes incorporated in the petroleum pump price build-up

- (a) Revised Excise Duty on Diesel from Kshs 8.244 per litre to Kshs 10.305.
- (b) Introduced Excise Duty on Kerosene at the rate of Kshs 7.205 per litre.
- (c) Revised Excise Duty on Super Petrol from Kshs 19.505 per litre to Kshs 20.519, that on Diesel from Kshs 10.305 to Kshs 10.841 and that on Kerosene from Kshs 7.205 to Kshs 7.580.
- (d) Revised Excise Duty on Super Petrol from Kshs 20.519 per litre to Kshs 19.505, that on Diesel from Kshs 10.841 to Kshs 10.305 and that on Kerosene from Kshs 7.580 to Kshs 7.205.
- (e) Adjusted Excise Duty on Super Petrol, Diesel and Kerosene by +5.15%.

- (f) Adjusted Excise Duty on Super Petrol, Diesel and Kerosene by +4.94%.
- (g) Revised Road Maintenance Levy on Super Petrol and Diesel from Kshs 9 per litre to Kshs 12.
- (h) Revised Road Maintenance Levy on Super Petrol and Diesel from Kshs 12 per litre to Kshs 18.
- (i) Revised the Petroleum Development Levy on Super Petrol and Diesel from Kshs 0.40 per litre to Kshs 5.40.
- (j) Revised the Petroleum Regulatory Levy on Super Petrol and Kerosene from Kshs 0.05 per litre to Kshs 0.12 and that on Diesel from Kshs 0.04 per litre to Kshs 0.12.
- (k) Revised the Petroleum Regulatory Levy on Super Petrol, Diesel and Kerosene from Kshs 0.12 per litre to Kshs 0.25.

Performance of the Petroleum Taxes and Levies (Kshs. Million)

Petroleum Taxes /Levies	2019/20		
	Actual	Target	Performance rate (%)
Import Duty-Oil	1,656	1,563	93
Excise Duty- Oil	65,065	64,424	101
VAT-oil	5,506	5,627	98
VAT-Oil at 8%	15,926	17,303	92
Petroleum Development Levy	2,044	2,261	90
Road Maintenance Levy	74,458	80,387	93
Petroleum Regulatory Levy	1,073	1,232	87
Anti-Adulteration Levy	2,762	2,791	99
Total	168,490	175,588	96

Source: KRA

Committee Observations

The Committee made the following observations –

- i) The recent increase in fuel was greatly affected by the hike in international prices and further compounded by domestic levies and taxes.
- ii) On comparison between pump price in East Africa, it was observed that Kenya has the highest pump price even as compared with the landlocked countries e.g. Rwanda and Uganda. Taxes and levies are the biggest contributor to the pump price of Super Petrol and the second greatest contributor to the price of Diesel and Kerosene.
- iii) Import Declaration Fee, Railway Development Levy and Value Added Tax are charged as a percentage of the product cost resulting in a compounding effect when product costs increase.
- iv) As global oil prices escalate, pump prices in Kenya will continue to rise. It would therefore be prudent to pursue a price stabilization mechanism to mitigate against the economic impacts brought about by high petroleum pump prices such as the recent intervention by the National Treasury to compensate for increase in landed cost so as to maintain the petroleum product prices.
- v) The operationalization of the Petroleum Consolidated Fund provided for in the Petroleum Act needs to be fast tracked. The Fund shall cater for strategic stocks as well as the regulations to provide for a governance framework for the Petroleum Development Levy which Government intends to utilize to stabilize the prices.
- vi) On the demand side, containment measures and economic disruption related to the Covid19 outbreak have led to a slowdown in production and producing a significant drop in the global demand for oil.

Way Forward

The Parliamentary Budget Office was requested to submit additional information/analysis on distribution and transportation costs from other East African countries as a contributing factor to cost of petroleum products.

PBO was further requested to avail information on landed cost of refined oil in January 2020.

The Committee will at a later date invite the Ministry of Petroleum and Mining, the Energy and Petroleum Regulatory Authority (EPRA) to appear before the joint Committee to demonstrate the extent to which it complied with the statutory formulae in arriving at the pump prices.


MIN.NO. /NA/CDL/2021/101 ANY OTHER BUSINESS

No other business arose.

MIN.NO. /NA/CDL/2021/102 ADJOURNMENT

The meeting was adjourned at 11.15 a.m. until Thursday, 29th April, 2021 at 10.00 a.m. for a joint meeting with the Departmental Committee on Energy.

Signed:.....



Date.....

13/5/21

HON. KASSAIT KAMKET, M.P.

(CHAIRPERSON)

MINUTES OF THE 19TH SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD VIRTUALLY ON THURSDAY, 15TH APRIL, 2021 AT 10.00 A.M.

PRESENT – VIRTUAL

- | | | |
|---|---|-------------------------|
| 1) The Hon. Kassait Kamket, M.P. | - | Chairperson |
| 2) The Hon. Muriuki Njagagua, M.P. | - | Vice Chairperson |
| 3) The Hon. Cecily Mbarire, MGH, M.P. | | |
| 4) The Hon. Alice Wahome, M.P. | | |
| 5) The Hon. Timothy Wanyonyi, M.P. | | |
| 6) The Hon. (Dr.) Wilberforce Oundo, M.P. | | |
| 7) The Hon. Patrick Mariru, M.P. | | |
| 8) The Hon. Martha Wangari, M.P. | | |
| 9) The Hon. Abdi Tepo, M.P. | | |
| 10) The Hon. Ronald Tonui, M.P. | | |
| 11) The Hon. Edith Nyenze, M.P. | | |
| 12) The Hon. George Murugara, M.P. | | |
| 13) The Hon. Gideon Mulyungi, M.P. | | |
| 14) The Hon. Jennifer Shamalla, M.P. | | |
| 15) The Hon. Munene Wambugu, M.P. | | |
| 16) The Hon. Robert Gichimu, M.P. | | |
| 17) The Hon. Sammy Seroney, M.P. | | |

ABSENT WITH APOLOGY

- 1) The Hon. Waihenya Ndirangu, M.P.
- 2) The Hon. William Cheptumo, M.P.
- 3) The Hon. Kamoti Mwamkale, M.P.
- 4) The Hon. Daniel Maanzo, M.P.
- 5) The Hon. Robert Mbui, M.P.
- 6) The Hon. Nicholas Tindi Mwale, M.P.

IN-ATTENDANCE

National Assembly Secretariat

- | | | |
|-------------------------|---|---------------------------------------|
| 1) Ms. Susan Maritim | - | Senior Clerk Assistant |
| 2) Mr. Mohamed Jimale | - | Clerk Assistant II |
| 3) Mr. Wilson Dima Dima | - | Principal Legal Counsel |
| 4) Mr. Anthony Wamae | - | Serjeant-at-Arms |
| 5) Mr. Charles Ayari | - | Superintendent of Electronics (Audio) |

The National Treasury and Planning (Virtual Attendance)

- 1) Hon. (Amb) Ukur Yattani - Cabinet Secretary
- 2) Mr. Wanyambura Mwambia - Senior Deputy Director, M&FA
- 3) Mr. Joseph Ngugi - Deputy Director, Macro Fiscal Affairs
- 4) Ms. CPA Isabella Kogei - Asst. Director, Budget/Parliamentary Liaison Officer

Kenya Revenue Authority

- 1) Mr. Maurice Oray - Deputy Commissioner, Corporate Tax Unit
- 2) Mr. Ephraim Munene - Manager, Policy and Tax Advisory

MIN.NO. /NA/CDL/2021/084 PRAYERS AND PRELIMINARIES

The meeting commenced at 10.15 a.m. with the Prayers.

MIN.NO. /NA/CDL/2021/085 ADOPTION OF THE AGENDA

The Committee unanimously adopted the Agenda as presented having been proposed by Hon. Jennifer Shamalla, MP and seconded by Hon. Martha Wangari, MP.

MIN.NO. /NA/CDL/2021/086 CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

Minutes of the previous sittings were read and confirmed as follows –

Minutes of the 17th Sitting held on 10th March, 2021 were confirmed as a true record of the proceedings having been proposed by Hon. Abdi Tepo, M.P. and seconded by Hon. George Murugara, M.P.

Minutes of the 18th Sitting held on 23rd March, 2021 were confirmed as a true record of the proceedings having been proposed by Hon. Timothy Wanyonyi, M.P. and seconded by Hon. Abdi Tepo, M.P.

MIN.NO. /NA/CDL/2021/087 MATTERS ARISING

No matter arose.

MIN.NO. /NA/CDL/2021/088 CONSIDERATION OF THE PUBLIC FINANCE MANAGEMENT (DROUGHT MANAGEMENT EMERGENCY FUND) REGULATIONS, 2021

Consideration of the Public Finance Management (Drought Management Emergency Fund) Regulations, 2021 was deferred to the next meeting.

MIN.NO. /NA/CDL/2021/089 CONSIDERATION OF EXEMPTION FROM INCOME TAX FOR JAPANESE COMPANIES, CONSULTANTS & EMPLOYEES (L.N. NO. 15 OF 2021)

The Cabinet Secretary informed the Committee that –

- 1) The legal basis for granting an exemption as contained in Legal Notice No. 15 of 2021 is stipulated in section 13(2) of the Income Tax Act, Cap 470 which empowers the Cabinet Secretary to exempt certain income tax.
- 2) The exemption is in respect of income which accrued in or was derived from Kenya by Japanese companies, Japanese Consultants or Japanese employees involved in the projects under the Financing Agreements signed between the Government of Kenya and Government of Japan.
- 3) The policy and requirement of the Japan Government of Japan is to have Japanese companies, consultants and Japanese nationals involved in the implementation of any project financed by the Government of Japan exempted from tax. This is not limited to Kenya but is the requirement by the Government of Japanese for all financing agreements between the Government of Japan and any other Government. All Agreements signed between Japanese Government and the Government of Kenya contain this exemption.
- 4) The overall benefits to be derived from effective and efficient implementation of these projects out way the tax forgone. In addition, the income from the jobs created from these projects and the income derived from the expenditure on these projects generates revenue that is far above the tax foregone as a result of the exemption.
- 5) On public participation, the exemption from income tax under the Agreements signed between the GoK and the Government of Japan is an understanding between two Governments, public participation may therefore not apply.

Plenary Discussions

The Committee raised the following concerns –

- i) The exemption is discriminatory and stands to benefit the Japanese nationals more than the Kenyan citizens. Local companies are not exempted from taxes, yet the Japanese enjoy expatriate benefits. In addition, Kenyan companies doing business in Japan do not enjoy similar exemptions.
- ii) Status of Nakuru – city or not?
- iii) Projects earmarked for development in each of the counties e.g. Nakuru County.

Way Forward

The Committee resolved to write to the National Treasury to request for the following information & documents –

- i) brief on the Agreement(s) between the Government of Kenya and the Japanese Government including the date(s) they were signed, what they seek to achieve, projects to be undertaken, project(s) duration and copies of such Agreement(s).
- ii) clarification on the Loans and Grants including the percentage of each; and

- iii) list of countries with similar exemptions including ongoing negotiations for such exemptions.

MIN.NO. /NA/CDL/2021/090

CONSIDERATION OF EXEMPTION FROM INCOME TAX BY AN AIRLINE IN WHICH THE GOVERNMENT OF KENYA OWNS AT LEAST 45% OF ITS SHARES AND ITS SUBSIDIARIES (L.N. NO. 27 OF 2021)

The Committee was informed that the Legal Notice was issued under Section 13 (2) of the Income Tax Act and it seeks to exempt an airline including its subsidiaries where the government owns at least forty five per cent of its shares, from minimum tax imposed under Section 12(d) of Income Tax Act.

Policy Background

- 1) The Finance Act, 2020 amended the Income Tax Act to introduce minimum tax to be charged on all business enterprises whether they are in profit position or not. This is meant to discourage tax planning, where some companies perpetually declare losses to avoid paying tax in Kenya, while others may not be paying the correct amount of tax. These companies benefit from services such as security, roads and hospitals among others.
- 2) The amendment did not take into consideration specific sectors of the economy that are strategic to any government for purposes of operations of governments e.g., the aviation industry which is strategic to any government for purposes of security and even trade. Many Governments such as Ethiopia, South Africa among others has significant shareholding to allow competing effectively at international level.
- 3) The introduction of minimum tax would significantly affect the stability of the operations of the aviation industry particularly on those airlines that are partially or indirectly owned by the Government. To ensure that this tax does not significantly compromise the operations of these airlines, it is necessary and in line with practice by other Governments to cushion these airlines from the impact of paying minimum tax as it is clearly known that the companies' financial position is on downwards trend.
- 4) On public participation, the CS informed the Committee that after the enactment of the Finance Act, 2020 that introduced minimum tax, the National Treasury received various presentations from stakeholders on the impact of the new tax on several classes of businesses including public entities that are facing challenges.
- 5) Implementation will be monitored by the Kenya Revenue Authority and may be reviewed as the target institution improves profitability.

Plenary Discussions

The Committee raised the following concerns –

- i) exempting Kenya Airways and its subsidiaries alone will discriminate other airlines operating domestically and also other companies especially those affected by the COVID-19 pandemic;
- ii) Justification for exemption of Kenya Airways yet it has been experiencing financial challenges for several years even before the COVID-19 pandemic and has been bailed out before.

The CS responded that Kenya Airways is a national carrier with strategic trade/business and tourism interests including the host of UNEP HQs and therefore needs support. In addition, GoK guaranteed the company a loan of approximately Kshs. 75billion which is yet to be fully repaid. Other countries have also injected funds to protect their national carrier during the pandemic.

The CS further informed the Committee that Kenya Airways is not exempted from Corporate Tax and other taxes, only the minimum tax.

- iii) possible political and personal interests in exemption of Kenya Airways whose majority shareholding is in private hands: the CS responded that he was not aware about political interests in exempting Kenya Airways and that the exemption is for business interest to save the national carrier.

Way Forward

The Committee resolved that the National Treasury avails the following documentation: -

- i. List of Kenya Airways' subsidiary companies and shareholding in each of the companies;
- ii. How the exemption will affect Kenya Airways Partners e.g. KLM and Air France; and
- iii. Kenya Airways Audit Reports for FYs 2018/2019, 2019/2020 and 2020/2021.

MIN.NO. /NA/CDL/2021/090 EXEMPTION OF COVID-19 INSTRUMENTS FROM SCRUTINY (S.14 OF THE STATUTORY INSTRUMENTS ACT, 2013)

The Committee was informed that Section 11(1) and (2) of the Statutory Instruments Act, 2013 requires every Cabinet Secretary responsible for a regulation-making authority to submit all statutory instruments published under their dockets, for tabling before the National Assembly. The statutory instruments issued by the Ministry of Health and the Ministry of Interior and National Government that touch on, are incidental or ancillary to the COVID-19 pandemic have a common goal, object and purpose, and are all aimed at mitigating the effect and spread of the COVID 19 pandemic and therefore qualify to be classified under "COVID-19 related Statutory Instruments".

In considering the exemption of COVID-19 instruments from scrutiny, the Committee noted that most of the Regulations subject matter therein, are made either by the Ministry of Health or Ministry of Interior and Coordination of the National Government. Further –

- i. all the instruments are made pursuant to section 36 of the Public Health Act;

- ii. all the Public Health instruments have the same subject matter being restriction of movement in and out of various specified regions in the country with an aim of curbing the spread of COVID-19 pandemic;
- iii. The issuance of the Rules on restrictions of movements in and out of the various places in the country have been based on the statistics of COVID-19 events of persons testing positive to the pandemic within the said areas;
- iv. The Ministry has occasionally amended, varied or made Rules extending the validity of the principal Rules; and
- v. With the incidences of the pandemic increasing or decreasing in different parts of the country, it is contemplated that the Ministry shall issue further gazette notices declaring restriction of movements or revoking the existing legal notices on the same subject matter thereby increasing the number of instruments in the said class.

Committee Resolution

Having examined the Public Health COVID-19 related instruments listed below, the Committee resolved that the instruments are in line with the Constitution, the Public Health Act, the Public Order Act, the Statutory Instruments Act, the Interpretations and General Provisions Act and that these instruments fall within the classification of "COVID-19 related Statutory Instruments" and thereby resolved to approve the Public Health (Covid-19 Indoor Meetings) Rules, 2020 (Legal Notice No. 224 of 2020).

The decision was proposed and seconded by Hon. George Murugara, M.P and Hon. Martha Wangari, MP, respectively.

MIN.NO. /NA/CDL/2021/091 ANY OTHER BUSINESS

1. **Request for meeting by the National Gender & Equality Commission:** The Committee was informed that the National Gender and Equality Commission had requested for a pre-publication consultations on the NGEC Regulations. The Committee resolved to undertake the activity after resumption from recess.
2. **Coverage of Committee Activities:** The Committee resolved that the media ought to be invited to cover Committee meetings especially during consideration of crucial business like the exemption of taxes.

MIN.NO. /NA/CDL/2021/092 ADJOURNMENT

The meeting was adjourned at 11.45 a.m. until Tuesday, 27th April, 2021 at 10.00 a.m.

Signed:.....

Date.....27 April 2021

HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)