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4/12/18

REPUBLIC OF KENYA




THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – SECOND SESSION, 2018

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THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON A PETITION FOR THE ENACTMENT OF A FRAUD ACT  
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 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 15 DEC 2018	DAY: WED, 13/12/18
TABLED BY:	CHAIR, JUSTICE & LEGAL AFFAIRS, COMMITTEE
CLERK-AT THE TABLE:	Moses Lemwa.

DIRECTORATE OF COMMITTEE SERVICES

CLERK'S CHAMBERS

PARLIAMENT BUILDINGS

NAIROBI

DECEMBER, 2018

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**ANNEXURES**

**A. Adoption List**

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## **ABBREVIATIONS AND ACRONYMS**

CAP	- Chapter
Hon	- Honourable
M.P.	- Member of Parliament
NA	-National Assembly
PIN	-Personal Identification Number
Ref	- Reference

## **CHAIRMAN'S FOREWORD**

The Speaker, Hon. Justin Muturi, conveyed this petition to the House on 14<sup>th</sup> December 2017 in accordance with the provisions of Standing Order No. 225 (2) (b). The Petition seeks to draw the attention of the House to the following-

1. The inherent limitations of the Penal Code, Cap 63 Laws of Kenya in respect of the offences of fraud, fraudulent activities, and conspiracy to defraud;
2. The inadequacies of the Penal Code in preventing and prosecuting persons who set up companies with the sole intention of defrauding innocent Kenyans both in private and public capacities;
3. The increasing number of cases pending before our courts where persons registered companies with the sole intention of perpetrating fraud on entities both legal and natural and especially creditors including National and County taxation authorities and judgment debtors of the company;
4. The need to hold directors of companies engaging in fraudulent trading or other fraudulent activities personally criminally liable for the said criminal actions and / or omissions; and
5. The need to provide prosecutors with increased powers in respect of tracing and recovery of assets and property obtained, misappropriated, disposed, transferred, or otherwise dealt with by directors and/ or officials of companies fraudulently with a view to defeating, the ends of justice and/ or the law.

The Petition was thereafter referred to the Departmental Committee on Justice and Legal Affairs for consideration and preparation of a report within sixty days in line with the requirements of Standing Order 227.

In considering the Petition, the Committee, during one of its sittings, held a meeting with the petitioner Mr. Allen Waiyaki Gichuhi. The meeting was aimed at inquiring into the issues raised in the Petition.

The Committee appreciates the assistance provided by the Office of the Speaker and the Clerk of the National Assembly that enabled it to discharge its functions in considering the petition.

On behalf of the Committee, and pursuant to Standing Order, 227 it is my duty to table on the Floor of the House the Report of the Committee on the petition.

**Hon. William Cheptumo, MP**

**Chairperson, Departmental Committee on Justice and Legal Affairs**

## CHAPTER ONE

### **1.0 PREFACE**

#### **1.1. Mandate of the Committee**

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

- (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
- (b) study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;*
- (c) study and review all legislation referred to it;*
- (d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
- (e) investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
- (f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)*
- (g) examine treaties, agreements and conventions;*
- (h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;*
- (i) consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and*
- (j) examine any questions raised by Members on a matter within its mandate.*

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

- (a) Constitutional affairs;**

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

## **1.2. Committee Membership**

The Committee was constituted on Thursday, 14<sup>th</sup> December, 2017 and comprises the following Honourable Members-

Hon. William Cheptumo, M.P.	–	<b><i>Chairperson</i></b>
Hon. Alice Muthoni Wahome, M.P.	–	<b><i>Vice Chairperson</i></b>
Hon. John Olago Aluoch, M.P.		
Hon. Roselinda SoipanTuya, M.P.		
Hon. Charles Gimose, M.P.		
Hon. Johana Ng’eno, M.P.		
Hon. William Kamoti Mwamkale, M.P.		
Hon. Ben Orori Momanyi, M.P.		
Hon. Peter Opondo Kaluma, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Beatrice Adagala, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P.		
Hon. John Munene Wambugu, M.P.		
Hon. George Gitonga Murugara, M.P.		
Hon. Anthony Githiaka Kiai, M.P.		
Hon. John Kiarie Waweru, M.P.		
Hon. Japheth Mutai, M.P.		
Hon. Adan Haji Yussuf, M.P.		
Hon. Zuleikha Hassan, M.P.		



### **1.3. Committee Secretariat**

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

## CHAPTER TWO

### **2.0 CONSIDERATION OF THE PETITION**

The Committee commenced its consideration of the Petition by meeting the Petitioner on 10<sup>th</sup> April 2018. During the meeting, written and oral evidence was adduced as noted hereunder:-

### **2.1 Submissions by the Petitioner Mr. Allen Waiyaki Gichuhi**

In his petition, Mr. Allen Waiyaki Gichuhi, sought to draw the attention of the House to the following-

1. The inherent limitations of the Penal Code, Cap 63 Laws of Kenya in respect of the offences of fraud, fraudulent activities, and conspiracy to defraud;
2. The inadequacies of the Penal Code in preventing and prosecuting persons who set up companies with the sole intention of defrauding innocent Kenyans both in private and public capacities;
3. The increasing number of cases pending before our courts where persons registered companies with the sole intention of perpetrating fraud on entities both legal and natural and especially creditors including National and County taxation authorities and judgment debtors of the company;
4. The need to hold directors of companies engaging in fraudulent trading or other fraudulent activities personally criminally liable for the said criminal actions and / or omissions; and
5. The need to provide prosecutors with increased powers in respect of tracing and recovery of assets and property obtained, misappropriated, disposed, transferred, or otherwise dealt with by directors and/ or officials of companies fraudulently with a view to defeating, the ends of justice and/ or the law.

The petitioner submitted that the Penal Code, while containing various provisions on Fraud, had not evolved to keep up with the evolution of fraud especially through corporate entities. It was his submission that the provisions on fraud contained therein

were not sufficient to deal with rising and sophisticated instances of fraud which include but are not limited to:

- a. Deceptive accounting practices meant to give impression of high profitability and revenue, prevalent in listed companies seeking to drive up share prices;
- b. Diversion of company funds for personal profit/ gain- prevalent in privately held companies where the executive directors may fraudulently divert company funds for their own use;
- c. Companies, including shell and shelf companies, created and run with the sole intention of defrauding the innocent public- many of these amass liabilities due to fraudulent practices and when sued for these liabilities are found not to have actual assets;
- d. Fraudulent transfers and preference- where directors of debtor companies transfer company assets in order to defeat just debts; and
- e. Fraudulently absconding with assets to defeat decretal debts.

It was his considered opinion that the country would greatly benefit from the enactment of an Act that would comprehensively deal with this unfortunately prevalent menace. Further, a single consolidated Law would be easier to create awareness of and enforce than the multiplicity of disjointed sections contained in the various laws presently dealing, albeit inadequately, with the issue of fraud.

**The petitioner therefore prays that Parliament:**

A. Do consider for enactment a Fraud Act along the lines of the United Kingdom's Fraud Act 2006, an outline of whose important provisions is as follows:

1. Fraud;
2. Fraud by false representation;
3. Fraud by failing to disclose information;
4. Fraud by abuse of position;
5. Definitions of 'gain' and 'loss' in respect of fraud offences;
6. Possession of articles for use in fraud;

7. Making or supplying articles for use in fraud;
8. Definition of articles of fraud;
9. Participating in fraudulent business carried on by sole trader;
10. Participating in fraudulent business carried on by company;
11. Obtaining services dishonestly;
12. Liability of company officers for offences by company;
13. A requirement that a person cannot be excused from answering a question in proceedings relating to property or complying with an order made in proceedings related to property on grounds of self-incrimination under the Act or related offence. Whilst also maintaining the Constitutional right not to self-incriminate by declaring statements and admissions made in the answer therein and complying with such order, inadmissible in evidence in proceedings for offences under the proposed Act and related proceedings being conspiracy to defraud and any such other offence involving fraudulent conduct and purpose.
14. Definition of proceedings related to property as proceedings for-
  - i. The recovery or administration of any property,
  - ii. The execution of a trust, or
  - iii. An account of any property or dealings with property,  
and “property” means money or other property whether real or personal (including things in action and other intangible property).
15. Savings and transitional provisions.

B. In the alternative, do consider adoption of the UK Fraud Act 2006 with such amendments, modifications, deletions and additions as may be necessary to serve the ends of justice within our jurisdiction.

## **2.2 Views on the petition by the Office of the Attorney-General and the Kenya Law Reform Commission**

While considering the Petition, the Committee sought the views and comments of the Office of the Attorney-General and the Kenya Law Reform Commission's on the same.

At the time of the adoption of this Report, the Committee had not received any response from the Office of the Attorney General.

## **2.3 Views of the Kenya Law Reform Commission**

The Kenya Law Reform Commission responded to the issues raised by the Committee with regard to the Petition as follows-

### **1. Specific issues raised by the Committee**

#### **(i) The inherent limitations of the penal code Cap 63 Laws of Kenya in respect of fraud, fraudulent activities and conspiracy to defraud**

Over the years, the Penal Code has not attracted or been accorded sufficient attention and traction in terms of law reform. Consequently the provisions of the Act relating to fraud or conspiracy to commit fraud as stipulated have not been under constant reform to keep pace with the evolution of fraud in the modern economy.

Indeed, the Penal Code is limited in respect of dealing with rising and sophisticated cases of new trends of fraud such as bank fraud, insurance fraud, pyramid scheme fraud, and stock market fraud, among others. In addition the classification and characterization of the inchoate offence of conspiracy to fraud is inadequate. This inadequacy has presented challenges to the prosecutors in effecting successful prosecutions on conspiracy to defraud as well as other inchoate offences.

Rapid development in technology has further made it difficult for the Penal Code to facilitate the trials of technology-related criminality, such as those relating to credit cards, PIN entry devices, and internet frauds, among others. This Act is certainly not flexible enough to respond to these emerging types of criminality.

There has been an attempt to mitigate these Penal Code shortcomings by providing for and addressing the offence of fraud in various other legislation. The danger of this approach is that it results in some 'charge sheet arbitrage' where it is left upon the prosecutors to decide which law relating to fraud to base their prosecution, that is, whether the sector or the Penal code.

**(ii) The inadequacies of the Penal Code in prosecuting persons who incorporate companies with the sole intention of committing fraud**

It is true that the Penal Code does not have provisions to deal with persons who incorporate companies with the intention of committing fraud. However, absence of such provisions is good law, as otherwise it would contradict the development of corporation law. The Kenyan legal system recognizes the principle of corporate legal personality. It is an accepted understanding that a company, upon incorporation, acquires an identity distinct and separate from that of its promoters, shareholders, with separate rights and liabilities.

Being a non-natural person, a corporation works through its agents who may be the directors, managers or servants of the company. Therefore, any offence such as fraud and other that may result into criminal liability ought to be directed upon the corporate entities themselves or their managers, not on the promoters irrespective of their *mens rea* (intention).

The regulation of the companies, including any criminality by the directors, ought to be handled by the law relating to companies. If people who incorporate the company are to be pursued for any criminal liability purpose, it should be on very exceptional cases.

Nevertheless, it is our view that the Penal Code is inadequate in holding companies as well as other corporate entities liable for their misdoings that are of a criminal nature. Despite the development in other jurisdictions, the concept of holding a “company as a criminal” in the Kenyan criminal justice system is yet to evolve. The only relevant provision on the offences by corporations, societies, and similar bodies in the Penal Code states as follows:

*“Where an offence is committed by any company or other body corporate, or by any society, association or body or persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.”*

This provision criminalizes the acts of directors and other managers of the company.

The Commission observed that this is in line with the Companies Act. Whereas there would be no difficulty in ascribing criminal liability upon company directors where their culpability is established, difficulties arise when the company itself is to be perceived as the subject of criminal law. This lacuna of not having mechanisms to hold the companies in the country criminally liable is unfortunate. This is because corporations, either through their negligence or acts or otherwise omissions, continue to perpetrate or contribute towards the preparation of criminal wrongs. A traditional defence to the effect that the corporation lacks the mental element or that the act can only be attributed to the individual person has been rightly scrapped by some jurisdictions. However, questions may arise as to the types of crimes a corporation may commit and the forms or kinds of punishment or consequential penalties that may be imposed upon a corporation.

In the first question, our view is that the penal code ought to address key issues in relation to fraud by a company on issues such as deceptive accounting practices, fraudulent absconding with assets to defeat decretal debt, among others. Sanctions of criminal liability of corporations ought to be generally by way of proportionate fines. This is due to the reality that a fine imposed on a company would ultimately impact on the shareholders whose assets or profit margin is depleted or reduced. The employees may be affected too, because the fine impoverishes the company.

In the United States, criminal liability on companies has been adopted and that has seen an increase of criminal fines and heralded a change on the management of corporations. The penal code therefore needs to provide for the aspect of criminal liability on companies to deter the rising cases of using companies to effect fraud.

However, it should be reluctant to penalise the promoters of a company as this may have an adverse effect on the development of corporation law and practise in the country.

**(iii) The increasing number of cases pending before courts where persons registered companies and used them to commit fraud on entities both legal and natural persons especially creditors including government taxation authorities and judgement debtors of companies**

Further to the issues responded to in (ii), the promoters of the companies should generally not be held liable. Any act of alleged criminality including on the aspect of fraud ought to be brought upon the management of the company. Various laws contain provisions on how to deal with fraud on various aspects. Some of these include:

**a) The Tax Procedures Act**

This act provides for a penalty in relation to fraudulent claim for refund. It provides that a person (including a company) who fraudulently makes a claim for a refund of tax shall be liable to pay a penalty of an amount equal to two times the amount of the claim. It further penalizes acts of a person who claims



any relief or refund to which he or she is not entitled; or makes any incorrect statement which affects his/her liability to tax; or prepares false books of account or other records relating to that other person or falsifies any such books of account or other records; or deliberately defaults on any obligation imposed under a tax law

**b) The Companies Act**

Section 787 of this Act provides for investigation of company's affairs in some cases, especially in relation to fraud. Some of these instances is powers offered by a Court to appoint one or more competent inspectors to investigate the affairs of a company and to go and report on its affairs in such a manner as the court directs if it appears to the court on a report from the Attorney General that there are circumstances suggesting that the company business is-

- Being conducted with a intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose that the company was formed for a fraudulent or unlawful purpose;
- That persons responsible for the company formation or the management of its affairs are or have been guilty of fraud, misfeasance or other misconduct towards it or towards its members;
- That the company's members have not been given all the information with respect to its affairs that they might reasonably expect to have been given.

This provision in the Companies Act, to some extent, considers the probability that a criminal liability may be attributed to the promoters of a company in certain instances but on the order of the court. Further, there are common law principles on lifting the veil of a company to reveal the actual and beneficial owners that would be applicable in cases where various persons connected with the company would be under investigation for fraud.

**c) Prevention of fraud (investments) act no 1 of 1977**

This law was enacted to provide for the control of persons dealing in securities, and for the more effective prevention of fraud in investments and related matters. Unfortunately, with the enactment of various laws regulating financial markets, this law has ceased to have much effect and it ought to be repealed or significantly reformed.

**d) The proceeds of Crime and Anti-Money Laundering Act**

This act sets up the Assets Recovery Agency which is tasked with the mandate to trace, freeze and confiscate proceeds of all crime. The only difficulty with this set up is that the assets recovery agency is housed under the office of the attorney general thus presenting a potential conflict and duplicity of functions with office of director of public prosecutions.

**(iv) The need to hold directors of companies engaging in fraudulent trading criminally liable for their acts**

The Companies Act contemplates various instances where the directors of company may be criminally liable for their acts. As earlier discussed, the Penal Code envisages such a situation where directors and managers may be held liable for their conduct in the management of the company. Such provisions would nevertheless need to be enhanced.

**2. Comparative Analysis**

The laws relating to fraud in some other selected jurisdiction are as follows-

**a) United kingdom**

The United Kingdom has enhanced the Fraud Act, 2006 (Cap 35). This Act creates a criminal offence of fraud. It defines fraud to include three classes: fraud by false representation, fraud by failing to disclose information and fraud by abuse of position.

It provides where an offence is committed by a body corporate, but was carried out with the 'consent or connivance' of any director, manager, secretary or officer of the body- or any person purporting to be such- then that person, as well as the body itself, is liable

**b) Guyana**

The State of Guyana has enacted the Criminal Law (Offences) Act, Chapter 8:01 Laws of Guyana. This Act in Sections 203-208 contain detailed provisions dealing with corporate fraud as well as sections 214-220 dealing with fraudulent debtors

**c) Isle of man**

This country has enacted the Fraud Act, 2017. This Act is fashioned with the UK Fraud Act 2006. Of importance is section 17 of the Act which creates liability for the officers of a corporation that commits offences under the Act.

**3. Conclusions and Recommendation**

- (i) The legal provisions relating to conspiracy to defraud and corporate fraud in Kenya are inadequate. This has been exacerbated by the slow pace of legal reforms directed at the Penal code.
- (ii) There is need for Kenya to strengthen the provisions on corporate fraud and develop the law to include holding corporations criminally liable as it has evolved as practise with other jurisdictions.
- (iii) It is a good practice to have single consolidated law dealing with penal offences than have multiplicity of disjointed penal laws contained in the various laws
- (iv) Therefore, the Commission advises against enacting a law solely to tackle the issue of fraud. The Commission believes it's not wide enough to warrant

housed in a statute on its own. Even in the UK where they have enacted such a law, it was for purpose of replacing the UK Theft Act. It is a small Act with few provisions.

- (v) The Commission also recommendsthat the issues raised of corporate and new trends of frauds be included in the Penal Code. In addition, the penal code needs a comprehensive review to align it to the constitutional and factor in other new trends of criminal offences as discussed.

## CHAPTER THREE

### **3.0 COMMITTEE FINDINGS AND RECOMMENDATIONS**

#### **3.1 Committee Findings**

The Committee made the following observation from the evidence adduced during the meetings-

Fraud is multi-faceted, as such there are several pieces of legislation dealing with it, namely the Penal Code, the Anti-corruption and Economics Crime Act 2003, Public Procurement and Disposals Act 2015, Proceeds of Crime and Anti-Money Laundering Act 2009(revised 2016), Bribery Act 2016, and the Computer Misuse and Cybercrimes Act 2018, among others.

#### **3.2 Committee Recommendations**

In response to the prayers by the Petitioner, the Committee recommends as follows-

**There is need to engage the Attorney General and the Kenya Law Reform Commission to look at the gaps in legislation handling Fraud and help determine if there is need for a single piece of legislation to deal with Fraud.**

Sign.......... Date..........

**Hon. William Cheptumo, MP**

**Chairman, Departmental Committee on Justice and Legal Affairs**

# **ADOPTION LIST**

13.	Hon. Adan Haji Yussuf, MP.	
14.	Hon. Japheth Kiplangat Mutai, MP.	
15.	Hon. Anthony Githiaka Kiai, MP.	<u>KIAI</u>
16.	Hon. Jennifer Shamalla, MP.	Shamalla
17.	Hon. Beatrice Adagala, MP.	Adagala
18.	Hon. John Munene Wambugu, MP.	Wambugu
19.	Hon. Boss Shollei, CBS, MP.	



GEORGE GAZEMBA, ACI Arb  
 or: CLERK OF THE NATIONAL ASSEMBLY

KENYA NATIONAL ASSEMBLY



DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

ATTENDANCE REGISTER FOR MEMBERS

DATE... 29/11/2018 ..... TIME... 11am.....

VENUE... Committee Room 7.....

NO.	NAME	SIGNATURE
1.	Hon. William Cheptumo, M.P. – Chairperson	
2.	Hon. Alice Wahome, MP. - Vice Chairperson	
3.	Hon. John Olago Aluoch, MP.	
4.	Hon. Roselinda Soipan Tuya, MP.	
5.	Hon. Ben Momanyi, MP.	
6.	Hon. Mwamkale William Kamoti, MP.	
7.	Hon. Peter Opondo Kaluma, MP.	
8.	Hon. Charles Gimose, MP.	
9.	Hon. Johana Ngeno Kipyegon, MP.	
10.	Hon. Zuleikha Hassan, MP.	
11.	Hon. John Kiarie Waweru, MP.	
12.	Hon. George Gitonga Murugara, MP.	



**MINUTES OF THE  
COMMITTEE SITTINGS**

**MINUTES OF THE TWENTY NINTH SITTING OF THE  
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS  
HELD ON TUESDAY, 10<sup>TH</sup> APRIL, 2018 AT 11.00 A.M. IN THE  
BOARDROOM ON 5<sup>TH</sup> FLOOR, CONTINENTAL HOUSE, PARLIAMENT  
BUILDINGS**

**PRESENT-**

Hon. William Cheptumo, M.P.	-	<b>Chairperson</b>
Hon. Alice Muthoni Wahome, M.P.	-	<b>Vice Chairperson</b>
Hon. John Olago Aluoch, M.P.		
Hon. Peter O. Kaluma, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P		
Hon. John M. Wambugu, M.P.		
Hon. Beatrice Adagala, M.P		
Hon. John Kiarie Waweru, M.P.		
Hon. George G. Murugara, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Anthony G. Kiai, M.P.		
Hon. Adan Haji Yussuf, M.P.		
Hon. Japheth Mutai, M.P.		

**ABSENT-**

Hon. Charles Gimose, M.P.  
Hon. Ben Momanyi Orori, M.P.  
Hon. William K. Mwamkale, M.P.  
Hon. Johana Ng'eno, M.P.  
Hon. Roselinda Soipan Tuya, M.P.  
Hon. Zuleikha Hassan, M.P.

**IN ATTENDANCE**

**COMMITTEE SECRETARIAT**

Mr. George Gazemba	-	Senior Clerk Assistant
Mr. Denis Abisai	-	Principal Legal Counsel
Ms. Doreen Karani	-	Legal Counsel II
Ms. Halima Hussein	-	Clerk Assistant III

**PETITIONER**

Mr. Allen Waiyaki - Advocate of the High Court of Kenya

**MIN No. 103/2018: PRELIMINARIES**

The Chairperson called the meeting to order at 11:00 a.m. which was followed by a word of prayer from the Vice Chairperson.

**MIN No. 104/2018: CONSIDERATION OF A PETITION BY ALLEN WAIYAKI GICHUHI, ADVOCATE ON ENACTMENT OF ANTI-FRAUD LEGISLATION**

Mr. Allen Waiyaki Gichuhi, an Advocate of the High Court of Kenya and Chairperson of the Law Society of Kenya appeared before the Committee and argued a case in support of his petition seeking the National Assembly's enactment of anti-fraud legislation. He cited the following reasons in support of his petition-

- (i) The inherent limitations of the Penal Code, Cap 63, Laws of Kenya in respect of offences of fraud, fraudulent activities and conspiracy to defraud;
- (ii) The inadequacies of the Penal Code in preventing and prosecuting persons who set up companies with the sole intention of defrauding innocent both in in private and public capacities;
- (iii) The increasing number of cases pending before courts where persons registered companies with the sole intention of perpetrating fraud on entities both legal and natural especially creditors including national and county taxation authorities and judgement debtors of companies;
- (iv) The need to hold directors of companies engaging in fraudulent activities personally criminally liable for the said criminal actions and omissions;
- (v) The need to provide prosecutors with increased powers in respect of tracing and recovery of assets and properties obtained, misappropriated, disposed, transferred or otherwise dealt with by the directors of companies fraudulently with a view to defeating the ends of justice.

The Committee was satisfied that the Petitioner's case for enactment of anti-fraud legislation had merit and resolved to meet the Attorney-General and Kenya Law Reform Commission with a view to agreeing on a process of developing draft legislation for enactment.

The Petitioner in his capacity as the chairperson of the Law Society of Kenya underscored the need for the Society and the Committee to enhance synergy and submitted that he will organize a forum for the Committee and the Society to deliberate on how to realize this objective.

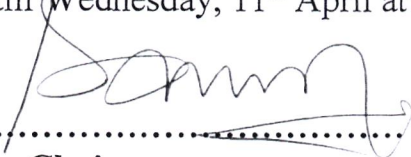
**MIN No. 105/2018:            APPROVAL HEARING ON THE VETTING OF JUSTICE MOHAMED ABDULLAHI WARSAME FOR APPOINTMENT AS A MEMBER OF THE JUDICIAL SERVICE COMMISSION**

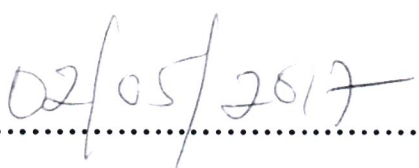
The meeting was informed that the National Assembly had been served and complied with a court order prohibiting it from vetting the nominee. The order further prohibited the nominee from appearing for vetting.

The Committee deliberated on the court order and observed that in view of the fact that the National Assembly had complied with the order, vetting could not proceed on 11<sup>th</sup> April, 2018 as scheduled, pending the outcome of the case filed. In this regard, it was agreed that the Committee tables a report in the House on the status of the vetting and that a meeting be held on Wednesday, 11<sup>th</sup> April, 2018 to consider and adopt the report for tabling.

**MIN No. 106/2018:            ADJOURNMENT**

There being no other business to transact, the Chairperson adjourned the meeting at 12:25 p.m. till Wednesday, 11<sup>th</sup> April at 11.00 a.m. at a venue to be communicated.

Signed.....  
Chairperson

Date.....

**MINUTES OF THE NINETY - FIFTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON THURSDAY, 29<sup>TH</sup> NOVEMBER, 2018 AT 11.00 A.M. IN COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS**

**PRESENT-**

- |                                    |   |                         |
|------------------------------------|---|-------------------------|
| 1. Hon. William Cheptumo, M.P.     | - | <b>Chairperson</b>      |
| 2. Hon. Alice Muthoni Wahome, M.P. | - | <b>Vice Chairperson</b> |
| 3. Hon. Peter O. Kaluma, M.P.      |   |                         |
| 4. Hon. John Olago Aluoch, M.P.    |   |                         |
| 5. Hon. William K. Mwamkale, M.P.  |   |                         |
| 6. Hon. Jennifer Shamalla, M.P.    |   |                         |
| 7. Hon. Anthony G. Kiai, M.P.      |   |                         |
| 8. Hon. George G. Murugara, M.P.   |   |                         |
| 9. Hon. Beatrice Adagala, M.P.     |   |                         |
| 10. Hon. John Kiarie Waweru, M.P.  |   |                         |
| 11. Hon. John M. Wambugu, M.P.     |   |                         |

**ABSENT WITH APOLOGIES**

1. Hon. Ben Momanyi, MP.
2. Hon. Roselinda Soipan Tuya, M.P.
3. Hon. Charles Gimose, M.P.
4. Hon. Japheth Mutai, M.P.
5. Hon. Adan Haji Yussuf, M.P.

**ABSENT**

1. Hon. Zuleikha Hassan, M.P.
2. Hon. Johana Ng'eno, M.P.

**IN ATTENDANCE**

1. Ms. Halima Hussein
2. Ms. Fiona Musili

**COMMITTEE SECRETARIAT**

- |   |                        |
|---|------------------------|
| - | Third Clerk Assistant  |
| - | Researcher Officer III |

**MIN No. 355/2018**

**PRELIMINARIES**

The chairperson called the meeting to order at 11.00 A.m. which was followed by a word of prayer from Hon John Olago, MP.

**MIN No. 356/2018**

**CONFIRMATION OF PREVIOUS MINUTES**

1. Minutes of the 94<sup>th</sup> Sitting held on Tuesday 27<sup>th</sup> November, 2018 at 11.00 am in CPA Room were confirmed as true record of the proceedings and signed by the Chairperson after being proposed by Hon. John Kiarie, M.P and seconded by Hon. Beatrice Adagala, MP.

**MIN No. 357/2018**

**CONSIDERATION AND ADOPTION OF THE  
DRAFT REPORT ON A PETITION FOR  
ENACTMENT OF A FRAUD ACT ALONG  
THE LINES OF THE UNITED  
KINGDOM'S FRAUD ACT 2006, BY ALLEN  
GICHUHI**

The Committee considered and unanimously adopted the draft report on the petition for enactment of a Fraud Act along the lines of the United Kingdom's Fraud Act 2006, by Allen Gichuhi

**MIN No.358/2018:**

**ADJOURNMENT**

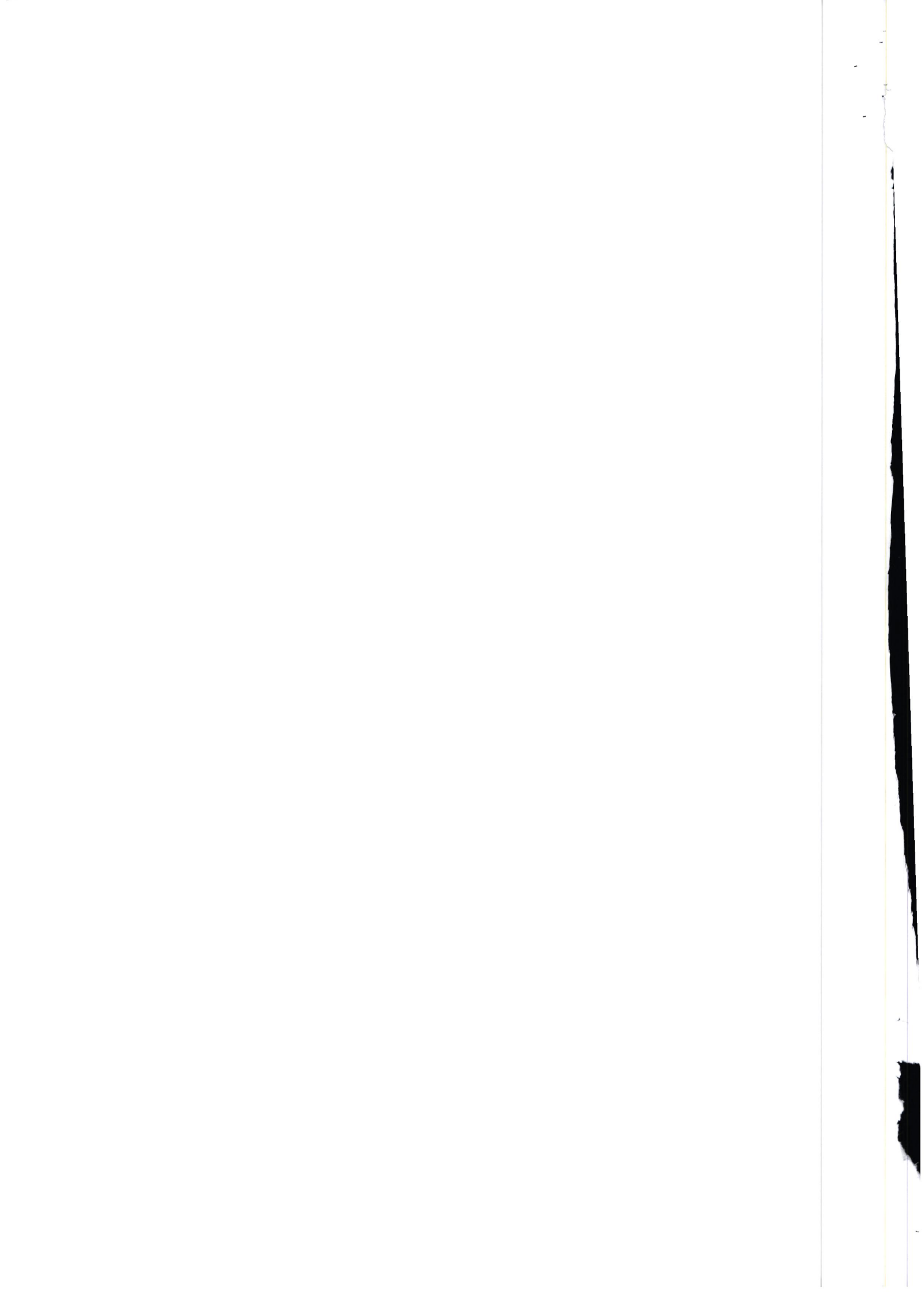
There being no other business to transact, the Chairperson adjourned the meeting at 12.50 p.m.

Signed.....

**Chairperson**

Date..... 24.12.18 .....

**COPY OF THE  
PETITION**





PETITION

(Under Article 119(1) of the Constitution, 2010 and Section 3 of the Petition to Parliament (Procedure) Act No. 22 of 2012, Laws of Kenya)

TO: THE NATIONAL ASSEMBLY  
MAIN PARLIAMENT BUILDINGS  
NAIROBI

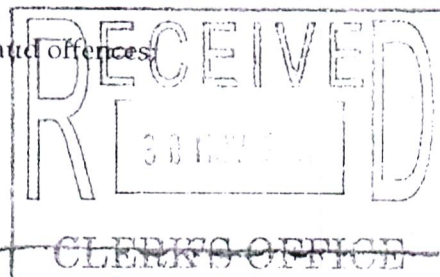
I, ALLEN WAIYAKI GICHUHI, the undersigned, a citizen of Kenya DRAW the attention of the House to the following:

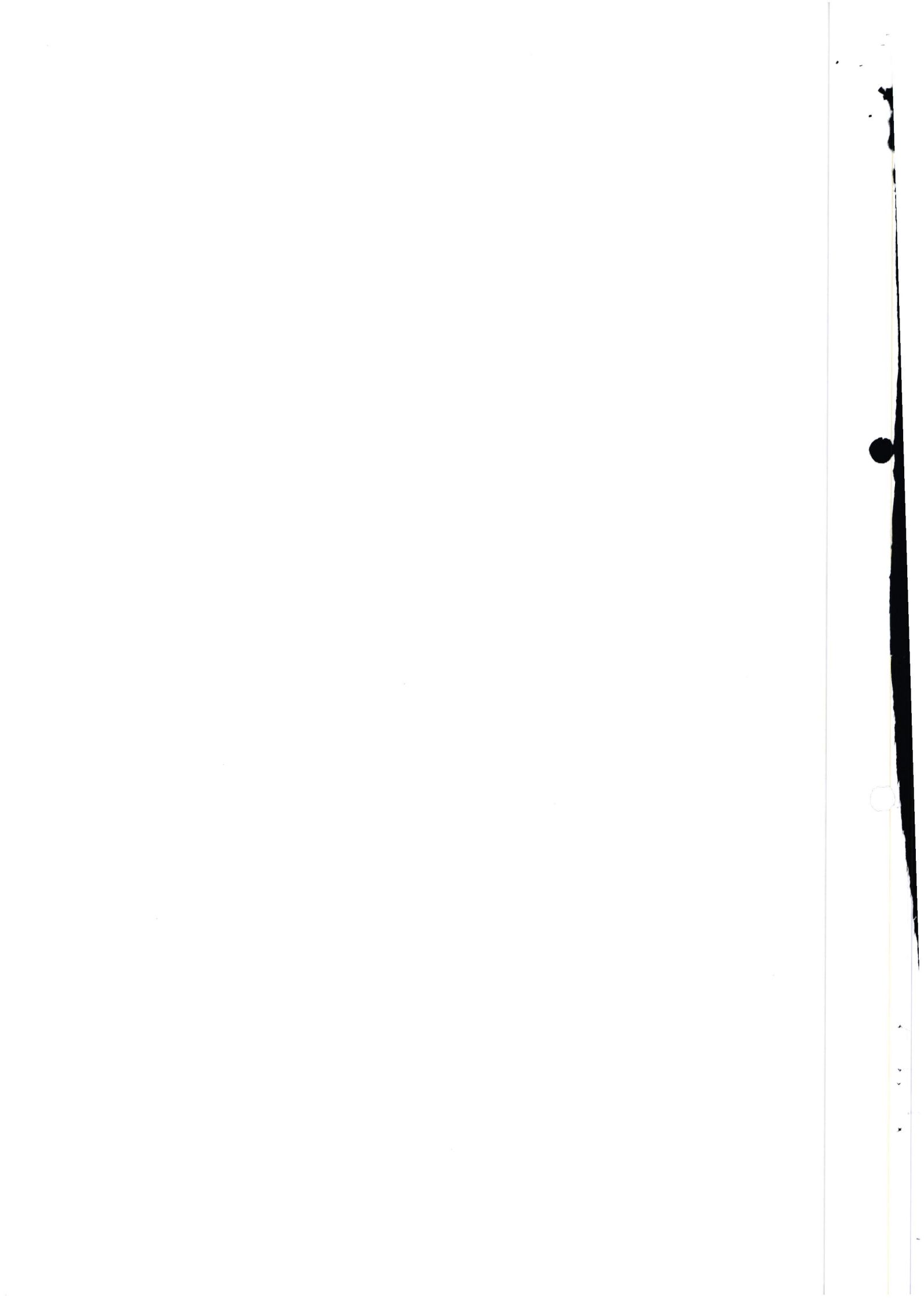
1. The inherent limitations of the Penal Code, Cap 63 Laws of Kenya in respect of the offences of fraud, fraudulent activities, and conspiracy to defraud;
2. The inadequacies of the Penal Code in preventing and prosecuting persons who set up companies with the sole intention of defrauding innocent Kenyans both in private and public capacities;
3. The increasing number of cases pending before our courts where persons registered companies with the sole intention of perpetrating fraud on entities both legal and natural and especially creditors including National and County taxation authorities and judgment debtors of the company;
4. The need to hold directors of companies engaging in fraudulent trading or other fraudulent activities personally criminally liable for the said criminal actions and/or omissions; and
5. The need to provide prosecutors with increased powers in respect of tracing and recovery assets and property obtained, misappropriated, disposed, transferred, or otherwise dealt with by directors and/or officials of companies fraudulently with a view to defeating the ends of justice and/or the law.

THAT this being a legislative matter solely within the purview and province of Parliament, the matter is hereby submitted for first consideration to Parliament and THAT the issues in respect of which this petition is made are not pending before any court of law, constitutional, or legal body to the Petitioner's best belief and knowledge **HEREFORE your humble Petitioner prays that Parliament:**

A. Do consider for enactment a Fraud Bill along the lines of the United Kingdom's Fraud Act 2006, an outline of whose important provisions is as follows:

1. Fraud;
2. Fraud by false representation;
3. Fraud by failing to disclose information;
4. Fraud by abuse of position;
5. Definitions of 'gain' and 'loss' in respect of fraud offences;
6. Possession of articles for use in fraud;
7. Making or supplying articles for use in fraud;
8. Definition of articles of fraud;






9. Participating in fraudulent business carried on by sole trader;
  10. Participating in fraudulent business carried on by company;
  11. Obtaining services dishonestly;
  12. Liability of company officers for offences by company;
  13. A requirement that a person cannot be excused from answering a question in proceedings relating to property or complying with an order made in proceedings related to property on grounds of self-incrimination under the Act or a related offence. Whilst also maintaining the Constitutional right not to self-incriminate by declaring statements and admissions made in the answer therein and complying with such orders, inadmissible in evidence in proceedings for offences under the proposed Act and related proceedings being conspiracy to defraud and any such other offence involving fraudulent conduct and purpose.
  14. Definition of proceedings related to property as proceedings for-
    - i. the recovery or administration of any property,
    - ii. the execution of a trust, or
    - iii. an account of any property or dealings with property,and "property" means money or other property whether real or personal (including things in action and other intangible property).
  15. Savings and Transitional Provisions.
- B. In the alternative, do consider adoption of the UK Fraud Act 2006 with such amendments, modifications, deletions and additions as may be necessary to serve the ends of justice within our jurisdiction.

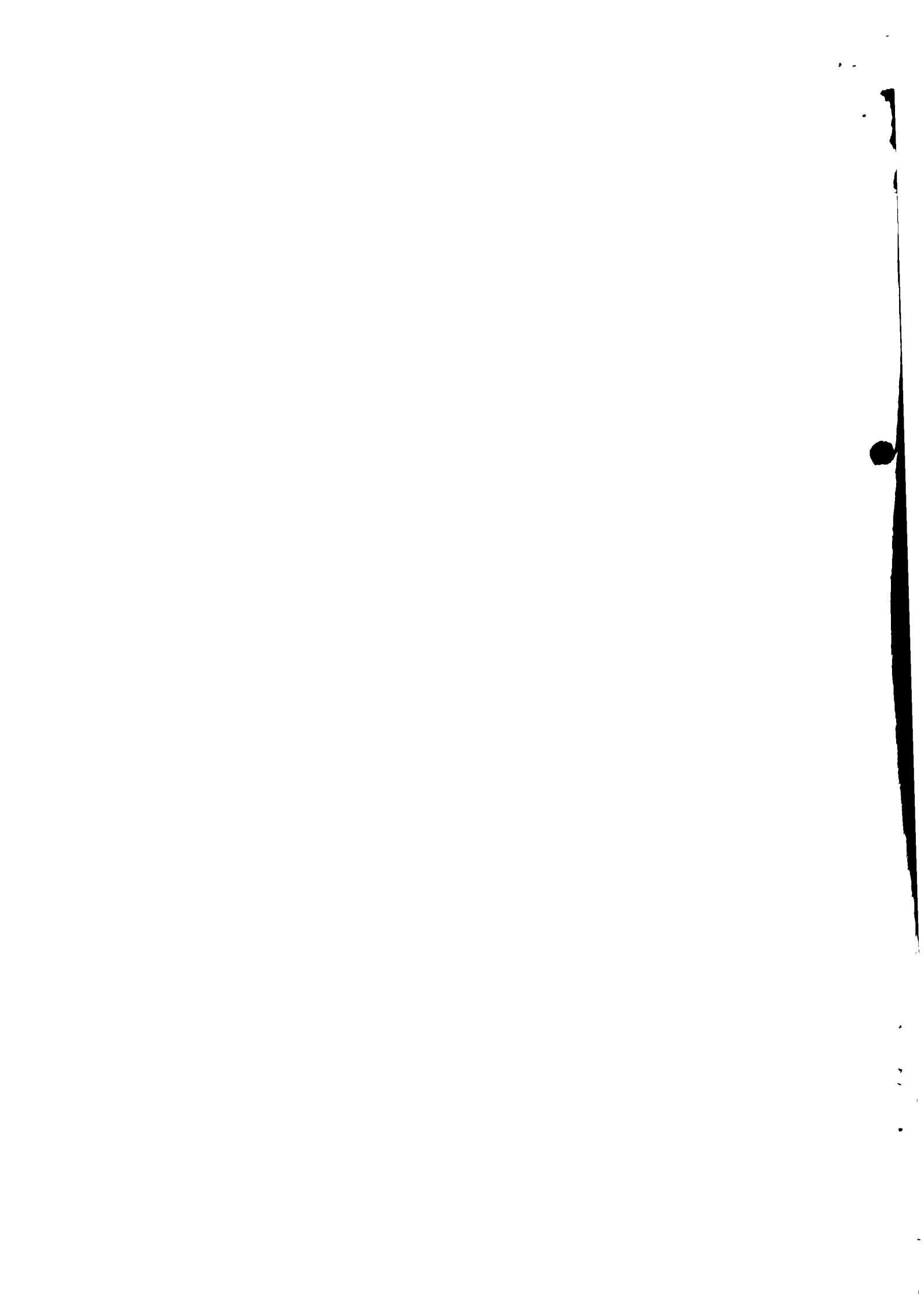
And your Petitioner will ever Pray.

DATED at NAIROBI this 29<sup>TH</sup> day of NOVEMBER 2017

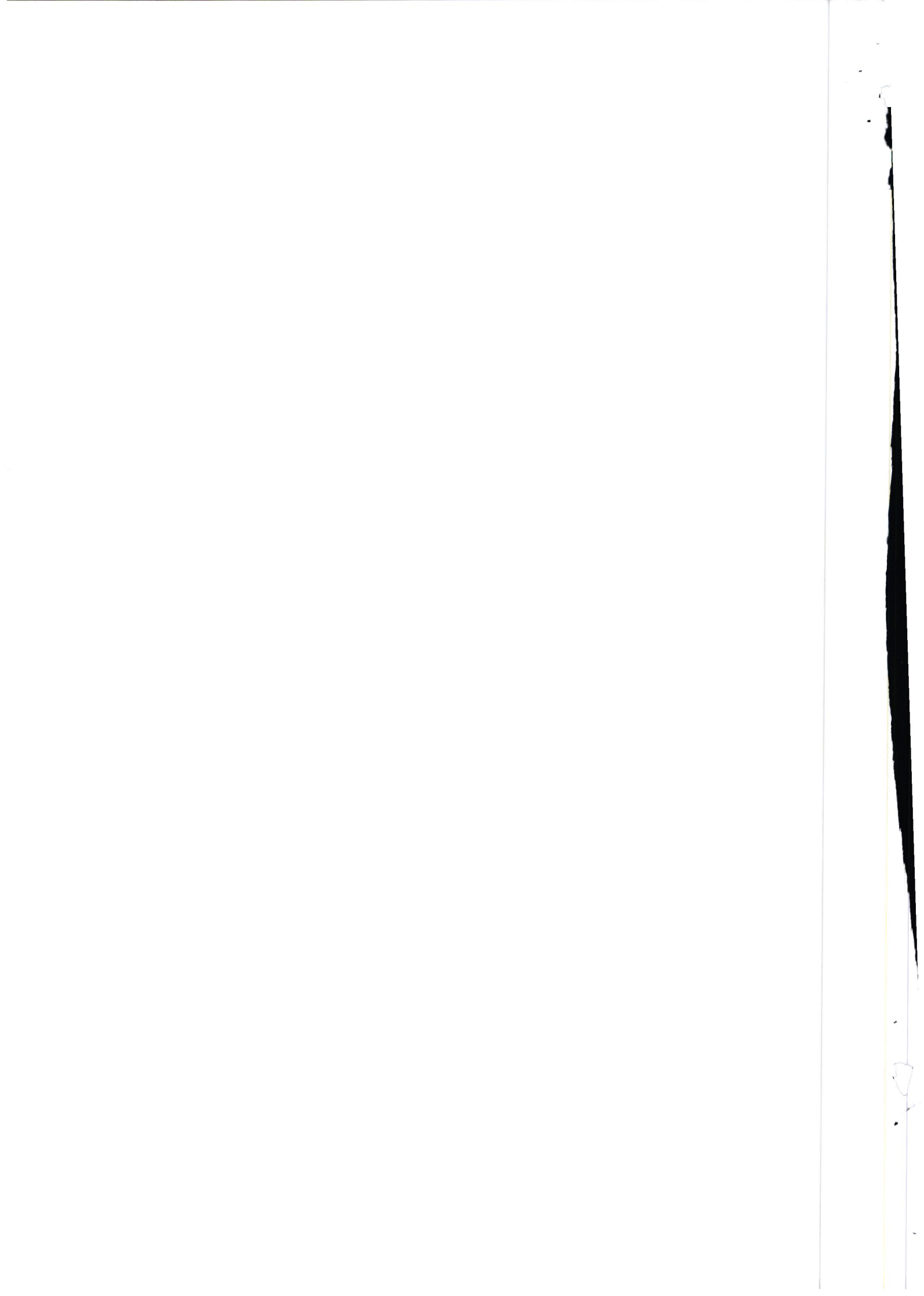


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*Nairobi*



**SUBMISSION FROM  
KENYA LAW REFORM  
COMMISSION**





Kenya Law Reform Commission  
Presentation by Joash Dache, MBS the Chief Executive Officer  
On the Need for the Enactment of Anti-Fraud Legislation  
In a Meeting with the National Assembly Committee on Justice and Legal  
Affairs  
On 2<sup>nd</sup> May 2018

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Table of contents

1. Response to specific questions

- Limitations of the Penal code in respect of fraud, fraudulent activities and conspiracy to defraud
- Inadequacies of the penal code in prosecuting persons who incorporate companies with the sole intention of committing fraud
- Increased cases of incorporating companies to commit fraud on both natural and legal persons
- The need to hold directors of companies engaging in fraudulent trading criminally liable for their acts

2. Comparative Analysis

3. Conclusions and Recommendations

1. RESPONSE TO SPECIFIC ISSUES

- i) *The inherent limitations of the penal code Cap 63 Laws of Kenya in respect of fraud, fraudulent activities and conspiracy to defraud*

- Over the years, the Penal Code has not attracted or been accorded sufficient attention and traction in terms of law reform.
- Consequently, the provisions of the Act relating to fraud or conspiracy to commit fraud as stipulated have not been under constant reform to keep pace with the evolution of fraud in the modern economy.
- Indeed, the Penal Code is limited in respect of dealing with rising and sophisticated cases of new trends of fraud such as bank fraud, insurance fraud, pyramid Scheme fraud, and stock market fraud, among others.
- In addition, the classification and characterisation of the inchoate offence of conspiracy to fraud is inadequate. This inadequacy has presented challenges to the prosecutors in effecting successful prosecutions on conspiracy to fraud as well as other inchoate offences.
- Rapid development in technology has further made it difficult for the Penal Code to facilitate the trials of technology-related criminality, such as those relating to credit cards, PIN entry devices, and internet frauds, among others. This Act is certainly not flexible enough to respond to these emerging types of criminality.
- There has been attempt to mitigate these Penal Code short comings by providing for and addressing the offence of fraud in various other legislation.
- The danger of this approach is that it results in some 'charge sheet arbitrage' where it is left upon the prosecutors to decide which law relating to fraud to base their prosecution, that is, whether the sector law or the Penal Code.

ji) *The inadequacies of the Penal Code in prosecuting persons who incorporate companies with the sole intention of committing fraud*



- It is true that the Penal Code does not have provisions to deal with persons who incorporate companies with the intention of committing fraud.
- However, absence of such provisions is good law, as otherwise it would contradict the development of corporation law. The Kenyan legal system recognises the principle of corporate legal personality. It is an accepted understanding that a company, upon incorporation, acquires an identity distinct and separate from that of its promoters, shareholders, with separate rights and liabilities.
- Being a non-natural person, a corporation works through its agents who may be the directors, managers or servants of the company. Therefore, any offence such as fraud and others that may result into criminal liability ought to be directed upon the corporate entities themselves or their managers, not on the promoters irrespective of their *mens rea* (intention).
- The regulation of the Companies, including any criminality by the directors, ought to be handled by the law relating to companies. If people who incorporate the company are to be pursued for any criminal liability purpose, it should be on very exceptional cases.
- Nevertheless, it is our view that the Penal Code is inadequate in holding companies as well as other corporate entities liable for their misdoings that are of criminal nature.
- Despite the development in other jurisdictions, the concept of holding a "company as a criminal" in Kenyan criminal justice system is yet to evolve. The only relevant provision on the offences by corporations, societies, and similar bodies in the Penal Code states as follows:

*"Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved*

*by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission."*

- This provision criminalises the acts of directors and other managers of the company. We observe this is in line with the Companies Act.
- Whereas there would be no difficulty in ascribing criminal liability upon company directors where their culpability is established, difficulties arise when the company itself is to be perceived as the subject of criminal law.
- This lacuna of not having mechanisms to hold the companies in the country criminally liable is unfortunate. This is because corporations, either through their negligence or acts or otherwise omissions, continue to perpetrate or contribute towards the perpetration of criminal wrongs.
- A traditional defence to the effect that the corporation lacks the mental element or that the act can only be attributed to the individual person has been rightly scrapped by some jurisdictions.
- However, questions may arise as to the types of crimes a corporation may commit and the forms or kinds of punishment or consequential penalties that may be imposed upon a corporation.
- In the first question, our view is that the Penal Code ought to address key issues in relation to fraud by a company on issues such as deceptive accounting practices, fraudulent transfers and preference, fraudulently absconding with assets to defeat decretal debts, among others.
- Sanctions of criminal liability of corporations ought to be generally by way of proportionate fines. This is due to the reality that a fine imposed on a company would ultimately impact on the shareholders

whose assets or profit margin is depleted or reduced. The employees may be affected too, because the fine impoverishes the company.

- In the United States, criminal liability on companies has been adopted and that has seen increase of criminal fines and heralded a change on the management of corporations.
- The Penal Code therefore needs to provide for the aspect of criminal liability on companies to deter the rising cases of using companies to effect fraud.
- However, it should be reluctant to penalise the promoters of a company as this may have adverse effect on the development of corporation law and practice in the country.

iii) *The increasing number of cases pending before courts where persons registered companies and used them to commit fraud on entities both legal and natural persons especially creditors including government taxation authorities and judgement debtors of companies*

- We refer to response in Issue (ii).
- The promoters of the companies should generally not be held liable. Any act of alleged criminality including on the aspect of fraud ought to be brought upon the management of the company.
- Various laws contain provisions on how to deal with fraud on various aspects. Some of these include:

a) **The Tax Procedures Act**

- This Act provides for a penalty in relation to fraudulent claim for refund. It provides that a person (including a company) who fraudulently makes a claim for a refund of tax shall be liable to pay a penalty of an amount equal to two times the amount of the claim.

- It further provides penalizes the acts of a person who claims any relief or refund to which he or she is not entitled; or makes any incorrect statement which affects his or her liability to tax; or prepares false books of account or other records relating to that other person or falsifies any such books of account or other records; or deliberately defaults on any obligation imposed under a tax law.

#### b) The Companies Act

- Section 787 of this Act provides for investigation of company's affairs in some cases, especially in relation to fraud.
- Some of these instance is powers offered by a Court to appoint one or more competent inspectors to investigate the affairs of a company and to report on its affairs in such manner as the Court directs if it appears to the Court on a report from the Attorney General that there are circumstances suggesting that the company's business is—
  - being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose that the company was formed for a fraudulent or unlawful purpose;
  - that persons responsible for the company's formation or the management of its affairs are or have been guilty of fraud, misfeasance or other misconduct towards it or towards its members;
  - that the company's members have not been given all the information with respect to its affairs that they might reasonably expect to have been given; or
- This provision in the Companies Act, to some extent, considers the possibility that a criminal liability maybe be attributed to

the promoters of a company in certain instance but on the order of the court.

- Further, there are common law principles on lifting the veil of a company to reveal the actual and beneficial owners that would be applicable in cases where various persons connected with the company would be under investigation for fraud.

c) **Prevention Of Fraud (Investments) Act no. 1 Of 1977**

- This law was enacted to provide for the control of persons dealing in securities, and for the more effective prevention of fraud in investments and related matters.
- Unfortunately, with the enactment of various laws regulating financial markets, this law has ceased to have much effect, and it ought to be repealed or significantly reformed.

d) **The Proceeds of Crime and Anti-Money Laundering Act**

- This Act sets up the Asset Recovery Agency which is tasked with the mandate to trace, freeze and confiscate proceeds of all crime.
- The only difficulty with this set up is that the Asset Recovery Agency is housed under the Office of the Attorney General thus presenting a potential conflict and duplicity of functions with the office of Director of Public Prosecutions.

iv. *The need to hold directors of companies engaging in fraudulent trading criminally liable for their acts*

- The Companies Act contemplates various instances where the directors of a company may be criminally liable for their Acts.

- As earlier discussed, the Penal Code envisages such a situation where directors and managers may be held liable for their conduct in the management of the company. Such provisions would nevertheless need to be enhanced.

## 2. COMPARATIVE ANALYSIS

- The laws relating to fraud in some other selected jurisdiction is as follows.

### a) United Kingdom

- The United Kingdom has enacted the **Fraud Act, 2006** (Cap 35). This Act creates a criminal offence of fraud. It defines fraud to include three classes: fraud by false representation, fraud by failing to disclose information, and fraud by abuse of position.
- It provides where an offence is committed by a body corporate, but was carried out with the "consent or connivance" of any director, manager, secretary or officer of the body - or any person purporting to be such - then that person, as well as the body itself, is liable,

### b) Guyana

- The State of Guyana has enacted the **Criminal Law (Offences) Act, Chapter 8:01 Laws of Guyana**. This Act in Sections 203-208 contain detailed provisions dealing with Corporate Fraud as well as Sections 214-220 dealing with Fraudulent Debtors.

### c) Isle of Man

- This country has enacted the **Fraud Act, 2017**. This Act is fashioned with the UK Fraud Act 2006. Of importance is Section 17 of the Act which creates liability for the officers of a corporation that commits offences under the Act.

## 3. CONCLUSIONS AND RECOMMENDATIONS

- The legal provisions relating to conspiracy to fraud and corporate fraud in Kenya are inadequate. This has been exacerbated by the slow pace of legal reforms directed at the Penal Code.

- There is need for Kenya to strengthen the provisions on corporate fraud and develop the law to include holding corporations criminally liable as it has evolved as practice with other jurisdictions.
- It is a good practice to have single consolidated law dealing with penal offences than have multiplicity of disjointed penal laws contained in the various laws.
- Therefore, we advice against enacting a law solely to tackle the issue of fraud.
- We believe it's not wide enough to warrant being housed in a statute on its own. Even in the UK where they have enacted such a law, it was for purpose of replacing the UK Theft Act. It is a small Act with few provisions.
- Our recommendation is that the raised issues of corporate and new trends of frauds be included in the Penal Code.
- In addition, the Penal Code needs a comprehensive review to align it to the Constitution and factor in other new trends of criminal offences as discussed.

