

LIBRARY COPY

PARLIAMENT
OF KENYA
LIBRARY



**A Report on Procurement of Cemetery Land by the Nairobi
City Council - Land LR No.14759/2 Machakos**

To

**The Parliamentary Committee on Local Authorities and Funds
Accounts**

By

**The Acting Director / Chief Executive
Kenya Anti-Corruption Commission**

On

4th May 2010

[Handwritten signature]

Handwritten text, possibly a signature or stamp, located at the top of the page.

A. STATUS OF INVESTIGATION

1. The matter was reported to the Commission on **21st January 2009** and investigations commenced on **23rd March 2009**. Documentary exhibits in respect of the procurement process and transmission of funds related to the purchase were collected. Several persons who in one way or the other participated in the sale of the Land Reference Number 14759/2 measuring 48.3 hectares (120 acres) situated in the South of Athi River in Machakos District were interviewed and their statements recorded.
2. Upon completion of the investigations the Commission forwarded the case file to the Attorney General on 1st April 2010 with two major recommendations that the Commission institutes recovery proceedings against all the beneficiaries of the scam pursuant to sections 46 and 47 as read with section 48 of the Anti-Corruption and Economic Crimes Act, 2003 and that, criminal proceedings be instituted against all persons found culpable in the matter pursuant to the Anti-Corruption and Economic Crimes Act No 3 of 2003 and the Penal Code.
3. The Honourable the Attorney General concurred with the recommendations and gave consent for immediate prosecution of the following 14 suspects:
 - i. Sammy K. Kirui - PS MoLG
 - ii. Mary N. Ngethe - Dir Legal Affairs CCN
 - iii. Alexander M. Musee - D/Dir Procurement CN
 - iv. Maina Chege - Dir Naen Rech Ltd
 - v. Naen Rech Limited
 - vi. Newton O. Osiemo - Dir Cibiya Worldwide Ltd and Cibiya Farm Holdings
 - vii. Alphonse Mutinda - Lawyer to Henry Kilonzi
 - viii. Pius C. Onduso - Lawyer to Maina Chege
 - ix. Davies O. Osiemo - Lawyer to Naen Rech Ltd
 - x. Nelson W. Otido - D/Town Clerk CCN
 - xi. Joseph O. Kojwando - Lawyer
 - xii. Daniel M. Nguku - MOH, CCN

- xiii. Herman Stevens Chavera – CFO MoLG
- xiv. William Peter Mayaka – Former PS and Chairman Nyayo Tea Zone

4. On 28th April 2010, the Commission arrested nine of the suspects and arraigned them in Court on 29th April 2010 vide Court Case No. ACC/19/2010 and ACC/20/2010. Court summonses have been issued in respect of five of the other suspects who are required to appear before Court on 12th May 2010 and plead to the charges.
5. The Attorney General further directed the Commission to complete any outstanding aspects of the investigations within thirty days.

B. BACKGROUND TO THE INVESTIGATIONS

1. The Langata Cemetery acquired in 1956 and measuring 117.6 acres, reached its full capacity in the year 2000. Since then, the Council has been using pathways within the Cemetery for burial purposes. These are now fully exhausted.
2. Due to the above, the City Council of Nairobi sought financial assistance from Treasury through the Ministry of Local Government to be assisted to procure an alternative land for cemetery purposes.
3. The Deputy Town Clerk then, a Mr. Nelson W. Otido set up a team to prepare the tender documents for use in procuring a cemetery land. The team comprised the following Departmental Heads:
 - a. Dr. Daniel M. Nguku – Medical Officer of Health (M.O.H)
 - b. Peter M. Kibinda – Director City Planning
 - c. Gitonga Akotha – Chief Valuer
 - d. Gibson K. Njamura – Director Procurement
4. The City Council of Nairobi advertised the Tender number CCN/MOH/T/020/08/09 for the procurement of land for Cemetery purposes in the print media as follows; The Standard and Daily Nation of 18th and 22nd September 2008 respectively. The tender

closed on 6th November 2008 with Twelve (12) bidders responding.

5. On 07th October 2008 the Deputy Town Clerk, Mr. N.W. Otido, appointed an **"Opening and Evaluation of Bids team"** which comprised of the following City Council of Nairobi Officials:

- a. Ms. M. N. Ngethe - Legal Affairs Department - Chairman
- b. Mr. A. Gitonga – Valuation Section – Member
- c. Mr. I. Ngacha – Internal Audit Department - Member
- d. Mr. T. Odongo – City Planning Department – Member
- e. Mr. J. Wanjohi – City Mortuary Department – Member
- f. Mr. A. Musee – Procurement Department – Secretary

6. The tender opening and evaluation team conducted technical evaluation of the 12 bids received. The bidders included:

- i. Impals Developers (k) ltd
- ii. Acres and Homes ltd
- iii. Triton (k) ltd
- iv. Kalove advocates
- v. Zinger Enterprises
- vi. Busam Holdings ltd
- vii. Naen Rech Limited
- viii. Gitonga Wambugu Kariuki
- ix. Three steps Investment
- x. Mary Njeri Muchai
- xi. Amusement Gurdens
- xii. Stannly Enterprises limited

7. The tender opening and evaluation team upon concluding the evaluation, recommended award of tender to M/S Naen Rech Limited at a consideration of Ksh 283,200,000 (Kshs. Two Hundred and Eighty Three Million, Two Hundred Thousand only). The bidder offered 120 acres of land in Athi River.

8. The Confidential Business Questionnaire filled by the recommended bidder provided details of the Directors of the Company (Naen Rech Limited) as follows:

| Name | Citizenship Details | Shares % |
|---------------|----------------------------|-----------------|
| Maina Chege | Kenyan | 60 |
| Henry Kilonzi | Kenyan | 10 |
| Winnie Maina | Kenyan | 30 |

However a search at the Company Registry indicates that the Directors of Naen Rech Limited are as follows:

| Directors | Address |
|-----------------------|---------------------------|
| Winnie Wanjiku Mwangi | P.O. Box 72309 Nairobi |
| Maina Chege | P.O. Box 72309 Nairobi |

NB: Notice that, Mr Henry Kilonzi does not appear as a Director of the Company as per the records at the Registrar of Companies.

9. On 11th November 2008 the Deputy Director of City Planning Mr. Patrick Tom Odongo jointly with a member of the Technical Evaluation Team, the Assistant Director in-charge of Forward Planning Section Mr. John Koyier Barreh, wrote a memo addressed to the Chairman Tender Opening and Evaluation Team (Ms Mary Ngethe) and copied the following city council officials:

- | | |
|-----------------------|--------------------------------|
| a. Mr John Gakuo | Town Clerk |
| b. Mr. Alex M. Musee | Deputy Director of Procurement |
| c. Mr. David Wanjohi | (PHD) |
| d. Mr. Gitonga Akotha | Chief Valuer |
| e. Mr. John Kich | Valuation Section |
| f. Mr. Ouko | Procurement Department |
| g. Mr. Isaack Ngacha | Chief Internal Auditor |
| h. Mr. Jacob Munge | City Treasurer. |

The memo raised the following issues:

- i. That the Tender Document was defective and insufficient to assist in procuring suitable land for Cemetery use.
 - ii. That the said Document was used to evaluate the five sites that were substantially responsive and that at the end of the evaluation process, it was categorical that none of the five sites had met the suitability criteria for land for Cemetery use.
 - iii. That in the event that a report was made to the Tender Committee that was contrary to the facts of the findings of the evaluation process, then they would disassociate themselves from such a report.
11. According to the City Council of Nairobi Senior Funeral Superintendent Mr. David Mukuri Wanjohi, a suitable burial site should possess the following characteristics:
- Red soil – is soft and facilitates faster decomposition of bodies.
 - Soil depth of a minimum of 1.8 meters (6 feet).

Mr. David Mukuri Wanjohi participated in the technical evaluation and specifically examined the trial pits dug on land parcel number 14759/2 Athi River in Machakos District, and formed the opinion that the soil profile of the subject land was not suitable for burial purposes. He finally never signed the evaluation report.

12. The tender opening and evaluation report was only signed by the Chairperson (Ms. Mary Ngethe) and the Secretary (Mr. Alex Musee).

It is apparent that the Chairperson and the Town Clerk ignored fundamental issues raised by the Professionals within the City Council namely; Mr. Patrick Tom Odongo, Deputy Director of City Planning, Mr. John Koyier Barreh the Assistant Director in-charge of Forward Planning Section and Mr David Wanjohi, Senior

Funeral Superintendent and a member of the Tender Opening and Evaluation Team.

13. The Tender Committee Chaired by the Deputy Town Clerk Mr. N.W. Otido met on 12th November 2008 and awarded the tender number CCN/MOH/T/020/08-09 Expression of interest for sale of Land for Cemetery use to **M/s Naen Rech Limited** (Parcel No. L.R.14759 (part) situated South of Athi River Township in Machakos District measuring 120 acres and registered in the name of Henry Musyoki Kilonzi) at a unit price of Kshs. 2,360,000 and a total cost of Kshs. 283,200,000 on grounds that:

- i. Naen Rech attained the highest combined score of **86.5%**.
- ii. That the Commissioner of Lands provided a market valuation for the land offered by **M/s Naen Rech Limited** at a total of Kshs.325,150,000 which translated to Kshs. 2,709,583.35 per acre.

The purported valuation report conveying a value of Kshs. 325,150,000 in respect of the Land which formed part of the basis upon which the Tender was awarded to Naen Rech limited was a forgery as it has been disowned by Mr. Anthony Matenge Itui, the Deputy Commissioner of Lands in-charge of valuations.

The subject land was inspected and valued by the Commission's Valuer Mr. Pius N. Maithya at Kshs. 30,000,000 (Kshs. Thirty Million only) on 7th May 2009 yet the City Council of Nairobi purchased the said land at a consideration of Kshs. 283,200,000.

- iii. That the land offered cost Kshs. 2,360,000 per acre and a total of Kshs.283,200,000 which compared well with the Commissioner of Lands estimate of Kshs. 2,709,583.35 per acre.

14. Investigations established that, the Director of Legal Affairs City council of Nairobi Ms. Mary Ngethe entered into correspondence with the Deputy Commissioner of lands in-charge of valuation Mr. Anthony Itui over valuation of the subject land.
15. Following the award of the Tender to M/s Naen Rech Limited. Notification of award was done to M/s Naen Rech Limited through a Letter dated 13th November 2008 signed by N.W. Otido on behalf of the Town Clerk.
16. On 4th December 2008, the Permanent Secretary, Office of the Deputy Prime Minister and Ministry of Local Government did a letter to Mr. John Gakuo, Town Clerk City Council of Nairobi which forwarded Memoranda that contained the technical issues raised the professional at CCN regarding the tender process and suitability of the subject land. The Permanent Secretary asked the Town Clerk to attend to the issues raised and revert back to him.

The Town Clerk's response was surprising. He forwarded the PS's letter to both Mr. Odongo and Mr. Kibinda of Physical Planning Department and requested for their comments to enable him take the necessary action. On 17th December 2008, the Town Clerk through his letter reference number TC/JG/9/3889/2008 forwarded Mr. Kibinda's memo dated 17th December 2008 reference number CPD/ADMIN/008020/PMK/mmg to the Permanent Secretary without addressing the issues raised.

On receipt of Mr. Gakuo's letter the Permanent Secretary commented that there were no serious issues raised and therefore the Chief Finance Officer (CFO) should release the funds. The CFO however commented that the issue of defective Tender Documents had not been addressed and suggested that the Chief Procurement Officer should urgently examine them and that a State Counsel should peruse the draft sale agreement.

The Permanent Secretary dismissed the CFO's comments as mere bureaucratic hurdles. On 19 December 2008 the Town Clerk forwarded Mr. Odongo's memo reference number

CPD/ADMIN/7543 to the Permanent Secretary through a letter reference number TC/JG/9/3890/2008 without addressing the weighty issues raised.

Upon receipt of the above letter/memo, the Permanent Secretary curiously commented that he was satisfied that the Tender process was above board.

17. A sale agreement in respect of the Land was prepared by the City Council Lawyer Mr. Omotii of Omotii and Company Advocates. The Sale Agreement was between Mr. Henry Musyoki Kilonzi as the Vendor and the City Council of Nairobi the Purchaser. The Purchase price was indicated as Kshs. 283,200,000.

The Sale Agreement was purportedly signed by Henry Musyoki Kilonzi and witnessed by Alphonse Mutinda of Alphonse Mutinda & Co. Advocates on one hand and executed by His worship the Mayor Geoffrey Majiwa and the Deputy Town Clerk on behalf of the City Council of Nairobi on the other hand. The same was witnessed by Edward N. Omotii.

18. Mr. Henry Musyoki Kilonzi has since denied ever selling his land to the City Council of Nairobi. He stated that he sold his land L.R. No. 14759/2 to an Israeli Company by the name of Naen Rech Limited for a consideration of Kshs. 110,000,000 and executed a sale agreement over the same. He further stated that the Israeli Company was interested in farming and it was represented by one Mr. Maina Chege.

It appears Mr. Kilonzi was either duped by his Lawyer (Alphonse Mutinda) to sign a Sale Agreement and Transfer Documents in respect of L.R.No. 14759/2 for a consideration of Kshs. 283,200,000 or his signature was forged.

Mr. Kilonzi further denies ever instructing Mr. Alphonse Mutinda to write to the Town Clerk City Council of Nairobi a Letter dated 7th October 2008 which appointed Naen Rech Limited as his agent in the sale of the Land.

19. Upon execution of the Sale Agreement, the Ministry of Local Government released the **Payments** in two instalments to the Town Clerk, City Council of Nairobi for onward transmission to the Council Lawyer Mr. Edward Omotii of Omotii and Company Advocates as follows:

- Cheque No. 005643 dated 30th June 2008 for Kshs. 175,000,000 (Kenya Shillings One Hundred and Seventy Five million only) released on 22nd December 2008.
- Cheque No. 005915 dated 15th January 2009 for Kshs. 108,000,000 (Kenya Shillings One Hundred and Eight Million only) released on 16th January 2009.

20. Mr. Omotii deposited the above funds in a deposit account which attracted interest amounting to Kshs.1, 898,082.03 which he utilized.

On 11th February 2009, Mr. Omotii issued a cheque for Kshs. 281,300,000 in favour of an escrow account domiciled at Bank of Africa Reinsurance branch operated by three firms of Lawyers namely Odero Osiemo and Co. Advocates, P.C. Onduso and Co. Advocates and Alphonse Mutinda and Co. Advocates.

From the said escrow account, the following payments were made:

| S/ No | Name of Payee | Amount (Kshs) | Remarks |
|--------------|----------------------|----------------------|---|
| 1 | Alphonse Mutinda. | 135.9M | <ul style="list-style-type: none"> ➤ The lawyer to Mr. Henry Kilonzi, the true owner of the subject land. (Mr. Henry Kilonzi received kshs. 110M) ➤ One of the signatories to the escrow account |

| | | | |
|---|--------------------------------|----------------|--|
| 2 | P.C. Onduso | 9.6M | <ul style="list-style-type: none"> ➤ The lawyer to Maina Chege, the Director of Naen Rech Ltd ➤ One of the signatories to the escrow account |
| 3 | Odero Osiemo and Co. Advocates | 117M | <ul style="list-style-type: none"> ➤ Lawyer representing Naen Rech Ltd ➤ One of the signatories to the escrow account |
| 4 | Naen Rech Limited | 9.45M | The company that was awarded the tender by the City Council of Nairobi |
| 4 | Cephas Kamande Mwaura | 9.3M | A private land surveyor who purportedly identified the subject parcel of land for Maina Chege |
| | Total | 281.25M | |

Out of the Kshs. 117,000,000 transmitted to Odero Osiemo and Co. Advocates at National Bank of Kenya Harambee Avenue, the following payments were made:

| S/ No | Name of Payee | Amount (Kshs) | Remarks |
|-------|--------------------------|---------------|---|
| 1 | Cibiya Worldwide Limited | 8.2M | The company is an offshore whose directors are Newton Omondi Osiemo (Brother to Davies Osiemo) and one Alex James |

| | | | |
|---|----------------------------------|-------|---|
| 2 | James Mwangi Gacheru | 20M | Paid on behalf on Cibiya Worldwide Ltd in respect of a land transaction, land reference number 12296 Karen Nairobi measuring 2.071 hectares from Mr. James Mwangi Gacheru |
| 3 | Cibiya Farm Holdings Ltd | 1.2M | The company directors are Newton Omondi Osiemo and Margaret Omondi |
| 4 | James Mithamo Kamau | 1.66M | Money paid in respect of a vehicle purchased by Newton Omondi Osiemo on behalf of Cibiya Farm Holdings Ltd. |
| 5 | Owino Kojwando and Co. Advocates | 10M | Lawyer who received the money on behalf of a client whom he is unwilling to reveal. |
| 6 | Dr. Daniel Nguku | 8M | Dr. Nguku was the MOH (User Department) and a member of the Tender Committee. The money was paid through proxies including his wife whose shares at Mwalimu Sacco were boosted. |
| 7 | Alex Musee | 8M | Mr. Musee was the Deputy Director of Procurement CCN and the Secretary to the Tender Opening and Evaluation Committee |
| 8 | William Mayaka | 2M | Mr. Mayaka, (former Permanent Secretary) received the money which was paid through a lawyer, Onyikwa and Company Advocates |

| | | | | |
|----|-----------------------------------|---------|-------------------------|--|
| 9 | Alice Mayaka | Kemunto | 2M | Wife to Mr. Mayaka and former Permanent Secretary received the money from lawyer Onyinkwa and Co. Advocates, being part of Kshs. 4 M paid to the lawyers following instructions by Mr. Mayaka |
| 10 | M/s Moeckings General Contracotrs | | 2M | The two partners in the company; Mercy Kinyanjui and Martin Nganga Kanyingi, received the money as a front to some unknown person(s) |
| 11 | Herman Chavera | Steven | 8.4M 8.6M | The Chief Finance Officer in the Office of the Deputy Prime Minister and Ministry of Local Government received the money through proxy, one Peterson Gichana who is a businessman. Mr. Gichana was in return given Kshs. 100,000/= but has since returned back the money through KACC upon realising that the money was part of the cemetery scam. |
| 12 | Boniface Misera | | 1.3M | A Senior Procurement Officer in the Office of the Deputy Prime Minister and Ministry of Local Government received the money through proxy, one Peterson Gichana |
| 13 | Edward N. Omotii | | 13M | City Council lawyer who received the money over and above his legal fees of Kshs 2,030,000 |

| | | | |
|----|---------|---------|--|
| 14 | Unknown | 31.73M | Various cash withdrawals from the said account |
| | TOTAL | 117.59M | |

Dr. John P. Mutonyi, MBS

Ag. Director / Chief Executive

4th May 2010

BRIEF ON ASSET RECOVERY IN RESPECT OF CEMETERY LAND-4.5.2010

Suspects have already been taken to court on criminal charges over the loss of Kshs. 281,300,000 in respect of the cemetery land. In addition, the Commission has commenced recovery process and issued demand letters on 26.4.2010 to the suspects for recovery of the said Kshs. 281,300,000. The defendants include a Permanent Secretary (DPM), City Council employees, Naen Rech Company Limited and its directors, advocates, business persons.

The Commission has secured other properties which were purchased with money emanating from this fraudulent transaction. It registered a caveat on 9.2.2010 upon IR 31227 LR NO 12296 measuring 2.071 situated in Karen. This land was purchased by Cibiya Worldwide Limited and its director Newton Osiemo and part of the purchase money totalling to Kshs. 38,660,000 came from the cemetery land purchase price.

The Commission has received Kshs. 100,000 from one Mr. Peterson Gichana on 11.3.2010 being what he had received when his account was used to transmit part of the money.

The Commission has accepted requests by some of the suspects to pay the money but this is received without prejudice to the criminal cases in court. One Mr. Boniface Misera has written to us and the AG on 26.4.2010 proposing to pay Kshs. 1,300,000 which he received.

Once the time for the demand has expired on 15.5.2010, the Commission shall file recovery suits.

10th Parliament 2008–2012 (WOMEN MEMBERS)

| | | |
|---|----------------------|----------------|
| 1. Chepchumba Peris | Eldoret South | Elected |
| 2. Kamar Jepkoech Margaret | Eldoret East | “” |
| 3. Kariuki Wanjiru Margaret | Starehe | “” |
| 4. Karua Wangari Martha | Gichugu | “” |
| 5. Kilimo Jebii Linah | Marakwet East | “” |
| 6. Kosgei Jemnetich Sally | Aldai | “” |
| 7. Kones Pauline Cherono | Bomet | “” |
| 8. Laboso Cherono Joyce | Sotik | “” |
| 9. Mathenge Murugi Esther | Nyeri Town | “” |
| 10. Mbarire Mutitu Cecily | Runyenjes | “” |
| 11. Mugo Wambui Beth | Dagoretti | “” |
| 12. Ndeti Wavinya | Kathiani | “” |
| 13. Ngilu Kaluki Charity | Kitui Central | “” |
| 14. Ongoro Elizabeth | Kasarani | “” |
| 15. Sambili Jepkemoi Hellen | Mogotio | “” |
| 16. Shaban Namsi Naomi | Taveta | “” |
| 17. Sophia Abdi Noor | Nominated | |
| 18. Milliie Grace Akoth Odhiambo | Nominated | |
| 19. Rachel Wambui Shabesh | Nominated | |
| 20. Maiso Leshomo | Nominated | |
| 21. Shakilla Abdalla | Nominated | |
| 22. Amina Abdalla | Nominated | |