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THE NATIONAL ASSEMBLY TWELFTH PARLIAMENT - FOURTH SESSION	

THE DEPARTMENTAL COMMITTEE ON  
TRANSPORT, PUBLIC WORKS AND HOUSING

# ADDENDUM

ON PUBLIC PARTICIPATION TO THE REPORT TABLED ON 10<sup>TH</sup>  
SEPTEMBER 2020  
ON THE CONSIDERATION OF THE NATIONAL AVIATION  
MANAGEMENT BILL, 2020  
(NATIONAL ASSEMBLY BILL NO. 18 OF 2020)

DIRECTORATE OF COMMITTEE SERVICES  
THE NATIONAL ASSEMBLY  
PARLIAMENT BUILDINGS  
NAIROBI

OCTOBER 2020





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## LIST OF ABBEVIATIONS

CAK	- Competition Authority of Kenya
KAA	- Kenya Airports Authority
KAAO	- Kenya Association of Air Operators
KALPA	- Kenya Airline Pilots Association
KATA	- Kenya Association of Travel Agents
KAWU	- Kenya Aviation Workers Union
KCAA	- Kenya Civil Aviation
KCA	- Kenya Camel Association
KLMC	- Kenya Livestock Marketing Council
KEMLEIC	- Meat and Livestock Exporters Industry Council of Kenya
KQ	- Kenya Airways PLC
LLP	- Limited Liability Partnership
PLC	- Public Limited Company

## ANNEXURES

- A. Adoption List for the Addendum
- B. Advertisement dated 14<sup>th</sup> September 2020 inviting submission of Memoranda
- C. Minutes of the meetings of the Committee
- D. Written Submissions received by the Committee vide the second advert:
  1. KMK Africa Law Advocates
  2. GERIVIA Advocates LLP
  3. Kenya Association of Air Operators
  4. Kenya Airline Pilots Association
  5. Kenya Aviation Workers Union
  6. Kenya Association of Travel Agents
  7. Mr. Fredrick A. Opot
  8. Meat and Livestock Exporters Industry Council of Kenya (KEMLEIC), Kenya Livestock Marketing Council (KLMC) and Kenya Camel Association (KCA)
  9. Kenya Meteorological Department
  10. SESLaw Advocates LLP
  11. Kakai Mugalo Advocates
  12. The Law Society of Kenya\*
  13. Mwangi, Mwangi & Associates\*
  14. R. Mobisa & Associates Advocates\*
  15. OKAO and Company Advocates \*
  16. Mr. David Njuguna Njathi

*\*Submissions sent earlier were used during oral submissions*



## **1.0 BACKGROUND**

The National Aviation Management Bill, 2020 was read for the first time on **30<sup>th</sup> June 2020** and subsequently committed to the Departmental Committee on Transport, Public Works and Housing for consideration pursuant to the provisions of Standing Order 127(1), and report to the House.

The Committee then held eight meetings both in-house and with different stakeholders where submissions were received and considered before the adoption of the Report. The Report was ultimately tabled before the National Assembly on **10<sup>th</sup> September 2020**.

After deliberations on the Floor of the House on 10<sup>th</sup> September 2020, the Honorable Speaker directed the Committee to conduct a second round of public participation with a view of affording members of the public and other stakeholders more time to submit their views and recommendations, if any, on the said Bill. The Speaker directed that an addendum to the Report be tabled upon the conclusion of that process.

Consequently, the National Assembly advertised for the second time on the local dailies on **14<sup>th</sup> September 2020**, requesting the general public to submit their views on the National Aviation Management Bill, 2020.

## **2.0 SITTINGS TO CONSIDER MEMORANDA RECEIVED**

In its sitting held on **23<sup>rd</sup> September 2020**, the Committee confirmed that pursuant to the directive of the Speaker made on 10<sup>th</sup> September 2020 and the subsequent advert of 14<sup>th</sup> September 2020, a total of eleven parties/stakeholders responded to the National Assembly's further request for submission of memoranda on the Bill. The Committee resolved to invite all the eleven to a physical meeting with the Committee on Tuesday, **28<sup>th</sup> September 2020** and on Wednesday, **29<sup>th</sup> September 2020**. These were:

1. KMK Africa Law Advocates
2. GERIVIA Advocates LLP
3. Kenya Association of Air Operators (KAAO)
4. Kenya Airline Pilots Association (KALPA)
5. Kenya Aviation Workers Union (KAWU)
6. Kenya Association of Travel Agents (KATA)
7. Mr. Fredrick A. Opot
8. Meat and Livestock Exporters Industry Council of Kenya (KEMLEIC), Kenya Livestock Marketing Council (KLMC) and Kenya Camel Association (KCA)
9. Kenya Meteorological Department
10. SESLaw Advocates LLP
11. Kakai Mugalo Advocates

The Committee further noted that in response to the initial advertisement and prior to tabling its report on 10<sup>th</sup> September 2020, there were other stakeholders who had submitted their written memoranda but never appeared before the Committee. Despite their views being captured well in the tabled Committee Report, the Committee was of the view that it was





important that they be given audience together with the eleven parties. In this regard the following were also invited to appear:

1. The Law Society of Kenya
2. Mwangi, Mwangi & Associates
3. R. Mobisa & Associates Advocates
4. OKAO and Company Advocates

The Committee observed that issues which may require further clarification from the Ministry may arise during the Committee interactions with stakeholders. It was the Committee's considered view that all the relevant government agencies be invited on **30<sup>th</sup> September 2020** so that the Committee may seek any further clarifications before retreating to prepare this addendum. In this regard, the following agencies were represented:

1. Ministry of Transport
2. The National Treasury
3. The Attorney General
4. Kenya Airways PLC
5. Kenya Airport Authority
6. Kenya Civil Aviation Authority
7. Ministry of Environment & Forestry
8. Competition Authority of Kenya

The Committee held another sitting on Tuesday, **6<sup>th</sup> October 2020** to consider the recommendations received from the stakeholders, made its observations and recommendations, and to adopt this addendum.

In that session of 6<sup>th</sup> October 2020, the Committee noted that it was in receipt of an extra memorandum from one Mr. David Njuguna Njathi, after the Committee had met all the other stakeholders on 30<sup>th</sup> September 2020. The Committee resolved to fully consider and incorporate the views, his late submission notwithstanding.

### **3.0 FURTHER SUBMISSIONS ON THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

The Committee extended its public participation period to consider all submissions received from 2<sup>nd</sup> July 2020 to 6<sup>th</sup> October 2020. This addendum covers the extra submissions made pursuant to the second advertisement made on 14<sup>th</sup> September 2020. Stakeholders were given an opportunity to submit both in written memoranda and through oral submissions. Below is the summary of the submissions received from the public and various stakeholders.

#### **3.1 KMK AFRICA LAW ADVOCATES**

KMK appeared before Committee on 28<sup>th</sup> September 2020. They referred to their written memorandum dated 21<sup>st</sup> September 2020. In their submissions, they submitted that-

1. Clause 5 be amended because the institutional structure was a bit heavy and therefore proposed that the President and the Air force Commander be removed from the council.
2. Deletion of clause 6 of the Bill to the extent that it creates an Aviation Holding Corporation. In its place, a clause specifying that each of the operating entities will



operate independently and as standalone entities should be inserted. They explained that the clause was an indirect way of reintroducing the now rejected plan of acquisition of the national airport JKIA by KQ and KAA. They submitted that the regulator (KAA) and the regulated (KQ) cannot be merged because there will be a potential conflict of interest. The Chairman of the Committee explained that whereas the stakeholders had all the right to their views, it was important to note that it was not really a merger but a common purpose arrangement.

3. The functions of the Board in clause 9 to be aligned and a new clause on evaluation and approval of an internal system of control and ensure it is maintained. They also submitted that it was paramount to ensure that shareholders' interests were protected.
4. Clause 27 be amended so that KAA's proposed status as an Operating Entity alongside KQ and the AIC be reconsidered in order to provide for effective and independent regulation and to promote fair competition.
5. Clause 52(g) and clause 53 be deleted. There must be an assurance or a securing of the interests of workers which the Bill did not appear to address. They further stated that any restructuring process usually has casualties in the form of retrenched employees.
6. Deletion of the Second Schedule. In particular, they proposed deletion of the provision in the Second Schedule which amends the Companies Act by inserting the words ".....none of the other provisions of this Act or the regulations under this Act, or any amendment thereof, or any other law relating to companies, shall apply to the state owned entities." They further proposed deletion of the proposed amendments to the Public Procurement and Asset Disposal Act, 2015.

**Committee observations:**

1. The Bill does not seek to merge Kenya Airways and Kenya Airports Authority within the meaning of the Competition Act, but to consolidate the aviation assets so as to effectively compete in the international market.
2. Pursuant to Article 132(4)(a) of the Constitution, the President has power to perform any executive function provided for in the Constitution or in national legislation e.g the National Climate Change Council established pursuant to the Climate Change Act, 2016 is chaired by the President. Further, the functions of the Council as an unincorporated body are not of an operational nature but to give policy direction considering the strategic nature of civil aviation.
3. The proposed consequential amendments, as contained in the Second Schedule of the Bill to the State Corporations Act, Cap 446, the Public Finance Management Act, 2015 and the Companies Act, 2015 were informed by the House recommendations contained in Committee's report on the Inquiry into the proposed Kenya Airways' Privately Initiated Investment Proposal to Kenya Airports Authority. The House approved that, upon nationalization of KQ, amendments be made to include exemptions in the State Corporations Act, the Public Finance Management Act, the Public Procurement and Asset Disposal Act and the Public Service Commission Act. (*Recommendation No.5*) As such, the proposed amendments do not expand the subject matter of the Bill.
4. The Bill has provisions for review of terms of service in accordance with the Constitution and other laws and further provides that the employment terms of service should be at the same level or improved.





### **3.2 GERIVIA ADVOCATES LLP**

Gerivia Advocates appeared before Committee on 28<sup>th</sup> September 2020. They referred to their written memorandum dated 21<sup>st</sup> September 2020. In their submissions, they proposed-

1. An amendment to clause 4 to include the aspect of financial accountability and profitability as one of the guiding principles.
2. Amendment to clause 5 to remove the President and the Air force Commander from the council.
3. Amendment to clause 9 for functions of the Board to be aligned and a new clause on evaluation and approval of an internal system of control and ensure it is maintained.
4. Amendment to clause 10(b) to provide for the minimum experience of 15 years for the Chairperson and a Master's degree in a relevant field, and 10years for the Board Members.
5. Amendment to clause 12(3)(c) to provide that the CEO should, in addition to communicating the Board's policies and guidelines, ensure that they are implemented by the Operating Entities.
6. Amendment to clause 21(4) to provide that in the absence of the Corporation Secretary, the person who the Board appoints to replace the Corporation Secretary should also be a member of the Institute of Certified Secretaries and in good standing or an Advocate of the High Court.
7. Amendment to clause 27 to provide for the powers of KAA to approve the establishment of private airstrips and control their operations as is currently the case.
8. Amendment to the First Schedule to provide that the Board shall develop a Board Charter to guide its operations
9. The regulatory role of KCAA over the Corporation should be clear and that the provisions of the Public Finance Management Act should apply.

#### **Committee observations:**

1. That currently, under section 8(1)(a) of the Kenya Airports Authority Act, Cap 395, KAA has power to approve the establishment of private airstrips and control their operations.
2. Pursuant to Article 132(4)(a) of the Constitution, the President has power to perform any executive function provided for in the Constitution or in national legislation e.g the National Climate Change Council established pursuant to the Climate Change Act, 2016 is chaired by the President. Further, the functions of the Council as an unincorporated body are not of an operational nature but to give policy direction considering the strategic nature of civil aviation.

### **3.3 MWANGI, MWANGI & ASSOCIATES**

Mwangi, Mwangi Associates appeared before Committee on 28<sup>th</sup> September 2020 and they referred to their written memorandum dated 7<sup>th</sup> July, 2020. They submitted that-

1. A general amendment should be made to subject the entities created under the Bill to the provisions of the Civil Aviation Act, 2013 and the supervision of the Civil Aviation Authority in regulatory and policy matters.
2. Clause 5 of the Bill should be amended to include a representative from the Kenya Civil Aviation Authority in the Council.
3. A general amendment should be made to subject the entities created under the Bill to the provisions of the Civil Aviation Act, 2013 and the supervision of the Civil Aviation Authority in regulatory and policy matters.





4. The entire Bill needed to be thoroughly thought-out. They stated that the Bill needed more study before it could be implemented.

**Committee observations:**

1. The Committee in its Report had recommended the inclusion of KCAA in the Kenya Civil Aviation Council and further proposed amendments to ensure that the regulatory role of KCAA is not in any way taken up by the Corporation.

**3.4 R. MOBISA & ASSOCIATES**

R. Mobisa & Associates appeared before the Committee on 28<sup>th</sup> September 2020 and they referred to their written memorandum dated 13<sup>th</sup> July, 2020. They submitted that-

1. Clause 2 of the Bill should be amended to provide for a definite date/time on which the Bill will come into force once passed and to exhaustively define what constitutes “user charges” and to delete the general power given to the Cabinet Secretary to define what the user charges are.
2. Clause 5 of the Bill should be amended to include a representative from the Kenya Civil Aviation Authority in the Council and to remove the President, the Cabinet Secretaries for the National Treasury and Interior and the Kenya Air force commander from the Council.
3. Clause 8 of the Bill should be amended to clarify the capacity in which the Chief Executive Officer and the Managing Directors of Kenya Airways and KAA sit on the Board; clarify the reporting relationship between the Chief Executive Officer and the two managing Directors; clarify whether the Managing Director of the Aviation Investment Company also sits on the Board; replace the Cabinet Secretary of the National Treasury with the Principal Secretary; and require the Cabinet Secretary to appoint the four independent directors subject to their nomination by entities not related to the government.
4. Clause 8 of the Bill should be amended to harmonize the term of office of the Chief Executive Officer and the Managing Directors.
5. Clause 24 of the Bill should be amended by deleting the general power given to the Board to assign undefined functions to Kenya Airways.
6. Clauses 25 and 28 of the Bill should be amended to reflect the true valuation of KQ and KAA.
7. Clause 27 of the Bill should be amended by removing any references to the grant of regulatory powers to KAA with regard to access to, operation and construction of aerodromes and by deleting the general function of providing other transport related services and undertaking other businesses related to air transport and ancillary businesses.
8. Clause 30 of the Bill should be amended by deleting the general power given to the Board to assign the Aviation Investment Corporation undefined functions.
9. Clause 43 of the Bill should be amended to harmonize the term of office of the Managing Directors to the term of the Chief Executive Officer.
10. Clause 43 of the Bill should be amended in order to require the Cabinet Secretary to seek the approval of Parliament before excluding any asset or liability of KQ and KAA from any vesting order.
11. Clause 67 of the Bill should be amended in order to harmonize the penalties prescribed with the gravity of the various offences.
12. Clause 72 of the Bill should be amended in order to provide for the objects and purpose for and limitations on the power granted to the Cabinet Secretary for Transport to make regulations.



**Committee observations:**

1. The Committee in its Report had recommended the inclusion of KCAA in the Kenya Civil Aviation Council to ensure KCAA's oversight mandate is recognized as under International Standards and recommended Practices, the Civil Aviation Authority has mandate to ensure effective oversight of the entire aviation sector.
2. The Committee in its Report had proposed amendments to harmonize the term of office of the Managing Directors of the Operating Entities and that of the Chief Executive Officer of the Corporation.
3. The Committee in its Report had proposed amendments to ensure that the powers granted to the Cabinet Secretary to make regulations are in line with Article 94(5) of the Constitution. However, there was need to specify the specific areas of law that may be made.

**3.5 KENYA ASSOCIATION OF AIR OPERATORS (KAAO)**

KAAO appeared before the Committee on 20<sup>th</sup> August 2020 and on 28<sup>th</sup> September 2020. They submitted that-

1. The title of this Bill and Section 1 (1) of the Bill is misleading as Kenya Aviation is comprised of diverse organizations some of which are in private ownership.
2. Clause 4 of the Bill should be amended as the guiding principles should include the enhancement and/or development of JKIA as an international Hub as this has always been one of the key strategies to enable Kenya capture the aviation market in the region.
3. Clause 9 of the Bill should be amended in order to ensure that the function of the Board to approve the user charges is not subjective especially as seen by other players, some being competitors.
4. Clause 10 of the Bill should be amended in order to remove the restriction for the Chairman to have knowledge and experience of similar business as it will be subjective.
5. Clause 13 of the Bill should be amended to provide for a longer period of experience for qualification for appointment as a Chief Executive Officer.
6. Clause 14 of the Bill should be amended to provide for the tenure of the Chief Executive Officer as three years renewable once.
7. Clause 15 of the Bill should be amended to provide for matters relating to integrity, Corruption, Performance and Fraud as grounds for removal of the Chief Executive Officer.
8. Clause 22 of the Bill should be amended in order to align it with the Business Laws (Amendment) Act, 2020 that abolished the use of Common Seals by Companies.
9. Stakeholder consultation by the Operating Entities in setting user charges though intended to protect other users, has by experience been found to be misused at the detriment of the users. It will result in subjective application due to direct conflict of interest.
10. Clause 43 of the Bill should be amended in order to ensure that the tenure of office of a Managing Director is four years and not five.

**Committee observations:**

1. The Committee in its Report had proposed amendments to the provisions of the Bill making reference to use of the common seal to align the provisions with section 37 of the Companies Act which provides that a document, contract or deed will be considered to be validly executed by a company if it is signed on behalf of the





company by two authorized signatories or by a director of the company in the presence of a witness who attests the signature.

2. The Committee in its Report had proposed amendments to harmonize the term of office of the Managing Directors of the Operating Entities and that of the Chief Executive Officer of the Corporation.
3. The Committee in its Report had proposed amendments to provide for matters relating to integrity, Corruption, Performance and Fraud as grounds for removal of the Chief Executive Officer which had not been provided for in the Bill.

### **3.6 KENYA AIRLINE PILOTS ASSOCIATION (KALPA)**

KALPA appeared before the Committee on 20<sup>th</sup> August 2020 and on 28<sup>th</sup> September 2020. They submitted that-

1. Clause 5 of the Bill should be amended to include a representative from the Kenya Civil Aviation Authority in the Council to offer expert advice
2. Clause 7 of the Bill should be amended to ensure that measures aimed at developing the Kenya aviation sector are ratified through a consultative approach.
3. Clause 8 of the Bill should be amended to provide for inclusion of a representative of the Kenya Airline Pilots Association in the Board Membership.  
They further proposed deletion of clause 8(1)(g) and substitute with nine independent non-executive Board members each with the following specific aviation expertise and nominated by the relevant stakeholder bodies. These are the Kenya Airline Pilots Association with over ten years of international flying experience; Aviation maintenance science expert or a licensed aircraft engineering expert; Aircraft acquisition, lease agreement and maintenance reserves expert; A nominee of the Hotels and Restaurants Association of Kenya; A nominee of the Horticulture, Floriculture and Agriculture associations; A nominee of the meat and livestock exports associations; An air cargo management expert; A nominee of the Kenya Aviation Medical Association; and an Aviation audit expert.
4. Clause 10 of the Bill should be amended to provide for the qualification of an ATPL with an executive MBA/MSc or ten years commercial airline experience and experience relevant to aviation.
5. Clause 14 of the Bill should be amended to provide that the tenure of the CEO should be three years.
6. Clause 40 of the Bill should be amended in order to specify a qualification of knowledge and experience in the aviation sector for appointment as a Managing Director.
7. Clause 43 of the Bill should be amended in order to ensure that the tenure of office of a Managing Director is four years and not five.
8. Clause 53 of the Bill should be amended to provide for consultation between the Board and representative associations of employees of the Group in the review of the terms of service of employees of the Operating Entities.
9. Part XI of the Bill on the provisions regarding employees endangering safety should be deleted as it goes against Annex 13 of ICAO (accident investigations).

#### **Committee observations:**

1. The Committee in its Report had recommended the inclusion of KCAA in the Kenya Civil Aviation Council to ensure KCAA's oversight mandate is recognized as under International Standards and recommended Practices, the Civil Aviation Authority has mandate to ensure effective oversight of the entire aviation sector.





2. There is need to have penal provisions in the Bill regarding employees endangering safety as there are instances where an employee, knowingly or intentionally endangers the safety of any person, aircraft or vehicle.
3. The Bill has provisions for review of terms of service in accordance with the Constitution and other laws and further provides that the employment terms of service should be at the same level or improved.

### **3.7 KENYA AVIATION WORKERS UNION (KAWU)**

KAWU appeared before the Committee on 28<sup>th</sup> September 2020. They referred to their written memorandum dated 8<sup>th</sup> July 2020 and an additional one dated 27<sup>th</sup> September 2020. In their submissions, they proposed-

1. The terms “union” and “CBA” should be included in clause 2 and clearly defined.
2. The council was not necessary at all and proposed its deletion. It was their submission that the aviation practice worldwide was that the Minister (Cabinet Secretary) on aviation was the ultimate boss.
3. Clause 49 be amended for additional specific instruments to be included in the Vesting Order to both Kenya Airways and Kenya Airports Authority. These are the respective Recognition Agreements; the existing Bargaining Agreements (CBA’s); the existing Memorandum of Agreements (MOA’s); the existing Memorandum of Understanding (MOU’s); all Rulings, Judgements and Awards of the Court in favour KAWU with the respective Transferring Entities that have not be honoured; all existing court cases filed by KAWU against the respective Transferring Entities; all existing trade disputes filed by KAWU against the respective Transferring Entities; all individual employee contracts entered between the unionizable employees and the respective Transferring Entities; and all other Industrial Relations instruments.
4. Clause 51 be amended to provide that the review and amendment of salaries shall be subject to negotiation and agreement with the Union.

#### **Committee observations:**

1. The Council is the apex body established so as to give policy direction relating to the aviation sector.
2. The term “**collective agreement**” has been defined in the Employment Act, No.11 of 2007 to mean a registered agreement concerning any terms and conditions of employment made in writing between a trade union and an employer, group of employers or employers’ organization. Further the term “**trade union**” has been defined in the Employment Act, No.11 of 2007 to mean an association of employees whose principal purpose is to regulate relations between employees and employers and includes an employers’ organization.
3. The Bill has provisions for review of terms of service in accordance with the Constitution and other laws and further provides that the employment terms of service should be at the same level or improved.

### **3.8 KENYA ASSOCIATION OF TRAVEL AGENTS (KATA)**

KATA appeared before the Committee on 28<sup>th</sup> September 2020 and they referred to their written memorandum dated 18<sup>th</sup> September 2020. They submitted that-

1. Clause 8 be amended for KATA to have a standing Board position because Kenya Aviation Sector is dependent on travel agents who contribute 75% of the passenger number bookings on KQ.



2. Clause 18 be amended to provide that the standing KATA Board position will be represented by the Chief Executive Officer for KATA for the avoidance of conflict of interest.
3. Clause 58(2) be amended to provide that the Board will allocate 3% monthly of the total Passenger Service Charge as provided for under the Air Passengers Service Charge Act to the Kenya Association of Travel Agents for use in marketing promotion activities and educational forum for KATA members such as IATA accredited courses.

**Committee observations:**

1. KATA is a private entity and an essential stakeholder in the promotion and development of the Kenya Aviation Sector as the sector is dependent on travel agents who contribute 75% of the passenger number bookings on KQ.

**3.9 MR. FREDRICK A. OPOT**

Mr. Fredrick A. Opot appeared before the Committee on 28<sup>th</sup> September 2020 and he referred to his written memorandum which was received at the National Assembly on 27<sup>th</sup> August 2020. He submitted that-

1. We need a policy first because the Bill only focuses on the Kenya Airways and the Kenya Airports Authority alone as opposed to the entire aviation sector in totality.
2. Exemption of Kenya Airways from certain provisions of taxation was tantamount to unfair competition.

**Committee observations:**

1. The Bill does not seek to merge Kenya Airways and Kenya Airports Authority within the meaning of the Competition Act, No.12 of 2010 but to consolidate the aviation assets so as to effectively compete in the international market.
2. The policy framework of the National Aviation Management Bill, 2020 is derived from the recommendations of the National Assembly after an extensive inquiry and public participation that culminated to a report tabled on 18<sup>th</sup> June 2019 and adopted by the House on 23<sup>rd</sup> July 2019 on the Inquiry into the proposed Kenya Airways' Privately Initiated Investment Proposal to Kenya Airports Authority.

**3.10 MEAT AND LIVESTOCK EXPORTERS INDUSTRY COUNCIL OF KENYA (KEMLEIC), KENYA LIVESTOCK MARKETING COUNCIL (KLMC) AND KENYA CAMEL ASSOCIATION (KCA)**

KEMLEIC appeared before the Committee on 28<sup>th</sup> September 2020 and they referred to their written memorandum dated 21<sup>st</sup> September 2020. They proposed-

1. Inclusion of the KCAA into the National Civil Aviation Council.
2. Clause 7(1)(c) be amended to provide for the consultation with relevant stakeholders including KALPA, the tourism sector, agriculture sector, horticultural sector, Meat Exporters Council, general aviation operators and the Ministry of Trade and Industry.
3. Amend clause 8 for the nine independent Board members to be nominated by their own bodies independently. These are the Kenya Airline Pilots Association with over ten years of international flying experience; Aviation maintenance science expert or a licensed aircraft engineering expert; Aircraft acquisition, lease agreement and maintenance reserves expert; A nominee of the Hotels and Restaurants Association of Kenya; A nominee of the Horticulture, Floriculture and Agriculture associations; A nominee of the meat and livestock exports associations; An air cargo





- management expert; A nominee of the Kenya Aviation Medical Association; and an Aviation audit expert.
4. Amend clause 40 to enhance the qualification requirements of a Managing Director.
  5. Amend clause 43 to provide for re-appointment based on the profitability and growth achieved.

**Committee observations:**

1. The Committee in its Report had recommended the inclusion of KCAA in the Kenya Civil Aviation Council to ensure KCAA's oversight mandate is recognized as under International Standards and recommended Practices, the Civil Aviation Authority has mandate to ensure effective oversight of the entire aviation sector.

**3.11 KENYA METEOROLOGICAL DEPARTMENT**

The Meteorological Department appeared before the Committee on 28<sup>th</sup> and 30<sup>th</sup> September 2020. They referred to their written memorandum dated 8<sup>th</sup> September 2020. In their submissions, they proposed-

1. Clause 5 be amended so that the Cabinet Secretary in charge be given a seat in the National Civil Aviation Council considering how critical their services are to the aviation sector.
2. Amendment to clause 58(1)(a) to provide for 30% of Air Passenger Service Charge as apportioned proceeds for recovery of costs and charges for meteorological services provided for in aviation.
3. Amendment to clause 58(1)(g) to include recovery of costs and services for meteorological services provided for Air Navigation Service.

**Committee observations:**

1. There is need to include the Cabinet Secretary for the time being responsible for the environment in the Council as meteorological services are critical in the aviation sector.
2. Meteorological services are key, critical and essential to the safety, regularity and operation of aircrafts during take-off, cruise, approach, and landing phases of both civil and military aircrafts.
3. The Ministry of Transport and the Ministry of Environment need to consult further on the sharing of the proceeds from the passenger service charge as provided for under the Air Passenger Services Charge Act, Cap.475.

**3.12 THE LAW SOCIETY OF KENYA**

The Law Society of Kenya appeared before the Committee on 29<sup>th</sup> September 2020 and referred to their written memorandum dated 18<sup>th</sup> August, 2020. They submitted that the Bill should be withdrawn for the following reasons-

1. The creation of the Council materializes to nothing as it replicates functional Cabinet Committees that the President can create without legislation.
2. The establishment of the Kenya Aviation Corporation is the primary goal of the Bill and other operating entities hence irregular and unconstitutional as it does not conform to the spirit of the rule of law. A standalone law for every state corporation called Operating Entities should be enacted separately in consonance with the State Corporations Act.
3. Kenya Airways is among the new entities being created yet the Bill is silent on private commercial interests under KQ currently and nothing on redress issues of assets and liabilities under the succession scheme.





4. The Bill purports to amend other statutes like the Public Procurement and Asset Disposal Act that are not related to it in a manner that unduly expands the subject matter of the Bill contrary to law.
5. The constitutional right of aviation workers should be fortified in the Bill after pragmatic consultation with the aviation stakeholders as there are ongoing court matters on the same.
6. Amend to reflect county government's as they are big stakeholders in the management of local aerodromes as they are transport leeway into the counties and their positioning directly affects the county development plans.

**Committee observations:**

1. Pursuant to Article 132(4)(a) of the Constitution, the President has power to perform any executive function provided for in the Constitution or in national legislation e.g the National Climate Change Council established pursuant to the Climate Change Act, 2016 is chaired by the President. Further, the functions of the Council as an unincorporated body are not of an operational nature but to give policy direction considering the strategic nature of civil aviation.
2. The proposed consequential amendments, as contained in the Second Schedule of the Bill to the State Corporations Act, Cap 446, the Public Finance Management Act, 2015 and the Companies Act, 2015 were informed by the House recommendations contained in Committee's report on the Inquiry into the proposed Kenya Airways' Privately Initiated Investment Proposal to Kenya Airports Authority. The House approved that, upon nationalization of KQ, amendments be made to include exemptions in the State Corporations Act, the Public Finance Management Act, the Public Procurement and Asset Disposal Act and the Public Service Commission Act. (*Recommendation No.5*) As such, the proposed amendments do not expand the subject matter of the Bill.
3. Pursuant to Paragraph 18(g) of Part 1 of the Fourth Schedule to the Constitution, civil aviation is a function of the National Government.
4. The Bill does not seek to merge Kenya Airways and Kenya Airports Authority within the meaning of the Competition Act, No.12 of 2010 but to consolidate the aviation assets so as to effectively compete in the international market.
5. The Bill has provisions for review of terms of service in accordance with the Constitution and other laws and further provides that the employment terms of service should be at the same level or improved.

**3.13 OKAO & COMPANY ADVOCATES**

OKAO & Company Advocates appeared before the Committee on 29<sup>th</sup> September 2020 and referred to their written memorandum dated 8<sup>th</sup> July, 2020. They submitted that they opposed the consolidation of Kenya Airways and Kenya Airports Authority into one entity under the National Aviation Bill, 2020 because-

1. The assets of KAA should be protected from the losses and debts of KQ;
2. No feasibility study has been done to show that the creation of a Kenya Aviation Corporation to consolidate aviation assets is viable, sustainable and will result in value for tax payers money;
3. The airlines business is historically an unprofitable undertaking. It's a business that should not be gambled with taxpayers money especially in the current pandemic of COVID-19; and



4. The government engaging in business has previously gone very badly leading to additional and unnecessary burdens on taxpayers e.g National Bank, Kenya Co-operative Creameries, all the sugar companies and Pan-paper Mills.

**Committee observations:**

1. The Bill does not seek to merge Kenya Airways and Kenya Airports Authority within the meaning of the Competition Act, No.12 of 2010 but to consolidate the aviation assets so as to effectively compete in the international market.

**3.14 SESLAW ADVOCATES**

SESLaw Advocates appeared before the Committee on 29<sup>th</sup> September 2020 and referred to their written memorandum dated 8<sup>th</sup> July 2020. They submitted that the Bill should be rejected in its entirety for-

1. Failure to follow the due process of making a Bill including lack of a policy paper informing nationalization.
2. Lack of adequate information/transparency on the nationalization and the proposed merger.
3. Failure to meet the constitutional threshold of public participation in law making;
4. Failure to adhere to established principals of public finance management and failure to conduct a comprehensive feasibility study on the financial viability of nationalization of KQ and its merger with KAA.
5. Failure to adhere to competition law and policy; potential for infringement on international obligations; and illegalities arising from unlawful/irregular amendment of other laws.

**Committee observations:**

1. The policy framework of the National Aviation Management Bill, 2020 is derived from the recommendations of the National Assembly after an extensive inquiry and public participation that culminated to a report tabled on 18<sup>th</sup> June 2019 and adopted by the House on 23<sup>rd</sup> July 2019 on the Inquiry into the proposed Kenya Airways' Privately Initiated Investment Proposal to Kenya Airports Authority.
2. The proposed consequential amendments, as contained in the Second Schedule of the Bill to the State Corporations Act, Cap 446, the Public Finance Management Act, 2015 and the Companies Act, 2015 were informed by the House recommendations contained in Committee's report on the Inquiry into the proposed Kenya Airways' Privately Initiated Investment Proposal to Kenya Airports Authority. The House approved that, upon nationalization of KQ, amendments be made to include exemptions in the State Corporations Act, the Public Finance Management Act, the Public Procurement and Asset Disposal Act and the Public Service Commission Act. (*Recommendation No.5*) As such, the proposed amendments do not expand the subject matter of the Bill.
3. The Bill was drafted by the Attorney General and approved by Cabinet before transmission to the National Assembly for consideration as provided for by the National Assembly Standing Orders.
4. The Bill does not seek to merge Kenya Airways and Kenya Airports Authority within the meaning of the Competition Act, No.12 of 2010 but to consolidate the aviation assets so as to effectively compete in the international market.





### **3.15 KAKAI MUGALO ADVOCATES**

Kakai Mugalo Advocates were invited to appear before the Committee on 29<sup>th</sup> September 2020 but did not make it. The Committee however considered their written memorandum dated 8<sup>th</sup> July 2020 in which they submitted that the Bill should be rejected in its entirety for the following reasons-

1. Lack of independent oversight of the Board due to conflict of interest in members of the operating entities.
2. Conflict of interest as KQ will be in competition with local and international air operators yet KQ CEO is a Board member in a Board that wields immense regulatory powers over the aviation sector.
3. Risk of CEOs of the operating entities to remove the Corporation CEO by conspiracy.
4. Possibility of KAAs fairly-earned and publicly owned revenues from being absorbed to pay KQs privately acquired debts as a result of poor management.
5. Apparent monopoly and anti-competitive practices which serve to suppress competition.
6. Need to amend the definition of “state corporations” as it is vague and open to abuse

#### **Committee observations:**

1. The Committee in its Report had proposed amendments on provisions regarding the composition of the Board to ensure that there is no conflict of interest as the Managing Directors of the Operating Entities, who report to the CEO are all Board members.

### **3.16 MR. DAVID NJUGUNA NJATHI**

Mr. David Njuguna Njathi’s memorandum was received on 30<sup>th</sup> September 2020. The Committee considered his views on 6<sup>th</sup> October 2020. He submitted that-

1. The return on investment from pooling so many diverse state resources may turn out to be poor.
2. The model proposed in the Bill may work in other jurisdictions where the industry is not comprised of many vibrant players as the case is uniquely so in Kenya.
3. Preferential tax breaks is against the spirit of the Kenyan Competition Rules.
4. We should not shackle the KAA to a financially struggling airline.
5. JKIA can expand to be an attractive hub if managed efficiently.
6. The nationalization of Kenya Airways is a hasty move which takes us back and there is need to carefully consider the reasons for the recent bad financial performance.
7. Support should be given to the entire aviation industry by reviewing the heavy taxation regime.
8. Waiver of duty and VAT on aircraft and aircraft parts would make JKIA and Wilson Airport affordable hubs for aircraft maintenance.
9. The proposed Aviation Council is not necessary in Kenya.

#### **Committee observations:**

1. The Council is the apex body established so as to give policy direction relating to the aviation sector.
2. The Second Schedule to the Bill contains provisions relating to consequential amendments to various Acts of Parliament, including the Public Procurement and Asset Disposal Act, 2015 to allow the Cabinet Secretary, from time to time, with approval of Cabinet and the National Assembly, by notice, to exempt a state organ



or public entity from the application of the Act based on procurement guidelines developed by that state organ or public entity and approved by the National Treasury, to enable the operating entities to effectively function.

#### **4.0 COMMITTEE'S GENERAL OBSERVATIONS**

The committee made the following observations and comments on the Bill:

- (1) The policy framework of the National Aviation Management Bill, 2020 is derived from the recommendations of the National Assembly after an extensive inquiry and public participation that culminated into a report tabled on 18<sup>th</sup> June 2019 and adopted by the House on 23<sup>rd</sup> July 2019 on the Inquiry into the proposed Kenya Airways' Privately Initiated Investment Proposal to Kenya Airports Authority.
- (2) The proposed consequential amendments, as contained in the Second Schedule of the Bill to the State Corporations Act, Cap 446, the Public Finance Management Act, 2015 and the Companies Act, 2015 were informed by the House recommendations contained in Committee's report on the Inquiry into the proposed Kenya Airways' Privately Initiated Investment Proposal to Kenya Airports Authority. The House approved that, upon nationalization of KQ, amendments be made to include exemptions in the State Corporations Act, the Public Finance Management Act, the Public Procurement and Asset Disposal Act and the Public Service Commission Act (*Recommendation No.5 of the Report as adopted on 23<sup>rd</sup> July 2019*). As such, the proposed amendments do not expand the subject matter of the Bill.
- (3) The assertion made by the Law Society of Kenya during its meeting with the Committee on 29<sup>th</sup> September 2020 that the Bill was not drafted within the realm of government procedural processes was unsubstantiated and the same was denied by the Office of the Attorney General and the Ministry of Transport during a Committee meeting held on 30<sup>th</sup> September 2020. The Office of the Attorney General confirmed taking all the instructions on the Bill from the Government and not from any other parties.
- (4) Meteorological services are key, critical and essential to the safety, regularity and operation of aircrafts during take-off, cruise, approach, and landing phases of both of both civil and military aircrafts.
- (5) The Bill does not seek to merge Kenya Airways and Kenya Airports Authority within the meaning of the Competition Act, No.12 of 2010 but to consolidate the aviation assets so as to effectively compete in the international market.
- (6) Pursuant to Article 132(4)(a) of the Constitution, the President has power to perform any executive function provided for in the Constitution or in national legislation e.g the National Climate Change Council established pursuant to the Climate Change Act, 2016 is chaired by the President. Further, the functions of the Council as an unincorporated body are not of an operational nature but to give policy direction considering the strategic nature of civil aviation.





- (7) There is need to amend clause 5 of the Bill to expressly provide that the Council is an unincorporated body and to include the Cabinet Secretary for the time being responsible for the environment in the Council as meteorological services are critical in the aviation sector.
- (8) There is need to amend clauses 11,12 and 13 of the Bill to remove ambiguity and provide clarity on the qualifications for appointment as the Chairperson of the Board, member of the Board and the Chief Executive Officer of the Corporation.
- (9) There is need to amend clause 16 and 42 of the Bill to ensure that the remuneration of the members of the Board and the Managing Directors is determined upon the advice of the Salaries and Remuneration Commission in line with Article 230 of the Constitution.
- (10) There is need to amend clause 44 of the Bill by inserting the word “or” after the first paragraph to connect the two paragraphs and construe them disjunctively.
- (11) There is need to amend clause 45 of the Bill to align it with the provisions of section 37 of the Companies Act,2015 which provides that a document, contract or deed will be considered to be validly executed by a company if it is signed on behalf of the company by two authorized signatories or by a director of the company in the presence of a witness who attests the signature.
- (12) There is need to amend clause 72 of the Bill to specify the specific areas of law that the Cabinet Secretary is required to make regulations for in line with Article 94(5) of the Constitution.

## **5.0 COMMITTEE RECOMMENDATIONS**

The Committee, having considered the National Aviation Management Bill, 2020, and submissions from stakeholders will be proposing amendments to **clauses 3, 5, 10, 11, 13, 16, 42, 44, 45 and 72.**

This is in addition to amendments already proposed in the main Report on **clauses 2,3,4,5, 7, 8, 13, 14, 15, 19, 22, 24, 27, 30, 40, 56, 72** and the **Second Schedule** of the Bill.

### **CLAUSE 3**

**THAT**, Clause 3 of the Bill be amended by deleting paragraph (e) and substituting therefor the following new paragraph—

(e) good governance, integrity, transparency, accountability in management, financing and operation of the Group.

**Justification:** To provide clarity on the objects and purpose of the Bill as regards to matters relating to leadership and integrity.

### **CLAUSE 5**

**THAT** Clause 5 of the Bill be amended in sub-clause (1) by

- (a) deleting the words “ a council” appearing immediately after the word “established” and substituting therefor the words “an unincorporated body”; and



- (b) inserting the following new paragraphs immediately after paragraph (d)—  
(da) the Cabinet Secretary for the time being responsible for matters relating to environment

**Justification:** Meteorological services are key, critical and essential to the safety, regularity and operation of aircrafts during take-off, cruise, approach, and landing phases of both of both civil and military aircrafts.

#### **CLAUSE 10**

**THAT** Clause 10 of the Bill be amended in paragraph (a) by deleting the words “or other related field” appearing immediately after the word “engineering”.

**Justification:** To remove ambiguity and provide for clarity on the qualifications for appointment as the Chairperson

#### **CLAUSE 11**

**THAT** Clause 11 of the Bill be amended in paragraph (a) by deleting the words “or other related field” appearing immediately after the word “engineering”.

**Justification:** To remove ambiguity and provide for clarity on the qualifications for appointment as a Board member.

#### **CLAUSE 13**

**THAT** Clause 13 of the Bill be amended in paragraph (a) by deleting the words “or other related field” appearing immediately after the word “engineering”.

**Justification:** To remove ambiguity and provide for clarity on the qualifications for appointment as the Chief Executive Officer of the Corporation.

#### **CLAUSE 16**

**THAT** Clause 16 of the Bill be amended by inserting the words “upon the advice of the Salaries and Remuneration Commission” immediately after the word “shall”.

**Justification:** Pursuant to Article 230 (4)(b) of the Constitution, the Salaries and Remuneration Commission is mandated to advise the National and county governments on the remuneration and benefits of all public officers.

#### **CLAUSE 42**

**THAT** Clause 42 of the Bill be amended by inserting the words “upon the advice of the Salaries and Remuneration Commission” immediately after the word “Board”.

**Justification:** Pursuant to Article 230 (4)(b) of the Constitution, the Salaries and Remuneration Commission is mandated to advise the National and county governments on the remuneration and benefits of all public officers.

#### **CLAUSE 44**

**THAT** Clause 44 of the Bill be amended

- (a) in sub-clause (1) by deleting paragraph (c); and





- (b) in sub-clause (2) by inserting the word “or” immediately after the word “appointment” appearing in paragraph (a).

**Justification:** To avoid repetition and to connect the two paragraphs and construe them disjunctively

#### **CLAUSE 45**

**THAT** Clause 45 of the Bill be amended by—

- (a) deleting sub-clause (1);
- (b) deleting sub-clause (2);
- (c) deleting sub-clause (3) and substituting therefore the following new sub-clause—
  - (1) Every document of each Operating Entity shall be validly executed by the signature of the relevant Managing Director”;
- (d) deleting sub clause (4) and substituting therefore the following new sub-clause—
  - (4) Every document purporting to be an instrument issued by an Operating Entity and authenticated in the manner provided by subsection (3) shall be deemed to be such an instrument and shall be received in evidence without further proof.

**Justification:** To align the provision with section 37 of the Companies Act,2015 which provides that a document, contract or deed will be considered to be validly executed by a company if it is signed on behalf of the company by two authorized signatories or by a director of the company in the presence of a witness who attests the signature.

#### **CLAUSE 72**

**THAT** the Bill be amended by deleting Clause 72 and substituting therefor the following new clause—

**72.** (1) The Cabinet Secretary may make Regulations for, or with respect to, any matter which is necessary or expedient to be prescribed for carrying out or giving effect to this Act.

(2) Without prejudice to the generality of the foregoing, the Cabinet Secretary may make Regulations for—

- (a) allotment, usage and reallocation of airline slots within airports;
- (b) prescribing measures that enhance stakeholder or public participation in matters touching on the Corporation and its Operating Entities;
- (c) the conduct of aeronautical studies and risk assessment;
- (d) the safety of aircraft, vehicles and persons using any such aerodromes and preventing danger to the public arising from the use and operation of aerodromes;
- (e) preventing or minimizing obstruction within and around aerodromes;
- (f) the preservation of order within aerodromes and preventing damage to property therein;
- (g) the regulation or restriction of advertising within aerodromes;
- (h) the regulation, promotion or restriction of movement of persons entering or leaving aerodromes;
- (i) the prohibition or regulation, in relation to the whole or any part of an aerodrome, of the presence of persons or classes of persons, animals or



- classes of animals, the use of vehicles of any class or description and the doing of acts which might endanger any property or person;
- (j) the regulation of vehicular traffic within an aerodrome including the imposition of speed limits on vehicles therein;
- (k) the appointment and regulation of the conditions for use of parking places for motor vehicles and aircraft in an aerodrome;
- (l) the prescription and regulation of the conditions for use of an aerodrome and its facilities;
- (m) the disposition of unclaimed property in the custody of the Authority;
- (n) security arrangements; and
- (o) the disposal of abandoned aircraft at an aerodrome.

(3) For the purposes of Article 94 (6) of the Constitution—

- (a) the purpose and objective of the delegation under this section is to enable the Cabinet Secretary to make regulations for better carrying into effect the provisions of this Act; and
- (b) the authority of the Cabinet Secretary to make regulations under this Act will be limited to bringing into effect the provisions of this Act and fulfilment of the objectives specified under this section
- (c) The principles and standards applicable to the delegated power referred to under this Act are those found in—
  - (a) the Statutory Instruments Act, 2013;
  - (b) the Interpretation and General Provisions Act,
  - (c) the general rules of international law as specified under Article 2(5) of the Constitution; and
  - (d) any treaty and convention ratified by Kenya under Article 2(6) of the Constitution.

**Justification:** In order to comply with the requirements of Article 94(6) of the Constitution i.e prescribe the purpose and objectives for which the authority is conferred, the limits of the authority, the nature and scope of the law that may be made and the principles and standards applicable to the law being made.

SIGNED .....  
 CHAIRPERSON  
 (HON. DAVID PKOSING, CBS, MP)

DATE ..... 08/10/2020





# **Adoption List**

*for the Addendum*



Adoption of the Addendum on Public Participation to the Report Tabled on 10<sup>th</sup>  
September 2020 on the Consideration of the National Aviation Management Bill, 2020  
(National Assembly Bill No. 18 of 2020)

We, the Members of the Departmental Committee on Transport, Public Works and Housing, have, pursuant to Standing Order 199, adopted this Addendum and affixed our signatures to affirm our approval and confirm its accuracy, validity and authenticity:

1. Hon. David Pkosing, M.P. – Chairperson 
2. Hon. Gathoni Wamuchomba, HSC – Vice Chairperson 
3. Hon. Abdul Rahim Dawood 
4. Hon. David Njuguna Kiaraho 
5. Hon. Johnson Manya Naicca 
6. Hon. Omar Mwinyi Shimbwa 
7. Hon. Peris Pesi Tobiko 
8. Hon. Samuel Arama 
9. Hon. Ahmed Abdisalan Ibrahim 
10. Hon. Ahmed Bashane Gaal 
11. Hon. Ali Wario Guyo 
12. Hon. Dominic Kipkoech Koskei 
13. Hon. George Aladwa Omwera 
14. Hon. Gideon Mutemi Mulyungi 
15. Hon. Kulow Maalim Hassan 
16. Hon. Mercy Wanjiku Gakuya 
17. Hon. Rehema Dida Jaldesa 
18. Hon. Shadrack John Mose 
19. Hon. Tom Mboya Odege 





# Advertisement

*dated 14<sup>th</sup> September 2020  
inviting submission of Memoranda*



*Thungo*

No turning back. Ruto says naysayers will be shocked, as he is not renegeing on Statehouse bid

# Ruto: I defeat the deep state

Deputy President says he is aware of efforts by 'deep State' to place obstacles on his path.

By Peterson Githaiga  
pgithaiga@standardmedia.co.ke

Can't you find something better to do with your time? Please! Give me a break!

This was Deputy President William Ruto's message when he addressed a gathering at two functions he attended in Kitengela, Kajiado County, yesterday.

Dr Ruto urged those opposed to his 2022 presidential bid to let him be, repeating his earlier remarks that he was aware of a plot by what he called the 'Deep

State' and systems to hamper his efforts.

"We are ready and waiting for that 'Deep State' and system that they are talking about. We will go head-on because we have nothing to fear," said Ruto, as he addressed the crowd in Kitengela.

He emphasised that he was still the Deputy President "under the current Constitution", adding that he would make sure the promises he and President Uhuru Kenyatta made to Kenyans before and after they were elected are fulfilled.

"I and President Uhuru promised Kenyans that we will deliver the Big Four agenda. As his deputy, I'm sure we will," said Ruto at the event, where he was accompanied by at least 15 MPs,

among them Kikuyu's Kimani Ichung'wa, Mathira's Rigathi Gachagua and Alice Wahome of Kandara. There were also 25 Kajiado Ward Reps.

The DP vowed to continue to donate money to churches despite the criticism his actions attracted. "When I was born by my mother, I was taken to church and I was trained to give. That's why God has brought me this far. Therefore, I will stop at nothing giving money to the church," said Ruto.

The DP accused his detractors of working "day and night" to stop him from succeeding Uhuru, adding: "What will they do to me?"

He sought the local electorate's support for his bid, saying: "I'm



requesting you that we move together in this journey to Statehouse. We should show these people that even people drawn from poor families can lead this nation".

Ruto first attended an ordination of a pastor at the Baraka FPK Church in Kitengela before going to the local Methodist Church, where he helped raise funds towards its construction.

In the past few weeks, Ruto, whose strategists consider Kajiado as one

of his vote-hunting grounds, has intensified his political activities, meeting five delegations at his Karen home, much to the chagrin of Uhuru's allies in Kajiado.

The first delegation was led by Kajiado South MP Katoo ole Metito. The second delegation was taken to Karen by Senator Philip Mpaayi, while the third was led by nominated senator Mary Seneta, who is eyeing the Kajiado East MP seat.

# Kalonzo set to start BBI rallies

Wiper leader Kalonzo Musyoka has announced plans to begin nationwide campaigns for Building Bridges Initiative (BBI) as he declared support for an expanded executive.

The announcement signals his keen interest in being part of the 2022 succession matrix by joining President Uhuru Kenyatta and ODM leader Raila Odinga in pushing for the envisioned constitutional reforms.

The party made the resolution following a two-day retreat in Machakos by the National Executive Council (NEC) even as it announced its plan to field a presidential candidate in the next polls.

The party has since launched a membership recruitment drive targeting to tap the youths in its 2022 polls strategy.

In a statement, Kalonzo said an expanded executive would ensure an all-inclusive government as well as strengthened devolution.

He said it would be hilarious to reduce the BBI agenda into a political duel between two leaders.

Uhuru and Raila have been spearheading the BBI agenda, which has been opposed by the Deputy President William Ruto.

"Importantly, it provides a unique opportunity to address fears and concerns of millions of Kenyans, who feel excluded in our governance structure. As a party we believe in an all inclusive country where no one feels left behind," said Kalonzo. "That, WDM-K, therefore will traverse the entire country to popularize the initiative and engage robustly with wananchi," he added.

BBI has proposed to have the position of a prime minister, two deputies, official opposition leader on top of the current positions of the president and deputy president.

Kalonzo said the envisioned constitutional reforms would bring to an end the cycle of electoral violence in the country as Kenyans would have the sense of inclusion in the government.

"More than ever before, we clearly see why we direly need the BBI framework; when mer chants of violence who thrive in the politics of bitterness and threats are regrouping," said Kalonzo.

He said politicians with penchant for chaos will have no space in the post-BBI Kenya stating his resolve to back Uhuru's vision of a united country.

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY  
TWELFTH PARLIAMENT - FOURTH SESSION

In the matter of consideration by the National Assembly:-  
The National Aviation Management Bill  
(National Assembly Bill No. 18 of 2020)

## RE-ADVERTISEMENT SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees". Further, the National Assembly Standing Order 127(3) provides that, "The Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House".

The National Aviation Management Bill (National Assembly Bill No. 18 of 2020) seeks to provide for establishment of the National Aviation Council; Kenya Aviation Corporation and its operating entities to provide for their powers, functions and management and for connected purposes. The Bill has undergone First Reading and pursuant to Standing Order 127 (3) is now committed to the Departmental Committee on Transport, Public Works and Housing for consideration and thereafter report to the House.

Further to the advertisement that appeared in both the Daily Nation and Star Newspapers of Thursday, 2nd July, 2020, requesting the Public to submit memoranda on the said Bill, the Committee invites interested members of the Public to make further submissions on the said Bill. The Bill can be accessed from the parliamentary website at [www.parliament.go.ke/the-national-assembly/house-business/bills](http://www.parliament.go.ke/the-national-assembly/house-business/bills).

The representations or written submissions may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hard-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before Monday, 21st September, 2020 at 5.00 pm.

MICHAEL R. SIALAJ, EBS  
CLERK OF THE NATIONAL ASSEMBLY



REPUBLIC OF KENYA  
COUNTY GOVERNMENT OF NYANDARUA  
DEPARTMENT OF LANDS, HOUSING AND  
PHYSICAL PLANNING

Telephone: 0705-284180, 0705-284186  
Email: [lands@nyandarua.go.ke](mailto:lands@nyandarua.go.ke)

[www.nyandarua.go.ke](http://www.nyandarua.go.ke)



P.O. Box 720 20303  
Olkaria  
NYANDARUA

## PUBLIC NOTICE

IT IS NOTIFIED for the information of the general public that the Taskforce on Land Issues in Nyandarua County appointed by H.E. The Governor and published in the Kenya Gazette Notice No. 2412 dated 15th March 2019 to critically examine the land issues facing Nyandarua County, with an emphasis on Olkaria Town, will conduct a Site visit on all plots within Olkaria Township purported to be allocated within public utility.

Plot owners or their representatives are required to be on site at 9:00am with Original and copies of Ownership documents without fail.

DATE	BLOCK	PUBLIC UTILITY/ RECOMMENDED USER
28.09.2020	1 & 2	Show Ground, G.K. Prison, Hospital Primary School, JubKali and Conservation Area near Water Offices. Road Reserve next to PCEA Church, Sanitation next to site and services and Community Centre.
29.09.2020	2	Hawkers ground & Sanitary Reserve next to Main Stage, County Government Houses, Borehole next to ACC Primary School, Open area and riparian Reserve next to existing Slaughter House, Existing cemetery, Proposed Slaughter slab and old quarry
30.09.2020	3 & 5	Proposed Senior Government Housing, New Quarry, Nursery School, Dispensary, Community Hall, Retail Market next to Deliverance Church and Riparian reserve, Public Primary School Opposite Huduma Centre, KGGCU, KNTC, Open Space and Road Reserve, Slaughter House, Fisheries Department and Eco Parks
01.10.2020	3 & 5	Primary School and Public Purpose next to former Public service offices and Power line Wayleave Milk Cooling Plant, Post Office, Public Secondary School next to Governor's Office and Public Purpose next to Power sub-station.
02.10.2020	4 & 6	Conservation/Riparian Reserve next to Huruma estate, Olkaria Stadium, Home for the Aged, Children Home & Dispensary opposite County Assembly, Solid and Liquid Waste Disposal, Cemetery, Playing field, Conservation Area/ Riparian Reserve area next to Mahingo Estate.

It is also notified that, persons who surrendered their land to Olkaria Town Council for public use and were compensated with disputed or plots within public utility land, to present their copies of Ownership documents of the land surrendered and the plot allocated, a sketch route map showing direction to the surrendered property and any other necessary documents supporting the transaction, to Department of Lands, Housing and Physical Planning, Registry Office, on or before 17th September, 2020.

The Taskforce will conduct a Site visit on all properties surrendered on 21st & 22nd September, 2020.

For more information on land reserved for public utilities, visit the Department of Lands, Housing and Physical Planning, County Archi House Building, Behind Governor's Office, Olkaria Town.

Dated 10th September, 2020

Hon. Lawrence N. Mukundi (Eng)  
CECM - Lands, Housing and Physical Planning





Drama A GSU officer was injured on his right hand while trying to gain entry into MP's home

# Oscar Sudi surrenders to police after 48-hour dramatic search

Legislator strolls into Langas Police Station while accompanied by Gladys Shollei, catching officers by surprise

BY NATION TEAM

The 48-hour dramatic search for controversial Kapseret MP Oscar Sudi ended theatrically yesterday morning when he presented himself to police in Eldoret before he was transferred to cool his heels in a Nakuru cell.

The lawmaker, who inexplicably escaped police dragnet at his Kapseret home on Friday night, strolled into Langas Police Station, Eldoret, accompanied by his lawyer Gladys Shollei, the Uasin Gishu woman rep, and other lawmakers; catching officers at the report office by surprise.

Following media reports that police were looking for him, Sudi decided to present himself because there were no summons and neither was there warrant of arrest for him," Ms Shollei said.

"He was not on the run because he had not been summoned, he presented himself voluntarily and he has been officially booked at 8am and now he is in police custody in accordance with the law."

Uasin Gishu police boss Johnston Ipara said Mr Sudi's allies helped "fish" him from his hideouts, but the officer could not explain how the MP managed to hide in suspected plain-sight.

"I applaud leaders who have managed to fish him from his hideouts because it has helped to ease tensions, which were building across the region," said Mr Ipara. "We have been looking for Sudi, we wanted him to be arrested so he can record a statement by NCIC against utterances he made."

Even though they are yet to establish where the legislator was



Kapseret MP Oscar Sudi waves at a crowd that had gathered at Langas Police Station in Uasin Gishu County, where he presented himself yesterday morning. JARED NYATAYA / INATION

According to the MP, he presented himself to the authorities instead of engaging in what he described as "drama" after a contingent of heavily armed police barricaded his home on Friday night. "It was unnecessary to be treated with a lot of drama by sending a contingent of police officers to my home. I was away the time police arrived at my place," he posted on his social media accounts.

More than 100 officers under the command of Mr Ipara raided Mr Sudi's home on Friday night seeking to arrest him for alleged hate speech and incitement, but he managed to escape under unclear circumstances.

During the operation, one General Service Unit officer was injured on his right hand while trying to gain entry and the MP's guard, a Mr Samuel Kibiwot, was shot on both his right and left shoulders.

According to police reports, seven people were arrested during the raid, including three officers working with the Presidential Escort Unit.

Police claimed the officers — Simon Siengo and Issack Dida and CI Ekiru — came to rescue Mr Sudi from his house with a Toyota Prado and one fled with the MP while the other two stayed behind.

Two officers who were arrested in Mr Sudi's home — Simon Siengo and Issack Dida — were released due to lack of evidence, according to Kapseret sub-county police boss Francis Warui.

CI Ekiru, who is suspected to have fled with Mr Sudi, was yet to be accounted for by the time we went to press. "We are yet to establish why they were at Sudi's place, however, due to 24 hours rule, we had to release them as we continue with our investigations into this matter. After gathering our pieces to warrant their prosecution, we will re-arrest them," said Mr Warui on phone.

On surrendering, Mr Sudi was later bundled into a police vehicle, which sped off to Eldoret Airstrip, where he was airlifted by a police helicopter to Nakuru to record a statement with the National Cohesion and Integration Commission over utterances he made last week.

By Onyango Konyango, Barnabas Bili and Joseph Openda

## AT A GLANCE MP locked up in police cells

According to Ms Shollei, Mr Sudi was to be airlifted to Nairobi but the plot was later changed and the helicopter landed in Nakuru. The MP was booked at the station immediately and locked up in the cells amid tight security from police who were heavily armed. Ms Shollei, who briefed the media said they are yet to know the charges he is likely to face.

hiding, Mr Ipara said, police suspect he was in Nandi County.

The police boss said his suspicion was fuelled by the presence of Nandi Governor Stephen Sang and Aldai MP Cornelius Serem, who were among a host of leaders accompanying Mr Sudi to the police station.

"Our intention was to arrest the MP and this could be done either by us arresting him or him surrendering himself; and what happened in the morning is a clear indication that Mr Sudi could have hidden somewhere in Nandi and that is why Governor Sang and MP Serem got him to escort to our stations," said Mr Ipara.

"Those saying that he was not hiding, then why was he not at his home?"

# Kalonzo launches BBI drive

BY SAMWEL OWINO

Campaigns for Building Bridges Initiative (BBI) are set to heighten after Wiper Democratic Movement announced it will hit the ground running across the country to popularise the report.

The Kalonzo Musyoka-led party is today set to meet with its regional coordinators drawn from 47 counties to come up the schedule of their meetings. After a two-day retreat of the National Executive Council at Maanzoni Lodge, Mr Musyoka yesterday announced that the party will also be joining other parties in drumming up support for the BBI report.

The party has tentatively identified Murang'a, Western, Meru and Kisii, where they will be meeting their delegates. Mr Musyoka regretted that the debate on BBI has now been reduced to a political duel between ODM leader Raila Odinga and Deputy

President William Ruto instead of providing a platform to Kenyans to have a conversation on the milestones attained since the promulgation of the 2010 Constitution.

"It would be hilarious to reduce the BBI agenda into a political duel between two leaders. As a party we believe in an all-inclusive country where no one feels left behind. Through the BBI framework, we need to have sobriety in debating issues raised by Kenyans," Mr Musyoka said.

"We will traverse the entire country to popularise the initiative and engage robustly with wananchi. In the meetings, we will protect ourselves and not risk the lives of others because Covid-19 real and we don't want behave like other politicians," Mr Musyoka added.

The party also dismissed the formation of regional government fronted by a section of governors.

REPUBLIC OF KENYA



## THE NATIONAL ASSEMBLY TWELFTH PARLIAMENT - FOURTH SESSION

In the matter of consideration by the National Assembly:-  
The National Aviation Management Bill (National Assembly Bill No. 18 of 2020)

### RE-ADVERTISEMENT

### SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees". Further, the National Assembly Standing Order 127(3) provides that, "The Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House".

The National Aviation Management Bill (National Assembly Bill No. 18 of 2020) seeks to provide for establishment of the National Aviation Council; Kenya Aviation Corporation and its operating entities to provide for their powers, functions and management and for connected purposes. The Bill has undergone First Reading and pursuant to Standing Order 127(3) is now committed to the Departmental Committee on Transport, Public Works and Housing for consideration and thereafter report to the House.

Further to the advertisement that appeared in both the Daily Nation and Star Newspapers of Thursday, 2nd July, 2020, requesting the Public to submit memoranda on the said Bill, the Committee invites interested members of the Public to make further submissions on the said Bill. The Bill can be accessed from the parliamentary website at [www.parliament.go.ke/the-national-assembly/house-business/bills](http://www.parliament.go.ke/the-national-assembly/house-business/bills).

The representations or written submissions may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before Monday, 21st September, 2020 at 5.00 pm.

MICHAEL R. SIALAI, BBS  
CLERK OF THE NATIONAL ASSEMBLY





# Minutes

*of the 38<sup>th</sup>, 39<sup>th</sup>, 40<sup>th</sup>, 41<sup>st</sup> and 42<sup>nd</sup>  
sittings of the Committee*





**MINUTES OF THE THIRTY EIGHTH (38<sup>TH</sup>) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON WEDNESDAY, 23<sup>RD</sup> SEPTEMBER 2020 AT 2.30 P.M. IN COMMITTEE ROOM ON FIFTH FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS**

**MEMBERS PRESENT**

1. Hon. David L. Pkosing, M.P. - Chairperson
2. Hon. Johnson Many Naicca, M.P.
3. Hon. Omar Mwinyi Shimbwa, M.P.
4. Hon. Ahmed Abdisalan Ibrahim, M.P.
5. Hon. Ahmed Bashane Gaal, M.P.
6. Hon. Ali Wario Guyo, M.P.
7. Hon. Dominic Koskei, M.P.
8. Hon. Mercy Wanjiku Gakuya, M.P.
9. Hon. Rehema Dida Jaldesa, M.P.
10. Hon. Tom Mboya Odege, M.P.

**IN ATTENDANCE VIRTUALLY**

11. Hon. Gathoni Wamuchomba, M.P. - Vice Chairperson
12. Hon. Abdul Rahim Dawood, M.P.
13. Hon. David Njuguna Kiaraho, M.P.
14. Hon. Samuel Arama, M.P.
15. Hon. George Aldwa Omwera, M.P.

**MEMBERS ABSENT WITH APOLOGY**

16. Hon. Peris Pesi Tobiko, M.P.
17. Hon. Gideon Mulyungi, M.P.
18. Hon. Kulow Maalim Hassan, M.P.
19. Hon. Shadrack John Mose, M.P.

**SECRETARIAT**

1. Mr. Ahmed Salim Abdalla - Clerk Assistant II
2. Ms. Mercy K. Wanyonyi - Legal Counsel
3. Ms. Noelle Chelang'at - Media Relations Officer
4. Mr. Moses Ndegwa - Sergeant-at-Arms
5. Mr. Brian Ng'etich - Audio Officer

**IN ATTENDANCE VIRTUALLY**

- Ms. Chelagat Tungo - Clerk Assistant I

**MIN No. TPWH 197/2020:**

**PRELIMINARIES**

The Chairman called the meeting to order at forty minutes past two o'clock followed by a word of prayer. The Chairman informed the Honorable Members that the Committee was granted additional time by the Speaker to receive further views from the public and other stakeholders on the National Aviation Management Bill, 2020. It was on this background that the meeting was being held to receive a brief from the Secretariat on the submissions so far received and the proposed way forward. Members were also urged to take note of other pending businesses before the Committee as outlined in the Committee notice paper dated 22<sup>nd</sup> September 2020.

The agenda of the meeting was therefore adopted after having been proposed by the Hon. Tom Odege, MP and seconded by the Hon. Rehema Jaldesa, MP.

**MIN No. TPWH 198/2020:**

**CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

Minutes of the 37<sup>th</sup> sitting which was held on 15<sup>th</sup> September 2020 were confirmed as a true record of the proceedings, after having been proposed by the Hon. Ahmed Bashane, MP, and seconded by the Hon. Johnson Naicca, MP.

**MIN No. TPWH 199/2020:**

**BRIEFING FROM THE LEGAL COUNSEL ON THE SUBMISSIONS RECEIVED PURSUANT TO THE SECOND ADVERT ON THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

The Committee was informed that in compliance with the Hon. Speaker's directive communicated in the House on 10<sup>th</sup> September 2020, an advert was placed in the mainstream newspapers on Monday 14<sup>th</sup> September, 2020 requesting for views from the public and stakeholders on the Bill. Although the deadline was 21<sup>st</sup> September 2020, the Committee noted that as at the time the Committee was sitting, submissions were received from the following:

1. KMK Africa Law Advocates
2. GERIVIA Advocates LLP
3. Kenya Association of Air Operators (KAAO)
4. Kenya Airline Pilots Association (KALPA)
5. Kenya Aviation Workers Union (KAWU)
6. Kenya Association of Travel Agents (KATA)
7. F. A. Opot
8. Meat and Livestock Exporters Industry Council of Kenya (KEMLEIC), Kenya Livestock Marketing Council (KLMC) and Kenya Camel Association (KCA)
9. Kenya Meteorological Department
10. SESLaw Advocates LLP
11. Kakai Mugalo Advocates

The Legal Counsel took Members through the new submissions received. The Committee resolved to invite the stakeholders for physical meetings with a view of engaging them further. The Committee further resolved to invite the stakeholders who made submissions prior to tabling of the Report but did not manage to physically meet the Committee due to time constraints. In this regard, the Committee adopted the following schedule for meetings planned for 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> September 2020.

On Monday, 28<sup>th</sup> September 2020, the Committee proposed to meet with the following:

1. KMK Africa Law Advocates
2. GERIVIA Advocates LLP
3. Mwangi, Mwangi & Associates
4. R. Mobisa & Associates Advocates
5. Kenya Association of Air Operators (KAAO)
6. Kenya Airline Pilots Association (KALPA)
7. Kenya Aviation Workers Union (KAWU)
8. Kenya Association of Travel Agents (KATA)
9. F. A. Opot
10. Meat and Livestock Exporters Industry Council of Kenya (KEMLEIC), Kenya Livestock Marketing Council (KLMC) and Kenya Camel Association (KCA)
11. Kenya Meteorological Department

On Tuesday, 29<sup>th</sup> September 2020, the Committee to meet with the following:

1. The Law Society of Kenya
2. OKAO and Company Advocates
3. SESLaw Advocates LLP
4. Kakai Mugalo Advocates

On Wednesday, 30<sup>th</sup> September 2020, the Committee to meet Ministry so that they may make their comments and any clarifications that may arise from the stakeholders' submissions. In this regard it was proposed that the following be invited:

1. Cabinet Secretary, Transport
2. Cabinet Secretary, National Treasury
3. The Attorney General
4. Kenya Airways PLC (KQ)
5. Kenya Airport Authority (KAA)
6. Kenya Civil Aviation (KCAA)

The schedule for sittings to meet with the stakeholders was adopted by the Committee after being proposed by the Hon. Dominic Koskei, MP and seconded by the Hon. Omar Mwinyi, MP.

**MIN No. TPWH 200/2020:                      ADJOURNMENT**

There being no other business, the sitting was adjourned at seventeen minutes to four o'clock in the afternoon. The next meeting to be held on Monday 28<sup>th</sup> September, 2020 at 10.00a.m.

Signed.....

(Chairperson)

Date.....





**MINUTES OF THE THIRTY NINTH (39<sup>TH</sup>) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON MONDAY, 28<sup>TH</sup> SEPTEMBER 2020 AT 10.00 A.M. IN MINI CHAMBER, COUNTY HALL, PARLIAMENT BUILDINGS**

**MEMBERS PRESENT**

1. Hon. David L. Pkosing, M.P. - Chairperson
2. Hon. Johnson Many Naicca, M.P.
3. Hon. Omar Mwinyi Shimbwa, M.P.
4. Hon. Ahmed Bashane Gaal, M.P.
5. Hon. Ali Wario Guyo, M.P.
6. Hon. Dominic Koskei, M.P.
7. Hon. Kulow Maalim Hassan, M.P.
8. Hon. Tom Mboya Odege, M.P.

**IN ATTENDANCE VIRTUALLY**

9. Hon. Abdul Rahim Dawood, M.P.
10. Hon. David Njuguna Kiaraho, M.P.
11. Hon. Samuel Arama, M.P.

**MEMBERS ABSENT WITH APOLOGY**

12. Hon. Gathoni Wamuchomba, M.P. - Vice Chairperson
13. Hon. Peris Pesi Tobiko, M.P.
14. Hon. Ahmed Abdisalan Ibrahim, M.P.
15. Hon. George Aldwa Omwera, M.P.
16. Hon. Gideon Mulyungi, M.P.
17. Hon. Mercy Wanjiku Gakuya, M.P.
18. Hon. Rehema Dida Jaldesa, M.P.
19. Hon. Shadrack John Mose, M.P.

**SECRETARIAT**

1. Mr. Ahmed Salim Abdalla - Clerk Assistant II
2. Ms. Mercy K. Wanyonyi - Legal Counsel
3. Ms. Noelle Chelang'at - Media Relations Officer
4. Mr. Peris Kaburi - Sergeant-at-Arms
5. Mr. Job Owaga - Audio Officer
6. Ms. Brenda Michira - Legal Pupil

**IN ATTENDANCE VIRTUALLY**

1. Ms. Chelagat Tungo - Clerk Assistant I

**IN ATTENDANCE**

1. Ms. Stella Aura - Director, Kenya Meteorological Dept.
2. Mr. Reginald Mahonga - Head of Planning, KMD
3. Mr. Fredrick Etemesi - Principal Meteorologist, OIC-JKIA
4. Mr. Fredrick A. Opot - Vice Chairman, KAAO
5. Mr. David Njuguna Njathi - Dir. Quality Assurance, Opot/Njuguna Cons.
6. Mr. Nicholas Nганu - CEO, KEMLEIC
7. Mr. Mwenda Mabura - KALPA official
8. Mr. Newton M. Mwangi - Advocate, Mwangi Mwangi & Associates
9. Ms. Susan W. Munene - Advocate, Gerivia Advocates LLP
10. Ms. Sylvia Waiganjo - Advocate, Gerivia Advocates LLP
11. Mr. George Karuthui Kamau - Advocate, Gerivia Advocates LLP

- |                            |   |   |
|----------------------------|---|---|
| 12. Ms. Agnes Mucuha       | - | CEO, Kenya Association of Travel Agents     |
| 13. Mr. Muriuki Muriungi   | - | Advocate, Partner, KMK Africa Law Advocates |
| 14. Mr. Daniel Yatich      | - | KAWU official                               |
| 15. Mr. Danstone Muteshi   | - | KAWU official                               |
| 16. Mr. Walter Onger       | - | Chairman, KAWU                              |
| 17. Mr. Moss Ndiema        | - | Sec. General, Kenya Aviation Workers Union  |
| 18. Ms. Christine Kwamboka | - | Advocate, R. Mobisa & Associates            |
| 19. Mr. Richard Mobisa     | - | Advocate, R. Mobisa & Associates            |

**MIN No. TPWH 201/2020:**

**PRELIMINARIES**

The Chairman called the meeting to order at ten o'clock followed by a word of prayer. The Chairman informed the Honorable Members that the Committee was meeting pursuant to the resolution of the Committee made on 23<sup>rd</sup> September 2020 where it was agreed that all stakeholders who submitted views on the National Aviation Management Bill, 2020 be invited for a physical meeting. The Chairman confirmed that all the eleven invited stakeholders were represented. These were from the following:

1. KMK Africa Law Advocates
2. GERIVIA Advocates LLP
3. Mwangi, Mwangi & Associates
4. R. Mobisa & Associates Advocates
5. Kenya Association of Air Operators (KAAO)
6. Kenya Airline Pilots Association (KALPA)
7. Kenya Aviation Workers Union (KAWU)
8. Kenya Association of Travel Agents (KATA)
9. F. A. Opot
10. Meat and Livestock Exporters Industry Council of Kenya (KEMLEIC), Kenya Livestock Marketing Council (KLMC) and Kenya Camel Association (KCA)
11. Kenya Meteorological Department

The agenda of the meeting was therefore adopted after being proposed by the Hon. Johnson Many Naicca, MP and seconded by the Hon. Ali Wario Guyo, MP.

**MIN No. TPWH 202/2020:**

**CONFIRMATION OF THE MINUTES OF THE PREVIOUS SITTING**

Confirmation of minutes of the 38<sup>th</sup> sitting which was held on 23<sup>rd</sup> September 2020 was deferred to a later date.

**MIN No. TPWH 203/2020:**

**SUBMISSIONS FROM STAKEHOLDERS PURSUANT TO THE SECOND ADVERT ON THE NATIONAL AVIATION MANAGEMENT BILL, 2020 MADE ON 14<sup>TH</sup> SEPTEMBER 2020**

The Committee proposed to consider the Bill in a sequential manner (clause by clause) and allow the stakeholders to raise their views or proposals on each clause. The proposals from the stakeholders were as follows:

1. The Kenya Association of Air Operators (KAAO) submitted that the **title** of the Bill and **clause 1(1)** of the Bill were misleading as Kenya Aviation is comprised of diverse organizations some of which were in private ownership. They were of the view that the Bill was merely about merging the Kenya Airways and Kenya Airports Authority and not about the entire management of the civil aviation sector.

2. On **clause 2** of the Bill, Kenya Airline Pilots Association (KALPA) proposed that the definition of the word “stakeholders” be expanded to mean a person or body with an interest or concern in aviation industry including but not limited to tourism, agriculture, floriculture, trade unions, professional bodies etc.
3. R. Mobisa & Associates submitted that the Bill should be shelved and reintroduced once a feasibility study has been conducted, but in the event the Bill is to be considered, they proposed an amendment to provide for a definite date/time on which the Bill will come into force once passed. They further proposed an amendment to exhaustively define what constitutes “user charges” and to delete the general power given to the Cabinet Secretary to define what the user charges are.
4. The Kenya Aviation Workers Union (KAWU) proposed that the terms “union” and “CBA” should be included in clause 2 and clearly defined while KALPA proposed that the words “safe” and “safety” be defined as per the international aircraft safety standards.
5. On **clause 4**, Gerivia Advocates proposed an amendment to include the aspect of financial accountability and profitability as one of the guiding principles. On their part, the Kenya Association of Air Operators (KAAO) proposed that the aspect of enhancement and development of JKIA as an international hub be strengthened as this has always been one of the key strategies to enable Kenya capture the aviation market in the region.
6. On **clause 5** of the Bill, the Kenya Meteorological Department proposed that they be given a seat in the National Civil Aviation Council considering how critical their services are to the aviation sector. The Committee proposed that the Kenya Meteorological Department appears on 30<sup>th</sup> September 2020 together with the Cabinet Secretary for Environment so that their concerns may be addressed by the Ministry the same day.
7. Still in clause 5, Mwangi, Mwangi & Associates noted that key members were left out of the council including the Kenya Civil Aviation Authority (KCAA). Both KALPA and the Meat and Livestock Exporters Industry Council of Kenya (KEMLEIC) recommended the inclusion of the KCAA into the National Civil Aviation Council.
8. R. Mobisa & Associates supported the inclusion of KCAA and further proposed that the President, the Cabinet Secretary for Treasury and the Kenya Air force Commander be removed from the council to safeguard the independence of the council. The KMK Africa Law Advocates and the Gerivia Advocates also submitted that the institutional structure was a bit heavy and therefore proposed that the President and the Air force Commander be removed from the council.
9. KAWU was of the view that the council was not necessary at all and proposed its deletion. It was their submission that the aviation practice worldwide was that the Minister (Cabinet Secretary) on aviation was the ultimate boss. They further asserted that in case the council is retained, then it was very important to include the Meteorological Department.
10. Some Members of the Committee noted that that the Kenyan airspace was security protected and therefore important to have the Kenya Air force Commander in the council, but the stakeholders who were against the inclusion were of the view that non-military aviation was not under the military, hence the need for KCAA inclusion.
11. On **clause 6**, KMK Africa Law Advocates proposed deletion of clause 6 of the Bill to the extent that it creates an Aviation Holding Corporation. In its place, a clause specifying that each of the operating entities will operate independently and as standalone entities should be inserted. They explained that the clause was an indirect way of reintroducing



the now rejected plan of acquisition of the national airport JKIA by KQ and KAA. They submitted that the regulator (KAA) and the regulated (KQ) cannot be merged because there will be a potential conflict of interest. The Chairman of the Committee explained that whereas the stakeholders had all the right to their views, it was important to note that it was not really a merger but a common purpose arrangement.

12. Functions and powers of the Corporation as provided for in clause 7, R. Mobisa & Associates were of the view that **clause 7(1)(e)** of the Bill should be amended or deleted because the Cabinet Secretary has been given general powers to confer undefined functions and duties to the Corporation and that the clause was therefore subject to misuse.
13. KALPA proposed that **clause 7(1)(c)** be amended to promote the development of the Kenyan aviation sector and the Group in consultation with the relevant stakeholders such as KALPA, Tourism sector, Agriculture sector, General aviation operators and traders associations. KEMLEIC also proposed that **clause 7(1)(c)** be amended to provide for the consultation with relevant stakeholders including KALPA, the tourism sector, agriculture sector, horticultural sector, Meat Exporters Council, general aviation operators and the Ministry of Trade and Industry.
14. Kenya Association of Travel Agents (KATA) recommended **clause 8** of the Bill to be amended for KATA to have a standing Board position because Kenya Aviation Sector is dependent on travel agents who contribute 75% of the passenger number bookings on KQ. They submitted that KATA was in constant assessment and review of customer trends and that denying them a position was akin to denying representatives of passengers' representation.
15. R. Mobisa & Associates proposed the Principal Secretary to sit in the Board of the directors instead of the Cabinet Secretary. They further explained that the reporting mechanism between the CEO and the two Managing Directors was not clear.
16. KALPA submitted that they needed representation in the Kenya Airways Board together with representatives from other vital sectors such as tourism, horticulture, cargo management, aviation audit, among others. KEMLEIC proposed nine independent Board members to be nominated by their own bodies independently.
17. On **clause 9**, Gerivia Advocates and KMK Africa Law Advocates wanted the functions of the Board to be aligned and a new clause on evaluation and approval of an internal system of control and ensure it is maintained. They also submitted that it was paramount to ensure that shareholders' interests were protected. KAAO was concerned that the holding company may restrict the use of airports and other facilities by other airlines raising competition concerns and consumer protection concerns contrary to sections 23 and 24 of the Competition Act. They proposed deletion or an appropriate amendment.
18. On **clause 10 and 11**, Gerivia Advocates proposed an amendment to clause 10(b) to provide for the minimum experience of 15 years for the Chairperson and a Master's degree in a relevant field, and 10years for the Board Members. KALPA proposed that the Chairperson should be an experienced pilot. They further proposed for Parliamentary Approval for the Board Chairman. KAAO however submitted that restriction for the Chairman having knowledge and experience of similar business will be subjective.
19. Gerivia Advocates proposed an amendment to **clause 12(3)(c)** to provide that the CEO should, in addition to communicating the Board's policies and guidelines, ensure that they are implemented by the Operating Entities. They explained that there was need to provide

for an oversight mechanism so as to ensure the operating entities conduct themselves in accordance to required standards.

20. On qualifications for appointment as Chief Executive Officer, both KAAO and KALPA submitted that a longer senior management experience is required. They proposed an amendment to **clause 13** to provide for the qualification of a bachelor's degree in aviation management, aeronautical engineering or an ATPL and a transparent and competitive hiring process.
21. On **clause 14**, KAAO was of the view that 5 years tenure was too long for the CEO. They proposed to amend to 3 years renewable to give room for another appointment of someone with fresh ideas/strategies, should this be deemed necessary. R. Mobisa & Associates, on their part, proposed an amendment to harmonize the term of office of the Chief Executive Officer and the Managing Directors.
22. On **clause 15** of the Bill, KAAO proposed that matters relating to integrity, Corruption, Performance and Fraud should be included as grounds for removal of the Chief Executive Officer.
23. On **clause 18**, KATA proposed to amend to provide that the standing KATA Board position will be represented by the Chief Executive Officer for KATA for the avoidance of conflict of interest.
24. Gerivia Advocates proposed an amendment to **clause 21(4)** to provide that in the absence of the Corporation Secretary, the person who the Board appoints to replace the Corporation Secretary should also be a member of the Institute of Certified Secretaries and in good standing or an Advocate of the High Court.
25. On **clause 22**, KAAO explained that the Business Laws (Amendment) Act, 2020 (the "Amendment") came into effect in March and abolished the use of Common Seals by Companies. In view thereof, subject to the interpretation of Section 36 [Operation of the Companies Act to Operating Entities] this Section should clarify that this Amendment does not apply to the Corporation if that was the intention.
26. On **clause 24**, R. Mobisa & Associates proposed to amend to delete the general power given to the Board to assign undefined functions to Kenya Airways as the same may be misused. Instead, they submitted that specific powers may be outlined. KAAO proposed to amend clause 24(1)(a) to read "to carry on business as carriers of air passengers, freight, cargo transport services and other related services".
27. Regarding **clauses 25 and 28** on share capital of Kenya Airways and that of the Kenya Airports Authority, R. Mobisa & Associates wondered how the figures were reached when there was no feasibility study done. They proposed to amend to reflect the true valuation of KQ and KAA.
28. On **clause 27(e-n)** regarding functions of the Kenya Airports Authority, the KMK Africa Law Advocates submitted that the KAA'S proposed status as an Operating Entity alongside KQ and the AIC ought to be reconsidered in order to provide for effective and independent regulation and to promote fair competition. Gerivia Advocates on their part proposed an amendment to provide for the powers of KAA to approve the establishment of private airstrips and control their operations as is currently the case. R. Mobisa & Associates submitted that any regulatory powers should be removed from KAA to KCAA.
29. On **clause 30**, KAAO submitted that the functions listed are all lifted from the current KAA Act which will raise the concern of the rest of the operators regarding matters of



conflict of interest, objectivity and fair treatment. Further, R. Mobisa & Associates proposed to amend to delete the general power given to the Board to assign the Aviation Investment Corporation undefined functions.

30. On **clause 37**, KAAO submitted that given the passing of the Business Laws (Amendment) Act, 2020, there was a need to indicate whether or not this provision was retrospective in application.
31. **Clause 38** provides for Stakeholder consultation by the Operating Entities in setting user charges. KAAO submitted that although it was intended to protect other users, it was from experience prone to abuse. They proposed that the responsibility for setting fees must be done by a neutral entity which does not stand to directly gain from the fees. KALPA on their part recommended the inclusion of the pilot's association among the relevant stakeholders.
32. On **clause 40**, KALPA, KEMLEIC and KAAO proposed to amend to enhance the qualification requirements of a Managing Director. KAAO submitted that the relevant senior level experience was better than a Master's degree. KALPA explained that international best practice and research shows that aviation expertise is critical in MD position due to subject matter expertise.
33. On **clause 43**, R. Mobisa & Associates proposed to amend to harmonize the term of office of the Managing Directors to the term of the Chief Executive Officer and the Board. KALPA proposed to amend to provide that Managing Director shall hold office for a period of four years and shall be eligible for re-appointment for one further term of four years based on performance, profitability and growth of the organization. KEMLEIC proposed to amend to provide for re-appointment based on the profitability and growth achieved while KAAO recommended a shorter term of 4 years renewable for the MD to give room for another appointment of someone with fresh ideas/strategies, should this be found necessary.
34. **Clause 49** provides for Transfer of Undertakings. KAWU requested and provided for additional specific instruments to be included in the Vesting Order to both Kenya Airways and Kenya Airports Authority.
35. R. Mobisa & Associates proposed an amendment to **clause 50** to require the Cabinet Secretary to seek the approval of Parliament before excluding any asset or liability of KQ and KAA from any vesting order.
36. KAWU proposed to amend **clause 51** to provide that the review and amendment of salaries shall be subject to negotiation and agreement with the Union.
37. On **clause 52(g)**, KMK Africa Law Advocates submitted that there must be an assurance or a securing of the interests of workers which the Bill did not appear to address. They further stated that any restructuring process usually has casualties in the form of retrenched employees. They proposed the deletion of both clause 52(g) and **clause 53**.
38. KALPA proposed an amendment to **clause 53** to provide for consultation with the Kenya Airline Pilots Association and any other associations of employees in the review of terms of service.
39. On **clause 58(1)**, KAAO submitted that among the sources of money into the Fund was the Passenger Service Charge and that the provision further permits that other than the apportionment to KCAA the rest will be invested in the Corporation fund as per Section 63 (3). They submitted that considering that the Corporation is by extension a competitor to other airport users, this would possibly go against the principles of the Competition

Act. They submitted that none of the funds should be used for shoring up the fortunes of one operator, all in the quest to have a “flag carrier”. Instead, they stated that the funds should be used to develop other airports.

40. On **clause 58(2)**, KATA proposed an amendment to provide that the Board will allocate 3% monthly of the total Passenger Service Charge as provided for under the Air Passengers Service Charge Act to the Kenya Association of Travel Agents for use in marketing promotion activities and educational forum for KATA members such as IATA accredited courses. They explained that the promotion and development of the Kenya Aviation Sector is dependent on travel agents who contribute 75% of the passenger number bookings on KQ.
41. On **clause 61**, KAAO proposed that after the phrase "issue any security....." to add the words "indemnity, guarantee....." to cover the guarantees already in place in KQ and subsidiaries.
42. R. Mobisa & Associates proposed that **clause 62** should be amended to subject the audit of the Corporation, Kenya Airways and Kenya Airports Authority to the provisions of Article 229 of the Constitution and the Public Audit Act, 2015.
43. Whereas R. Mobisa & Associates proposed an amendment to **clause 67** to harmonize the penalties prescribed with the gravity of the various offences, KALPA proposed a total deletion of **clause 67** as it goes against Annex 13 of ICAO (accident investigations).
44. On **clause 69**, KALPA proposed that the word “safe” should be clearly defined to avoid ambiguity and misuse.
45. R. Mobisa & Associates proposed an amendment to **clause 72** to provide for the objects and purpose for and limitations on the power granted to the Cabinet Secretary for Transport to make regulations.
46. Gerivia Advocates proposed an amendment to the **First Schedule** to provide that the Board shall develop a Board Charter to guide its operations.
47. KMK Africa Law Advocates proposed deletion of the **Second Schedule**. In particular, they proposed deletion of the provision in the Second Schedule which amends the Companies Act by inserting the words “.....none of the other provisions of this Act or the regulations under this Act, or any amendment thereof, or any other law relating to companies, shall apply to the state owned entities.” They further proposed deletion of the proposed amendment to the Public Procurement and Asset Disposal Act, 2015. On their part, Gerivia Advocates submitted that if public money is involved, there must be oversight of the procurements of these entities; the Public Procurement and Asset Disposal Act, 2015 does not in any way hamper the operations of the state entities; and rather than providing a blanket exemption, it should be for the special needs of the entities.

#### **General Comments on the National Aviation Management Bill, 2020:**

Having concluded presentation on specific clauses, the stakeholders were given an opportunity to make any general remarks. This is what was submitted:

48. Mwamgi Mwamgi Advocates submitted that the entire needed to be thoroughly thought-out. They stated that the Bill needed more study before it could be implemented.
49. KMK Africa Law Advocates submitted that there was no aviation policy informing the Bill. They explained that pre-1996, Kenya Airways was State-owned before it was

privatized to make profits. But it was due to some wrong decisions that it started making losses again.

50. Gerivia Advocates submitted that the regulatory role of KCAA OVER THE Corporation should be clear and that the provisions of the Public Finance Management Act should apply. They further proposed that the Jomo Kenyatta International Airport could be turned into a company to be managed alone while the rest of the airports could be managed by the KAA.
51. Mr. Fredrick A. Opot submitted that we need a policy first because the Bill only focuses on the Kenya Airways and the Kenya Airports Authority alone as opposed to the entire aviation sector in totality.
52. KAAO submitted that if there are any reliefs to be conferred, then they should be looked at for all air operators.

**Hon. Members' Comments:**

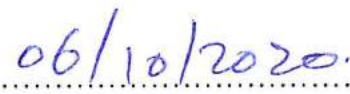
Members were of the view that there was need to incorporate views submitted by the stakeholders and that it was important that the final product will be aviation laws that are best for the aviation sector and the country at large. They noted that the aviation sector was currently doing badly in Kenya and that something had to be done. On the future of Kenya Airways, it was submitted that it was not in the best interest of Kenya to let Kenya Airways collapse even if it was currently a loss-making entity. The Chairman thanked the stakeholders for their contributions and especially to KALPA and KAWU for their consistency on matters aviation. He was optimistic that at the end of the process, there will be a fair balance and that everybody should be a winner.

**MIN No. TPWH 204/2020:                      ADJOURNMENT**

There being no other business, the sitting was adjourned at thirty-five minutes to one o'clock in the afternoon. The next meeting to be held on Tuesday 29<sup>th</sup> September, 2020 at 2.30p.m.

Signed.....

**(Chairperson)**

Date.....

**MINUTES OF THE FORTIETH (40<sup>TH</sup>) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON TUESDAY, 29<sup>TH</sup> SEPTEMBER 2020 AT 2.30 P.M. IN MINI CHAMBER, COUNTY HALL, PARLIAMENT BUILDINGS**

**MEMBERS PRESENT**

1. Hon. David L. Pkosing, M.P. - Chairperson
2. Hon. Gathoni Wamuchomba, M.P. - Vice Chairperson
3. Hon. Johnson Many Naicca, M.P.
4. Hon. Omar Mwinyi Shimbwa, M.P.
5. Hon. Peris Pesi Tobiko, M.P.
6. Hon. Ahmed Abdisalan Ibrahim, M.P.
7. Hon. Ahmed Bashane Gaal, M.P.
8. Hon. Ali Wario Guyo, M.P.
9. Hon. Dominic Kipkoech Koskei, M.P.
10. Hon. Gideon Mutemi Mulyungi, M.P.
11. Hon. Kulow Maalim Hassan, M.P.
12. Hon. Shadrack John Mose, M.P.
13. Hon. Tom Mboya Odege, M.P.
14. Hon. Tom J. Kajwang, M.P. - Friend of the Committee

**IN ATTENDANCE VIRTUALLY**

15. Hon. Abdul Rahim Dawood, M.P.
16. Hon. David Njuguna Kiaraho, M.P.
17. Hon. Samuel Arama, M.P.
18. Hon. George Aldwa Omwera, M.P.
19. Hon. Mercy Wanjiku Gakuya, M.P.
20. Hon. Rehema Dida Jaldesa, M.P.

**SECRETARIAT**

1. Mr. Ahmed Salim Abdalla - Clerk Assistant II
2. Ms. Mercy K. Wanyonyi - Legal Counsel
3. Ms. Sylvia Ocharo Mutabari - Senior Research Officer
4. Ms. Noelle Chelang'at - Media Relations Officer
5. Mr. Yeziel Jillo - Sergeant-at-Arms
6. Mr. Job Owaga - Audio Officer
7. Ms. Brenda Michira - Legal Pupil

**IN ATTENDANCE VIRTUALLY**

1. Ms. Chelagat Tungo - Clerk Assistant I
2. Ms. Winnie C. Kulei - Research Officer

**GUESTS IN ATTENDANCE**

1. Mr. Nelson Havi - LSK President
2. Ms. Herine Kabita - LSK Council Member
3. Mr. Evans Lagat - Advocate, SESLaw Advocates LLP
4. Mr. Silas Jakakimba - Advocate, SESLaw Advocates LLP
5. Mr. Steve Ogolla - Advocate, SESLaw Advocates LLP
6. Ms. Lilian Kabaya - Advocate, SESLaw Advocates LLP
7. Mr. James Okao - Advocate, OKAO & Co. Advocates
8. Ms. Monica M. Mwangi - Advocate, OKAO & Co. Advocates
9. Ms. Evelyn Maina - Advocate, SESLaw Advocates LLP
10. Ms. Esther Ang'awa - Advocate, LSK
11. Mr. Mohamed Abdi - Kenya Air Operators



**MIN No. TPWH 205/2020:                    PRELIMINARIES**

The Chairman called the meeting to order at forty minutes past two o'clock followed by a word of prayer. The Chairman informed the Honorable Members that the Committee was meeting pursuant to the resolution of the Committee made on 23<sup>rd</sup> September 2020 where it was agreed that all stakeholders who submitted views on the National Aviation Management Bill, 2020 be invited for a physical meeting. The Chairman reminded the Committee that the previous day on Monday, 28<sup>th</sup> September 2020, the Committee met with and received submissions from eleven stakeholders. In its meeting today, the Committee had invited representatives from:

1. The Law Society of Kenya
2. OKAO and Company Advocates
3. SESLaw Advocates LLP
4. Kakai Mugalo Advocates

The Chairman confirmed that out of the four invited, only Kakai Mugalo Advocates did not send their representatives and they did not send any communication regarding their attendance.

The agenda of the meeting was therefore adopted after being proposed by the Hon. Tom Mboya Odege and seconded by the Hon. Dominic Kipkoech Koskei.

**MIN No. TPWH 206/2020:                    CONFIRMATION OF THE MINUTES OF THE PREVIOUS SITTING**

Confirmation of minutes of the 39<sup>th</sup> sitting which was held on 28<sup>th</sup> September 2020 was deferred to a later date.

**MIN No. TPWH 207/2020:                    SUBMISSIONS FROM STAKEHOLDERS PURSUANT TO THE SECOND ADVERT ON THE NATIONAL AVIATION MANAGEMENT BILL, 2020 MADE ON 14<sup>TH</sup> SEPTEMBER 2020**

**Submissions by the Law Society of Kenya**

The President of the Law Society of Kenya (LSK) submitted that the LSK was opposing the enactment of the National Aviation Management Bill, 2020 in entirety. He was of the view that the Bill should not have been introduced at all for consideration. He invited the Members' attention to their written memorandum submitted to the National Assembly on 18<sup>th</sup> August 2020. In their submission before the Committee, some of the reasons he provided for its rejection include the following:

1. The Bill sought to merge a loss-making entity with a profit-making entity. In analogy, he explained that Kenya Airways (KQ) was making losses while Kenya Airports Authority (KAA) was a strong entity. He submitted that to merge KAA with KQ was not constitutionally and economically sound.
2. There was no full disclosure on how the arrangement proposed in the Bill was to be done.
3. Forty-four members of the public/stakeholders during the Committee inquiry into the PIIP were opposed to the merger between Kenya Airways (KQ) and Kenya Airports Authority (KAA).
4. The question on why the merger between the KQ and KAA was not answered or addressed.
5. The workers fate was not clear.
6. There were no strong grounds on why the government should bail a private entity.



7. The structure of the proposed National Civil Aviation Council was a replica of the National Security Council without justification or explanation.
8. There was a possible conflict of mandate between the KCAA and the National Civil Aviation Council and that the dichotomy did not seem clear.
9. Article 227 of the Constitution on matters procurement is offended by some of the exemptions provided for in the Bill on certain legislations. To exempt a public entity from the public procurement regime was not lawful.
10. Pertinent questions regarding KQ should have been addressed before attempting to resuscitate it. For instance, issues on what was bedeviling KQ, what contracts they have entered into with other parties, who was behind KQ issues, and the layering interests in the whole issue.

The LSK President urged the Hon. Members not to allow the KAA to be merged with KQ as this would go against public interest which the Members had vowed to protect. He urged the Honorable Members to reject the Bill in its entirety. He stated that he was informed that the drafting of the Bill was not done at the Attorney General's Chamber but in private law firms, but he didn't provide further details or evidence on the claims.

#### **Submissions by OKAO & Company Advocates**

In their submissions, OKAO & Company Advocates stated that they associated themselves with the statement of the LSK President. They submitted that they were opposed to the merger of KQ and KAA as envisaged under the Bill. Their written memorandum dated 8<sup>th</sup> July 2020 was noted. Some of the reasons they provided for its rejection include the following:

1. Assets of KAA should be protected from the losses of KQ.
2. There was no feasibility study done to show that the process was viable.
3. The airline business is historically a profitable undertaking. The government should not gamble with taxpayers' money especially in light of the Covi19 pandemic.
4. KQ in the years around 1990's was profit-making. The question on why it was making losses has never been addressed.
5. There was no fair balance between KQ and KAA. The Bill should be rejected.

#### **Submissions by SESLaw Advocates LLP**

In their submissions, SESLaw Advocates LLP also associated themselves with the views of the President of the Law Society of Kenya. Their written memorandum dated 8<sup>th</sup> July 2020 was noted. Some of the reasons they provided for the Bill's rejection include the following:

1. Kenya Airways (KQ) problems were largely managerial.
2. Aviation industry worldwide was competitive and not monopolistic as is being proposed through the Bill.
3. There was need to involve the Counties in the Bill's conversation because Counties have interests in aerodromes. They gave an example of a court case involving the Jomo Kenyatta International Airport and the County of Nairobi.
4. Privatization was proposed around 1992 to cure losses.
5. Article 2(1) talks of accountability and transparency, which were lacking in the current process. The whole process was shrouded in opaqueness.
6. Section 3 of the State Corporations Act gives the President Powers to form a parastatal and therefore there was no need of an Act of Parliament to nationalize KQ.
7. It was their considered view that merging the KQ and KAA; was not economically viable.
8. Proper public participation on the Bill cannot be done without proper information flow.
9. Clause 3 of the Bill talked about establishment of operating entities. KAA was already established by its own Act.

10. Clause 4(f) on Guiding Principles was, among others, talking about creating employment. The point was misplaced and amounted to “devaluing” the meaning of the Bill.
11. Clause 5(1)(e) was entirely problematic in terms of the composition of the Council and the same was the case with Clause 7 because it allocated undefined powers to the Corporation.
12. Clause 8(1)(f) provides that the MDs sit in the Board with the CEO of the Board yet the CEO is subordinated by the same MDs. It is almost like a reverse reporting system.
13. If the intention was nationalization, then a specific Kenya Airways Bill can be introduced instead of the current Bill.
14. KAA is doing well, working well, no losses and no complaints. It was therefore not proper to merge it with the problematic KQ.

**General comments and queries:**

1. Members commended LSK and SESLaw Advocates for their insight into the Bill. They asked if the LSK President was comfortable with KQ collapsing to which the President responded in the negative. He explained that the LSK wants the KQ to be resuscitated but not in the manner currently being pursued. The LSK President clarified that the Society was not belittling the House but their disappointment arose from the fact that the proposal that led to the Bill came from the House.
2. Hon. Tom J. Kajwang who appeared as a friend of the Committee appreciated the LSK’s presence and noted that whereas the Bill was a product of a Committee inquiry, the Bill as currently published did not belong to the National Assembly but simply a government Bill which was before the House and the Committee procedurally for consideration.
3. Members wanted to know if legally there was a problem with the President, the CS Interior and the Kenya Air force Commander being members of the National Civil Aviation Council to which the SESLaw Advocates responded that in case of a legal action against the Council, it may become a bit problematic involving the President. Members however expressed dissatisfaction with the response.
4. Members also noted that whether KQ collapses or survives, the government of Kenya had made prior undertakings to private banks, a matter to be considered.
5. Regarding what actions and solutions the LSK has proposed to address different national issues, the LSK President stated that he has been in office for seven months only and even then, they have sent many requests through the relevant government channels but they were not heard.
6. Ms. Herine Kabita, the LSK Council Member, submitted that Part III of the Bill that talked about four “independent” non-executive Board members appointed by the Cabinet Secretary made no sense since there was no real independence expected considering the appointment process. She further submitted that clause 37 of the Bill on exemption from the provisions of the Companies Act was not legally sound. She explained that Article 227 of the Constitution will also be offended if the provisions of the PFMA will be exempted from application to the proposed Act and the entities. The Council Member further submitted that a share capital of one million is too low for the Aviation Investment Corporation and made no sense especially when taking into account the KQ’s seven billion and the KAA’s sixty-six billion share capital

7. The SESLaw Advocates submitted that KQ problems are purely managerial. They informed the Committee that the National Treasury has recently just advertised expressing interest in coming up with an Aviation Policy. They submitted that enacting a Bill before the policy was developed was akin to putting the cart before the horse. They advised that in whatever case, oversight mandate of the entities should not be mixed with operating mandate.
8. The three organizations cautioned that we may be seeking to help KQ without seeking reasons as to why it was where it was. They prayed for the Bill to be withdrawn.

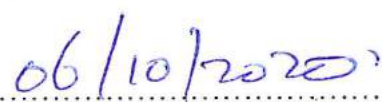
The Chairman thanked the stakeholders for their submissions and assured them that the Committee was simply interested in doing what was the best for Kenyans and not for any partisan interests.

**MIN No. TPWH 208/2020:                      ADJOURNMENT**

There being no other business, the sitting was adjourned at eighteen minutes past five o'clock in the afternoon. The next meeting to be held on Wednesday 30<sup>th</sup> September, 2020 at 2.30p.m.

Signed.....  .....

**(Chairperson)**

Date.....  .....



**MINUTES OF THE FORTY FIRST (41<sup>ST</sup>) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON WEDNESDAY, 30<sup>TH</sup> SEPTEMBER 2020 AT 2.30 P.M. IN 4<sup>TH</sup> FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS**

**MEMBERS PRESENT**

1. Hon. David L. Pkosing, M.P. - Chairperson
2. Hon. Johnson Many Naicca, M.P.
3. Hon. Omar Mwinyi Shimbwa, M.P.
4. Hon. Peris Pesi Tobiko, M.P.
5. Hon. Ahmed Abdisalan Ibrahim, M.P.
6. Hon. Ahmed Bashane Gaal, M.P.
7. Hon. Ali Wario Guyo, M.P.
8. Hon. Dominic Kipkoech Koskei, M.P.
9. Hon. Gideon Mutemi Mulyungi, M.P.
10. Hon. Kulow Maalim Hassan, M.P.
11. Hon. Shadrack John Mose, M.P.
12. Hon. Tom Mboya Odege, M.P.
13. Hon. Tom J. Kajwang, M.P. - Friend of the Committee

**IN ATTENDANCE VIRTUALLY**

14. Hon. Abdul Rahim Dawood, M.P.
15. Hon. David Njuguna Kiaraho, M.P.
16. Hon. Samuel Arama, M.P.
17. Hon. Mercy Wanjiku Gakuya, M.P.
18. Hon. Rehema Dida Jaldesa, M.P.

**MEMBERS ABSENT WITH APOLOGY**

19. Hon. Gathoni Wamuchomba, M.P. - Vice Chairperson
20. Hon. George Aldwa Omwera, M.P.

**SECRETARIAT**

1. Mr. Ahmed Salim Abdalla - Clerk Assistant II
2. Ms. Mercy K. Wanyonyi - Legal Counsel
3. Ms. Sylvia Ocharo Mutabari - Senior Research Officer
4. Ms. Noelle Chelang'at - Media Relations Officer
5. Ms. Zainab Wario - Sergeant-at-Arms
6. Mr. Job Owaga - Audio Officer
7. Ms. Brenda Michira - Legal Pupil

**IN ATTENDANCE VIRTUALLY**

1. Ms. Winnie C. Kulei - Research Officer
2. Mr. George O. Mogaka - Corporation Secretary, KCAA

**IN ATTENDANCE**

1. Hon. Christopher Obure - Chief Admn. Secretary, MTIHUD&PW
2. Mr. Solomon Kitungu - Principal Secretary, State Dept. for Transport
3. Dr. Chris Kiptoo - Principal Secretary, Environment & Forestry
4. Mr. Allan Kilavuka - CEO, Kenya Airways
5. Mr. Gilbert Kibe - DG, KCAA
6. Mr. Alex Gitari - Acting Managing Director, KAA
7. Ms. Katherine N. Kisila - Corporation Secretary, KAA
8. Mr. Samson Maundu - Senior State Counsel, AG's Office



- |                           |   |                                    |
|---------------------------|---|------------------------------------|
| 9. Mr. Fredrick Etemesi   | - | Principal Meteorologist, KMD       |
| 10. Mr. Stanley Kamau     | - | D-G-DIPM, The National Treasury    |
| 11. Mr. Wang'ombe Kariuki | - | DG, Competition Authority of Kenya |
| 12. Mr. Rodney Omari      | - | AS, Ministry of Environment        |

**MIN No. TPWH 209/2020:                      PRELIMINARIES**

The Chairman called the meeting to order at thirty-six minutes past two o'clock followed by a word of prayer. The Chairman informed the Honorable Members that the Committee was meeting pursuant to the resolution of the Committee made on 23<sup>rd</sup> September 2020 where it was agreed that after meeting all private stakeholders, the government side be invited to give clarification on any issues that might have arisen from the submissions received on the National Aviation Management Bill, 2020. The Chairman confirmed that the representatives from the following Ministries and Departments were in attendance:

1. Ministry of Transport
2. Ministry of Environment & Forestry
3. The National Treasury
4. The Attorney General
5. Kenya Airways PLC
6. Kenya Airport Authority
7. Kenya Civil Aviation Authority
8. Competition Authority of Kenya

The agenda of the meeting was therefore adopted after being proposed by the Hon. Tom Mboya Odege, MP and seconded by the Hon. Johnson Manya Naicca, MP.

**MIN No. TPWH 210/2020:                      CONFIRMATION OF THE MINUTES OF THE PREVIOUS SITTING**

Confirmation of minutes of the 40<sup>th</sup> sitting which was held on 29<sup>th</sup> September 2020 was deferred to a later date.

**MIN No. TPWH 211/2020:                      SUBMISSIONS FROM THE GOVERNMENT DEPARTMENTS ON THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

The Committee proposed that having interacted with stakeholders from the private sector, the session will be guided by issues raised. Members sought clarification on the following issues, which the Ministry responded.

**The place of the Meteorological Department in Aviation**

1. Both the Principal Secretary for Transport and the Principal Secretary for Environment agreed that the services of the Meteorological Department were very vital in aviation industry.
2. They admitted that the issue on whether to include in the Council the CS responsible for Meteorological Services should not have reached the Committee because they had their own forum at the Executive level where they should have been addressed.
3. The Principal Secretary for Environment explained that in Aviation, there are four critical services comprised of Communication Services, Navigational Services, Air Traffic Services and Meteorological Services.
4. The Director Meteorological Services submitted that considering their role as one of the critical services providers in the aviation industry, it was necessary that the law and

regulations on air passengers' service charge be amended so that a certain percentage is allocated to them.

5. The PS Environment observed that here was a compelling reason to include the Cabinet Secretary responsible for Meteorological Services in the Council. The Attorney General's Office had no objection to the inclusion and termed it as a policy issue by Transport Ministry.
6. The Chief Administrative Secretary for Transport admitted that the request was reasonable and that some years ago, the Meteorological Department was actually under the Ministry of Transport.

#### **The President as the Chairperson of the Council**

1. The Hon. Tom Kajwang' explained that the relevant provision which allows the President to perform any other executive function provided for in the Constitution or in national legislation is Article 132(4)(a).
2. He wondered whether the function that the Bill purported to confer on the President was an "executive function". He sought clarification on whether the intention to include the President was to create a constitutional immunity by putting the President as the Chairman of the Council.
3. The Attorney General Office submitted that a precedent was already set by making the President the Chairperson of the Climate Change Council.
4. The AG's office further submitted that the Council was not of operational nature and only proposed to play a policy role. They submitted that legal action may arise only when a private party is injured by the actions of someone, a nil-possibility under the Council.

#### **The Bill may kill competition**

1. The Director General of the Competition Authority of Kenya (CAK) confirmed that his office was consulted during drafting.
2. He submitted that a merger is what changes control, yet in the current instance, the relationship between the Kenya Airways and Kenya Airports Authority is an arrangement but not qualify to be a merger under the Act.
3. He explained that a merger is when there is a change in control or when fifty percent plus one of the shares have been acquired or when one has veto powers or when one has material influence over the entity. None of these were the case in the current arrangement proposed under the National Aviation Management Bill, 2020.
4. He explained that the only issue of concern is when the conduct of the resultant entity may have ramifications because the process may give one entity undue advantage. He however said it can be provided in the Bill on how they can allocate slots and deal with other issues.
5. The DG explained that since the entities will engage in trade, they will be under the purview of the Competition Authority of Kenya Act, 2010 and therefore issues regarding trade practices will be under scrutiny.

#### **Kenya Airways already given preferential treatment?**

1. The Director General for Kenya Civil Aviation Authority clarified that currently, no airline is given preferential treatment in time slotting. He explained that it was the airlines themselves which decided on their flight time.
2. The National Treasury explained that there was a sovereign guarantee of 750 million USD approved in 2017 mainly for aircraft leasing. This involved the Exim Bank of America and the local banks. He cautioned that killing KQ will only serve to make the lenders happy and not beneficial for the country.

### **The four independent non–executive Board members**

1. The Committee noted that the four independent non–executive Board members appointed by the Cabinet Secretary have attracted a lot of interest.
2. The Ministry was asked whether it was okay with bringing in one representative from private sector.
3. The Chief Administrative Secretary for Transport stated that there could be conflict interest.
4. The Attorney General office had no objection to the proposal.

### **Is the Bill introducing a merger between Kenya Airways & Kenya Airports Authority?**

1. The CAS denied that it was merger. He explained that it was simply an arrangement where different institutions were brought together with their own independent boards.
2. The PS Transport explained that it was not a merger but reorganization of government business in civil aviation. He submitted that the market was adequate for the process and that globally, most governments have consolidated the airline and airport business.
3. The Director General of the CAK also confirmed that it was not a merger as per the provisions of the Competition Authority of Kenya Act.

### **LSK was concerned that the Bill might have been drafted from outside the AG’s offices**

1. The Attorney General office denied any assertions that the Bill was drafted from outside and declared that the Attorney General office took instructions from the Government only during its processing.
2. The Principal Secretary for Transport affirmed that it was a government Bill which went through all the requisite processes before it was brought to Parliament. He also explained that during drafting, all the relevant government departments were involved. These include the KAA, KQ, National Treasury and even the Registrar of Companies. He explained that AG drafters retreated in Maanzoni for four days before the draft was approved by the relevant Principal Secretaries, Cabinet Secretaries and the full Cabinet later.

### **Concerns on exemptions from taxation and procurement**

1. The PS Transport explained that they didn’t want to legislate on taxation. He explained that any exemptions from the provisions of any law was subject to guidelines approved by both the Cabinet and Parliament and therefore there was no blanket exemption. He further explained that even the Public Finance Management Act has a framework for exempting institutions and with direct oversight by Parliament
2. The PS Transport further explained that both the Auditor General and the Controller of Budget will edit the institutions and therefore there was no possibility of running away from good governance, accountability and oversight.

### **How do we convince the public that the process was ripe?**

1. The Principal Secretary for Transport explained that Kenya Airways creates thousands of jobs for Kenyans, and that the employment aspect cannot be gainsaid.
2. The PS submitted that we have an economy that relies more on exports and killing KQ therefore denies the country to do that.
3. The MD for Kenya Airways explained that if Kenya Airways collapses, then the other non-Kenyan airlines will move traffic from Kenya to their own hubs and regions, which will heavily deal a blow to the economy by denying it the around 2.3 billion dollars contributed to the economy and endangering the more than 400,000 jobs in aviation.
4. The CAS for Transport submitted that if KQ dies, it will be disastrous to the Kenyan economy and areas such as tourism, exports and international trade will all be affected.

5. The KQ MD explained that there was urgent need to make KQ competitive and to reduce costs. He explained that once you consolidate the aviation sector, then it becomes easier to use synergies from other sectors.
6. The Principal Secretary for Environment explained that the importance of Kenya Airways to the country is beyond any financial value. He urged the Committee to ensure that all the necessary actions were taken to save the airline in the larger interests of the country.


**Way Forward:**

1. The Committee directed the Ministry of Transport and The Ministry of Environment & Forestry to come up with a compromise proposal on the Air Passenger Service Charge in light of the request by the Meteorological Services Department.
2. The Committee to go for a non-residential retreat within Nairobi County to prepare its report on the Addendum to the Report on the National Aviation Management Bill, 2020. Proposed dates for the retreat are Tuesday, 6<sup>th</sup> October 2020 and Wednesday, 7<sup>th</sup> October 2020.

**MIN No. TPWH 212/2020:**

**ADJOURNMENT**

There being no other business, the sitting was adjourned at eight minutes to five o'clock in the afternoon. The next meeting to be held on Tuesday 6<sup>th</sup> October, 2020 at 10.00a.m.

Signed.....

(Chairperson)

Date.....06/10/2020





**MINUTES OF THE FORTY SECOND (42<sup>ND</sup>) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON TUESDAY, 6<sup>TH</sup> OCTOBER 2020 AT 10.00 A.M. AT EMARA OLE SERENI, NAIROBI**

**MEMBERS PRESENT**

1. Hon. David L. Pkosing, M.P. - Chairperson
2. Hon. Gathoni Wamuchomba, M.P. - Vice Chairperson
3. Hon. Abdul Rahim Dawood, M.P.
4. Hon. David Njuguna Kiaraho, M.P.
5. Hon. Johnson Many Naicca, M.P.
6. Hon. Ahmed Abdisalan Ibrahim, M.P.
7. Hon. Ahmed Bashane Gaal, M.P.
8. Hon. Ali Wario Guyo, M.P.
9. Hon. Dominic Kipkoech Koskei, M.P.
10. Hon. George Aldwa Omwera, M.P.
11. Hon. Kulow Maalim Hassan, M.P.
12. Hon. Mercy Wanjiku Gakuya, M.P.
13. Hon. Shadrack John Mose, M.P.
14. Hon. Tom Mboya Odege, M.P.

**IN ATTENDANCE VIRTUALLY**

15. Hon. Omar Mwinyi Shimbwa, M.P.
16. Hon. Samuel Arama, M.P.
17. Hon. Rehema Dida Jaldesa, M.P.

**MEMBERS ABSENT WITH APOLOGY**

18. Hon. Peris Pesi Tobiko, M.P.
19. Hon. Gideon Mutemi Mulyungi, M.P.

**SECRETARIAT**

1. Mr. Ahmed Salim Abdalla - Clerk Assistant II
2. Ms. Mercy K. Wanyonyi - Legal Counsel
3. Ms. Zainab Wario - Sergeant-at-Arms
4. Ms. Winnie C. Kulei - Research Officer
5. Mr. Brian Ng'etich - Audio Officer
6. Ms. Brenda Michira - Legal Pupil

**IN ATTENDANCE VIRTUALLY**

1. Ms. Chelagat Tungo - Clerk Assistant I

**MIN No. TPWH 213/2020:**

**PRELIMINARIES**

The Chairman called the meeting to order at twenty-five minutes past ten o'clock followed by a word of prayer. The Chairman informed the Honorable Members that the Committee was meeting to draft and adopt its Addendum on Public Participation to the Report tabled on 10<sup>th</sup> September 2020 on the Consideration of the National Aviation Management Bill, 2020 (National Assembly Bill No. 18 of 2020).

The agenda of the meeting was therefore adopted after being proposed by Hon. Johnson Many Naicca, MP and seconded by the Hon. Kulow Maalim Hassan, MP.

**MIN No. TPWH 214/2020:**

**CONFIRMATION OF THE MINUTES OF THE PREVIOUS SITTING**

1. Minutes of the 38<sup>th</sup> sitting held on Wednesday, 23<sup>rd</sup> September 2020 were confirmed as the true record of the proceedings. Adoption proposed by Hon. Tom Odege, MP and seconded by the Hon. Dominic Koskei, MP.
2. Minutes of the 39<sup>th</sup> sitting held on Monday, 28<sup>th</sup> September 2020 were confirmed as the true record of the proceedings. Adoption proposed by Hon. Kulow Maalim, MP and seconded by the Hon. Ali Wario, MP.
3. Minutes of the 40<sup>th</sup> sitting held on Tuesday, 29<sup>th</sup> September 2020 were confirmed as the true record of the proceedings. Adoption proposed by Hon. Tom Odege, MP and seconded by the Hon. Dominic Koskei, MP.
4. Minutes of the 41<sup>st</sup> sitting held on Wednesday, 30<sup>th</sup> September 2020 were confirmed as the true record of the proceedings. Adoption proposed by Hon. Kulow Maalim, MP and seconded by the Hon. Dominc Koskei, MP.

**MIN No. TPWH 215/2020:**

**OBSERVATIONS AND RECOMMENDATIONS ON THE ADDENDUM ON THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

The Committee considered the draft Addendum and made observations on all the submissions received from sixteen parties who made their written and oral submissions to the Committee pursuant to the re-advertisement made on 14<sup>th</sup> September 2020 which extended the public participation process on the National Aviation Management Bill, 2020. The Committee noted that it was in receipt of an extra memorandum from one Mr. David Njuguna Njathi, after the Committee had met all the other stakeholders on 30<sup>th</sup> September 2020. The Committee resolved to fully consider and incorporate his views, his late submission notwithstanding.

The Committee further made the following general **observations** and comments on the Bill:

1. That the policy framework of the National Aviation Management Bill, 2020 is derived from the recommendations of the National Assembly after an extensive inquiry and public participation that culminated into a report tabled on 18<sup>th</sup> June 2019 and adopted by the House on 23<sup>rd</sup> July 2019 on the Inquiry into the proposed Kenya Airways' Privately Initiated Investment Proposal to Kenya Airports Authority.
2. The proposed consequential amendments, as contained in the Second Schedule of the Bill to the State Corporations Act, Cap 446, the Public Finance Management Act, 2015 and the Companies Act, 2015 were informed by the House recommendations contained in Committee's report on the Inquiry into the proposed Kenya Airways' Privately Initiated Investment Proposal to Kenya Airports Authority. The House approved that, upon nationalization of KQ, amendments be made to include exemptions in the State Corporations Act, the Public Finance Management Act, the Public Procurement and Asset Disposal Act and the Public Service Commission Act (*Recommendation No.5 of the Report as adopted on 23<sup>rd</sup> July 2019*). As such, the proposed amendments do not expand the subject matter of the Bill.
3. The assertion made by the Law Society of Kenya during its meeting with the Committee on 29<sup>th</sup> September 2020 that the Bill was not drafted within the realm of government procedural processes was unsubstantiated and the same was denied by the Office of the Attorney General and the Ministry of Transport during a Committee meeting held on 30<sup>th</sup>

September 2020. The Office of the Attorney General confirmed taking all the instructions on the Bill from the Government and not from any other parties.

4. Meteorological services are key, critical and essential to the safety, regularity and operation of aircrafts during take-off, cruise, approach, and landing phases of both of both civil and military aircrafts.
5. The Bill does not seek to merge Kenya Airways and Kenya Airports Authority within the meaning of the Competition Act, No.12 of 2010 but to consolidate the aviation assets so as to effectively compete in the international market.
6. Pursuant to Article 132(4)(a) of the Constitution, the President has power to perform any executive function provided for in the Constitution or in national legislation e.g the National Climate Change Council established pursuant to the Climate Change Act, 2016 is chaired by the President. Further, the functions of the Council as an unincorporated body are not of an operational nature but to give policy direction considering the strategic nature of civil aviation.
7. There is need to amend clause 5 of the Bill to expressly provide that the Council is an unincorporated body and to include the Cabinet Secretary for the time being responsible for the environment in the Council as meteorological services are critical in the aviation sector.
8. There is need to amend clauses 11,12 and 13 of the Bill to remove ambiguity and provide clarity on the qualifications for appointment as the Chairperson of the Board, member of the Board and the Chief Executive Officer of the Corporation.
9. There is need to amend clause 16 and 42 of the Bill to ensure that the remuneration of the members of the Board and the Managing Directors is determined upon the advice of the Salaries and Remuneration Commission in line with Article 230 of the Constitution.
10. There is need to amend clause 44 of the Bill by inserting the word “or” after the first paragraph to connect the two paragraphs and construe them disjunctively.
11. There is need to amend clause 45 of the Bill to align it with the provisions of section 37 of the Companies Act, 2015 which provides that a document, contract or deed will be considered to be validly executed by a company if it is signed on behalf of the company by two authorized signatories or by a director of the company in the presence of a witness who attests the signature.
12. There is need to amend clause 72 of the Bill to specify the specific areas of law that the Cabinet Secretary is required to make regulations for in line with Article 94(5) of the Constitution.

**Committee Recommendations:**

Having considered the National Aviation Management Bill, 2020, and submissions from all the stakeholders the Committee resolved that it will propose amendments to clauses 3, 5, 10, 11, 13, 16, 42, 44, 45 and 72.

This was in addition to amendments already proposed in the main Report on clauses 2,3,4,5, 7, 8, 13, 14, 15, 19, 22, 24, 27, 30, 40, 56, 72 and the Second Schedule.

**MIN No. TPWH 216/2020:**

**ADOPTION OF THE ADDENDUM ON THE  
NATIONAL AVIATION MANAGEMENT BILL,  
2020**

The Addendum on Public Participation to the Report tabled on 10<sup>th</sup> September 2020 on the Consideration of the National Aviation Management Bill, 2020 (National Assembly Bill No. 18 of 2020) was unanimously adopted by the Committee. The proposal for adoption was made by Hon. Kulow Hassan, MP and seconded by Hon. Ahmed Bashane, MP.

**MIN No. TPWH 217/2020:**

**ANY OTHER BUSINESS**

1. The Committee to table the Addendum either on Thursday, 8<sup>th</sup> October 2020 or on Tuesday, 13<sup>th</sup> October 2020.
2. The Committee to organize for field visits in Mombasa and Malindi from 20<sup>th</sup> October 2020 to 24<sup>th</sup> October 2020.

**MIN No. TPWH 218/2020:**

**ADJOURNMENT**

There being no other business, the sitting was adjourned at thirty-eight minutes past one o'clock in the afternoon. The next meeting to be held on Tuesday 13<sup>th</sup> October, 2020 at 10.00a.m.

Signed.....

(Chairperson)

Date.....06/10/2020



*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

# **1. KMK Africa Law Advocates**





Partners:  
Alvin Kosgei  
Muriuki Muriungi  
Mutembei Koome

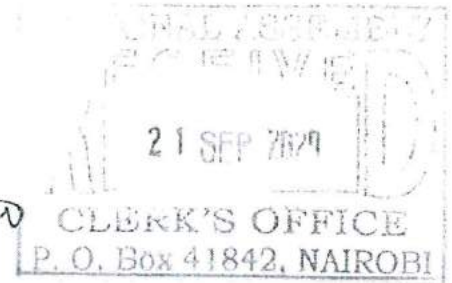
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21 September 2020

**MEMORANDUM ON THE NATIONAL AVIATION MANAGEMENT BILL 2020**

Through the Clerk of the National Assembly  
Parliament Buildings  
Parliament Road  
PO Box 41842-00100  
Nairobi, Kenya.

① blank  
22/9/20



To the Chairperson,  
Transport, Public Works and Housing Committee of the National Assembly  
Hon. David Losiakou Pkosing  
Parliament Buildings  
Parliament Road  
PO Box 41842-00100  
Nairobi, Kenya.

② TUNGO/SALIM  
please for  
22/9/20

Dear Sirs,

**RE: MEMORANDUM ON THE NATIONAL AVIATION MANAGEMENT BILL 2020**

We make reference to the advertisement in national newspapers inviting submission of memoranda in respect of the National Aviation Management Bill 2020. We hereby render our considered memoranda.

The National Aviation Management Bill 2020 (hereinafter the 'Bill') was presented in the National Assembly for the First Reading toward the end of June 2020 by the Transport, Public Works and Housing Committee of the National Assembly. The Bill is a sequel to the National Assembly's Transport Committee Report on the inquiry into the Kenya Airways Privately Initiated Investment Proposal to the Kenya Airports Authority (KAA) and in the main, seeks to provide a framework for nationalisation of Kenya Airways Plc, which is currently partly owned by government and private investors. The crux of the National Assembly Committee's Report recommendations was that there was need to nationalise the Kenya Airways, provide tax exemptions to the airline to make it more competitive, and form an aviation holding corporation under which the various entities including Kenya Airways would be held.

When replying please quote our reference



We have reviewed the published Bill that underwent the First Reading and herein present this Memorandum to this distinguished Committee on Transport, Public Works and Housing of the National Assembly for consideration.

### Comments and Recommendations on the Bill

1. We have concerns over the import of section 30 of the National Aviation Management Bill 2020 which gives **broad powers** to the Aviation Investment Corporation to inter alia, 'b) to carry on businesses in relation to **aviation training schools, maintenance and repair organisation, aircraft handling, flight catering, aviation medical services, tour and holiday management services, and any other business related to or ancillary to the aviation sector** as may be determined by the Board and to undertake all necessary activities necessary to construct, operate and manage such businesses' and c) 'to undertake any activities within a special economic zone or an export processing zone in accordance with applicable law.'

In one clean sweep, the Bill attempts run out of operations various businesses that deal in logistics and air freight within the airline industry, hotel businesses, airport taxi cab business among others. This has the potential to decimate existing businesses and companies that deal in this area. We are also concerned that the Bill potentially has a wide-ranging adverse effect on businesses that run duty-free shops, hoteliers and other ancillary services. The fact that the Bill expressly provides that the Aviation Investment Corporation is afforded **broad powers**, means that the **Bill virtually gives unlimited powers to the Corporation** and such powers are amenable to abuse and potentially provide an opportunity for cronyism. Accordingly, the implication of implementation of this law may result into loss of jobs and tax revenues arising from the existence of these businesses.

In addition, the relevant provision of the Bill in effect creates a **monopolistic entity in a dominant position, which raises anti-trust/competition concerns as well as consumer protection concerns**. This is because the Corporation is likely to use its broad powers to muzzle other existing businesses so as to amplify its monopolistic structure with the result of promoting inefficiencies, leading escalation of user charges and costs of services, and ultimately harming the public as consumers.

**RECOMMENDATION:** It is recommended that the relevant Clause 30 of the Bill be deleted and/or amended in as far as it clothes the Aviation Investment Corporation with **broad powers to deal in other ancillary activities which will have a deleterious effect on other businesses and harming consumers**.

2. Clause 27(e-n) of the Bill stipulates the various regulatory powers of Kenya Aviation Authority which include: prohibiting, controlling or regulating use of by any person of services performed and any aircraft and goods or facilities provided by the Authority; collecting aeronautical charges and levies levied on users of the facilities. This is in addition to being given additional operational mandates thereby raising



conflict of interest concerns as it is both an operator and regulator. In respect of private companies providing services, regulatory power is donated to an associated company of a competitor – KQ and the Aviation Investment Corporation (AIC). This poses competition concerns as well as consumer protection issues and conflict of interest concerns.

**RECOMMENDATION: KAA's proposed status as an Operating Entity alongside KQ and AIC ought to be reconsidered in order to provide for effective and independent regulation and to promote fair competition.**

3. Clause 52 (g) of the National Aviation Management Bill 2020 provides that the employment terms of service of the relevant Transferring Entity shall be transferred to the relevant Operating Entity and such employees will become employees of the new entity on the same or improved terms and conditions of service. Any restructuring process of an organisation including the current nationalisation process usually has casualties in the form of retrenched employees. The nationalisation process will also mean job losses as the entities reorganize themselves so as to remain afloat. This may also lead to industrial action and legal challenges that might drag the whole process or delay the turnaround of the fortunes of the companies. There has not been adequate input from the public and particularly the concerned aviation workers who will be directly affected by the changes. From a labour perspective therefore, it is critical that concerns of employees directed affected are taken into account.

**RECOMMENDATION: Attention must be paid to labour issues wrought by the associated restructuring and job losses that will accompany the changes envisaged by the Bill. There must be an assurance or a securing of the interests of workers which the Bill does not appear to address.**

4. Relatedly, Clause 53 of the Bill is critical in so far as it affords the Board the power to review or amend salaries, wages and terms and conditions of service of employees as may be necessary to ensure compliance with the Constitution and employment laws of Kenya. While this legal provision may be seeking to provide the necessary flexibility to the Board, it would be so even without any express provision to that effect. But the mischief in this provision is potentially that the Board can revise employment contracts that have already been entered into, in spite of applicable collective bargaining agreements, so long as the same does not offend existing applicable laws.

**RECOMMENDATION: Accordingly, we propose that the relevant section 53 as read with section 52(g) of the Bill be deleted.**

5. In seeking to nationalise Kenya Airways once more, we are coming full circle as a country, resuming the pre-1996 position where KQ was fully government-owned before being privatised. We seem to be adopting the model of the Ethiopian Airlines and the Emirates Airlines which are governments' owned entities. There are a number of other airlines which are either owned by governments (nationalised) or benefit from government subsidies. For context, it is useful to note that KQ has been a loss-making venture for a number of years now (since 2013), requiring bailouts from government. Certainly, a significant reason for this need for bailouts may be attributed to inefficiencies of the airline. And with the Covid-19 pandemic, which has virtually paralysed air transport globally, the financial hit for the airline is likely to worsen, seriously impeding chances of survival absent huge cash injection either from government or strategic investors.

The public must decide whether it needs to continue holding onto a loss-making and unsustainable airline for national pride thereby having a dent on the taxpayer. We may need to consider whether we should let the airline die if it cannot be operated profitably as in our view it does not constitute a public good that the government needs to continually provide. Given the huge implications of renationalising the airline on the efficiency of the airline, a national strategic asset given that the airline is partly government owned and the public funds to be expended in buying off private shareholders/investors through conversion of equity to Treasury Bonds as well as the funds to be expended in resuscitating and subsidising the airline to the tune of tens of billions of taxpayer money; it is critical that such decisions of such huge moments be determined by the public and the Cabinet through more extensive deliberations and debate.

By commencing with a report of the Committee of the National Assembly which was a response to a private proposal for takeover of the Jomo Kenyatta International Airport (JKIA) by Kenya Airways, an argument can legitimately be made that the same was not enough public participation and such weighty decisions ought to have originated from a Policy Paper. As a matter of procedure and law making process, a Policy should always precede law. And a renationalisation of an airline as well as the combination of a loss-making airline with other profit-making entities are serious policy decisions that should begin with Cabinet approval.

**RECOMMENDATION:** In view of the foregoing, we recommend that the formulation of this Bill should have been preceded by development of a Policy/Position Paper approved by Cabinet before the Bill could be initiated, after extensive public consultations and debates. At present, there does not appear to be any discernible policy yet renationalisation of a strategic asset is an issue of great national importance. To the extent this did not happen, the Bill is improperly before the Committee and need be shelved and await this prior process. The



**intended Bill will in essence end up creating a black hole for taxpayers' funds without enuring proportionate benefits to the public.**

6. It need be stated that renationalisation of KQ is no guarantee to its success in the same way that privatisation is no guarantee for failure. To illustrate, KQ registered phenomenal success between the years 2007 to 2012 when it was privately-owned and suffered remarkable losses when it was government-owned in the pre-1996 era. Both endogenous factors such as mismanagement, corruption, nepotism, ambitious expansion plans as well as exogenous factors such as oil prices, terror attacks and competition from neighbours as well as now the Covid-19 pandemic have eaten away at the airline's profitability and must be given serious thought with the endogenous factors being especially pronounced when government-owned.

An assessment of the renationalisation strategy appears to be mirrored on replicating the Ethiopian Airlines or Rwandair experience in Rwanda. We must however never lose sight of the markedly different political environment in which those two airlines operate, with those countries having a more controlled political environment that makes it easy to manage and make decisions, compared to Kenya which has a relatively more liberal democratic space. This will certainly have implications on governance of the airlines and the potential success.

**RECOMMENDATION: We recommend that the Bill in its entirety be shelved as it seeks to nationalise the entities thereby potentially exacerbating the governance problems that ail the sector.**

7. The proposal in the Bill under clause 6 of the Bill that effectively places the three operating entities into one State Corporation must be seen for what it really is, which in our view, is a merger of otherwise healthy balance sheets of KAA with the very unhealthy balance sheets of loss-making KQ, which is currently heavily indebted. The net consequence of such a merger may be the collapse of both entities through continued subsidisation of inefficiencies at KQ by KAA's and other businesses' profits.

**RECOMMENDATION: We need to rethink this whole restructuring model and consider whether we need to attempt to save KQ at the expense of collapsing the whole sector/other profit making entities makes economic sense.**

8. Clause 6 of the Bill proposes for formation of an Aviation Holding Company to be named Kenya Aviation Corporation that will have a healthy balance sheet and under which the Kenya Airways, the Kenya Airport Authority and Aviation Investment Corporation will be held. In our view, **this is an indirect way of reintroducing the now rejected plan of acquisition of the national airport the Jomo Kenyatta International Airport (JKIA) by KQ and KAA.** It is a move that seeks to have the loss-making KQ subsidised by the other two entities, and this has the potential to seriously breed even more inefficiencies, management and corruption since the airline's losses would be padded or masked by the other profit-making entities. In



addition, a political environment might delay decision making which may turn out to be costly in the airline business.

**RECOMMENDATION: Clause 6 of the Bill be deleted to the extent that it creates an aviation holding corporation. In its place, a clause specifying that each of the operating entities (Kenya Airways, Kenya Airports Authority and the Aviation Investment Corporation) will operate independently and as standalone entities should be inserted.**

9. The proposal to form an Aviation Holding Corporation which will hold the three entities particularly bringing the Kenya Airways and Kenya Airports Authority under the same control has the potential for conflict of interest as it is a classic case of a merger of a regulated player and a regulator. Ideally, a regulator should be separate from its regulated and should have no association that might lead to a lack of proper supervision or regulatory capture-especially in a sector as sensitive as the aviation sector as well as compromise regulation in the industry.

**RECOMMENDATION: Clause 6 of the Bill that in effect merges the Kenya Airways (regulated) and KAA (regulator) needs to be amended to prevent the potential conflict of interest and avoid compromising the regulation of the industry.**

10. The formation of a non-operating holding company to hold the three operating entities namely Kenya Airways, Kenya Airport Authority and the Aviation Investment Corporation means that the holding company may restrict the use of airports and other facilities by other airlines other than Kenya Airways or rather charge other external airlines to use the facilities thereby raising competition concerns. We think that there is potential for abuse of competition policy in this case potentially calling into aid the oversight role of the Competition Authority of Kenya (CAK).

Related to the potential for abuse of competition are consumer protection concerns on the part of air passengers who may have to pay more for inefficiencies of running the facilities as the extra costs arising from more charges and fees for facilities by other airlines will be passed on to consumers in the form of higher ticketing fees/more expensive tickets. These concerns are not far-fetched given that section 9(m) of the Bill lists 'approval of user charges for the airports' as some of the functions of the Board which is made up of political appointees. The user charges are to be set by the Group Entity (Kenya Aviation Corporation) even though through public participation under section 38 of the Bill. This provision in the Bill, construed in this way, thereby arguably falls foul of sections 23 and 24 of the Competition Act 2010 on dominant undertakings and abuse of dominant position and section 50 on unwarranted concentration of economic power, as well as the Consumer Protection Act 2012.

**RECOMMENDATION: Clause 6 of the Bill be deleted to the extent that it creates the Kenya Aviation Corporation. Clause 9(m) and 38 of the Bill also be amended in so far as they give the Kenya Aviation Corporation and the Board the power to set**



and approve user charges respectively. In its place, a clause specifying that each of the operating entities (Kenya Airways, Kenya Airports Authority and the Aviation Investment Corporation) will operate independently and as standalone entities should be inserted.

11. Relatedly, the proposed institutional structure in the Bill is likely to open the various entities to political interference or micro-management of the airline especially considering that the National Civil Aviation Council which is the decision making body is made up of government officials and headed by the President. In particular, the National Civil Aviation Council established under Clause 5 of the Bill in our view is highly political and militarised ( a military industrial complex), comprising of the President, Cabinet Secretaries for Transport, Internal Security, National Treasury, the Attorney General and the Kenya Air force Commander. We do not see any good reason why the composition of the National Civil Aviation Council is top heavy and reads like the National Security Council. Political economy questions always need to be considered in a sector that has the potential to be lucrative, and ways of minimising the potential forms of capture as well as preventing political interference be devised and implemented. There is no shortage of case studies of state corporations that collapsed due to inefficiencies and mismanagement and this must always serve as a cautionary tale.

**RECOMMENDATION:** Clause 5 of the Bill be deleted to remove the National Civil Aviation Council as it does not appear to play any particular useful role and its functions can be discharged by the duly constituted Board. Alternatively, the clause can be amended to reduce the overconcentration of political figures in the Council say by removing the President and the Kenya Air force Commander and replacing them with independent non-executive directors well versed in aviation matters.

12. It is not at all clear whether before this 'Government Bill' was introduced by the Majority Leader of Parliament in the House it had passed through the Attorney General's Office for drafting and relevant legal advice as is required and customary. A Bill with such significant ramifications on the entire aviation industry must be one that must not be shrouded in secrecy given what is at stake for many stakeholders and the public interest. Even more fundamentally, the possible conflict of interest mean that such a proposed law must strictly follow the law making process.

**RECOMMENDATION:** It is recommended that information on this matter on whether the Bill was drafted or passed through the Attorney General Office and other relevant issues be brought to light in the public interest.

13. Public participation is a core and non-derogable value in the law making process set out under articles 10, 118, 124, 201 and 221 of the Constitution of Kenya 2010 and the National Assembly Standing Orders 120-139. Public participation in the making of law gives rise to the sovereign will of the people and generates many benefits including more citizen empowerment, enhancing citizen-government relations,



generation of diverse and innovative ideas among others. Article 118b of the Constitution enjoins Parliament to facilitate public participation in its law making process both in the House and its Committees which sittings need to be open to the public. Whenever there is a Bill introduced in the House which is then referred to a relevant committee, the Committee usually places advertisements in the media requesting for views on the Bill from the public. The relevant committee facilitates this public participation through a variety of mechanisms including: inviting submission of memoranda; holding public hearings; consulting relevant stakeholders and consulting experts on technical subjects. The Committee is required to take into account or consideration the views and recommendations while considering the Bill and preparing its report to the House. In this regard, this memoranda must be considered by the relevant Committee seized of the current Bill (National Aviation Management Bill 2020). We note that the Bill is in the stage after the First Reading where the relevant committee invites comments and memoranda from the public before the Second Reading. On the need for public participation in the law making process, see *Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR* where the High Court quashed the Finance Bill of Kiambu County Government for lack of public participation on grounds that (para 79): ‘... there was no attempt to exhort the public to participate in the process of the enactment of the Bill. In my view there was no “facilitation”’.

**RECOMMENDATION:** We recommend that given the public interest nature of this matter, there is need for more public participation of the Bill to take into account the views of the people especially as it did not originate from the public (it was a Government Bill). There has not been enough debate on the matter and the Bill originated from recommendations of a report of this Committee. There is need for facilitation of the public to participate in this debate and to meaningfully participate on an issue as important as this one.

14. We further note that the International Air Transport Association (IATA) has urged before the need to be cautious about plans to privatise the airport saying studies indicate that the same is usually inimical to the aviation sector given the profit motive of private sector players who make the airport expensive to use. IATA did indeed make a statement to that effect when an earlier proposal for a public-private partnership between KQ and KAA was proposed whereby KQ would take over the airport (JKIA). While not exactly a similar scenario, the current Bill indirectly obtains the same situation (even though now as public entities) as it brings all the entities together under one head or control.

In addition, it is the Kenya Civil Aviation Authority (KCAA) that gives operating authorisation to various airlines to operate scheduled services in Kenya under the Licensing of Air Services Regulations 2018. Operating authorisation by KCAA is usually granted where there is in force between Kenya and the state in which a foreign airline has its principal place of business an air service agreement or arrangement under which the scheduled air services may be operated. This means



that it is possible for such arrangement or agreements to engage in a restrictive trade practice (which may qualify for exemption from the Competition Authority). Such a move would readily favour a particular airline such as KQ which would be a state corporation under the Bill and may easily get this favour, going against the spirit of liberalisation and free trade under the African Continental Free Trade Agreement and the Yamoussoukro Declaration 2002.

#### Amendment of Other Laws and Exemption from Application of Other Laws

15. We also take concern with amendments to enacted laws as proposed in the Second Schedule of the Bill. In particular, the amendment to section 4 of the Public Procurement and Asset Disposal Act 2015 to provide room for exemption of a state organ or public entity from the application of the Act by a Cabinet Secretary opens room for abuse and disposal of public assets for cheap and in a non-open manner as they will not be bound by principles of value for money and open tendering that are stipulated under the Act. If passed and in regard to this Bill, it may bring about the possibility for disposal of what are essentially public assets on the cheap. Acquisition of goods in the aviation sector including aircrafts is an extremely expensive affair and while an argument may be made that the exemption is meant to cut on bureaucracy in acquisitions and disposals is a potential avenue for grand corruption and ought to be firmly resisted.

**RECOMMENDATION:** The Second Schedule of the Bill should be deleted in as far as it purports to amend other substantive provisions of other parliamentary enactments such as the Public Procurement and Disposal Act 2015 and to give the Cabinet Secretary for Transport the power to exempt State organs from complying with the Public Procurement and Disposal Act 2015.

16. We are also concerned with the fact that the proposed Bill attempts to amend other statutes duly enacted by Parliament that are not necessarily related to it in a manner that unduly and unreasonably expands the subject of the Bill and in a manner that is not appropriate or in logical sequence to the subject matter of the Bill. In this case the subject matter of the Bill is nationalisation of the airline and the establishment of an institutional framework to realise this. Yet, other amendments such as the one highlighted above of the Public Procurement and Asset Disposal Act that affect other entities are sneaked in contrary to the law. In our view, this attempt is contrary to Section 133(5) of the National Assembly Standing Orders which read: *'No amendment shall be permitted to be moved if the amendment deals with a different subject or proposes to unreasonably or unduly expand the subject of the Bill, or is not appropriate or is not in logical sequence to the subject matter of the Bill'*. See also *Republic v National Assembly, Speaker of National Assembly & 6 others Ex parte George Wang'ang'a* [2018] eKLR, paras 128-130.

**RECOMMENDATION:** The Second Schedule of the Bill should be deleted in as far as it purports to amend other substantive provisions of other parliamentary enactments such as the Public Procurement and Disposal Act 2015.

17. The Bill rather surreptitiously exempts the three operating entities (KA, KAA and Aviation Investment Corporation) as well as other state-owned entities or parastatals from complying or being bound by the Companies Act 2015, which is the main framework relating to corporations, thereby presenting a danger of breach of corporate governance procedures and violation of transparency requirements.

**RECOMMENDATION:** Delete the provision in the Second Schedule which amends The Companies Act 2015 by inserting a new section 10L that provides ‘... none of the other provisions of this Act or the regulations under this Act, or any amendment thereof, or of any other law relating to companies, shall apply to state owned entities.’

18. The exemption of the proposed entity (Kenya Aviation Corporation) from complying with the strict requirements of the Public Finance Management Act and Regulations yet this is a national/state corporation is suspicious and begs for answers. In particular, the Kenya Aviation Corporation Fund which is established under the Bill will receive monies from passenger service charges, parliamentary appropriations, State grants and loans, donations, and surplus income earned from the three entities. Given that a significant portion of the monies in the Fund are thus public funds, there is no good reason why the Corporation and the Fund in general should be exempt from the Public Finance Management Act and Regulations which seek to ensure fiscal prudence.

**Comparative Analysis**

19. A comparative assessment of how other countries deal in the issue of running airlines as well as the associated ancillary businesses can offer guidance into how the legal and institutional framework of this Bill should look like. In the section below, we provide a matrix of how a number of countries have successfully managed these concerns

Issue	National Carrier?	Government Owned?	Does National Carrier also offer other ancillary services? Framework? Legislative? Concession Agreement
Country/Area/Airport			



<p><b>Heathrow, London UK</b></p>	<p>British Airways is the Flag carrier airline.<sup>1</sup></p> <p>The company was State owned from inception but was privatized in 1987 after the government issued an IPO.<sup>2</sup></p> <p>The Airline then merged with Iberia to form the International Airlines Group and is currently owned by the UK and Spain<sup>3</sup></p>	<p>No.</p>	<p>British Airways offers expansive services at the Heathrow airport.<sup>4</sup> The Concessions are awarded by the Managing body of the Airport, in this case, Heathrow issues the concessions.</p> <p>The Directive 96/67 (The European Union Aviation Law Regulations -EU Council Directive No. 96/67 of 15 October 1996- liberalized other ancillary services access to and these services are run by multiple parties which in the UK's view enhances competition and improved quality of services provided by the different Airlines.</p>
<p><b>Dubai, United Arab Emirates</b></p>	<p>The UAE has two flag carriers:</p> <ul style="list-style-type: none"> <li>i. Emirates</li> <li>ii. Etihad</li> </ul> <p>and each belongs to a different Royal family.<sup>5</sup></p>	<p>No</p>	<p>Guided by the provisions of the UAE Civil Aviation Regulation particularly the CAR OPS 1/1.1045</p>

<sup>1</sup> Dron, Alan (6 January 2017). "British Airways aims to mitigate strike effect". Air Transport World. Archived from the original on 12 January 2017.

<sup>2</sup> <https://centreforaviation.com/analysis/reports/airline-privatisation-requires-track-record-of-profitability-and-no-government-interference-380500>

<sup>3</sup> <https://mediacentre.britishairways.com/factsheets/details/86/Factsheets-3/33>

<sup>4</sup> <http://www.ba-mro.com/baemro/groundHandlingLHR.shtml>

<sup>5</sup> <https://simpleflying.com/uae-flag-carriers/>

Oliver Tambo, Johannesburg, South Africa	South African Airways is the state- owned flag carrier airline of South Africa <sup>6</sup>	Yes	The provision of various aviation/ancillary services is not regulated. Companies seeking to undertake other businesses require a license from Airports Company South Africa SOC Limited in order to operate at one of its airports. <sup>7</sup>
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We express our gratitude for the opportunity to submit this Memoranda and trust that our concerns will be given due consideration.

We would also be happy to appear before the distinguished Committee to clarify on the comments.

Yours Sincerely,



Muriuki Muriungi  
Partner, KMK Africa Law Advocates  
info@kmkadvocates.co.ke



<sup>6</sup> South African Airways | SA Airlines Flights & Specials". www.sa-airlines.co.za. Retrieved 3 October 2019

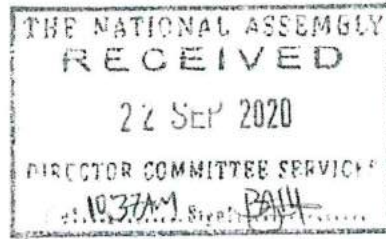
<sup>7</sup> <https://www.lexology.com/library/detail.aspx?g=db917c75-b022-48fb-9a38-4e8e1abbb300>

*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

## **2. GERIVIA Advocates LLP**







The Clerk of the National Assembly  
Office of the Clerk, Main Parliament Buildings  
Parliament Road  
P.O Box 48142-00100  
**NAIROBI**

*Paul 22/9/20*

*Advance copy sent via email to: clerk@parliament.go.ke*

Dear Sir,

**RE: FEEDBACK ON THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

We refer to the above matter.

Please find enclosed herein a paper containing our written submissions on the National Aviation Management Bill (National Assembly Bill No. 18 of 2020). Kindly note that we are available to make oral representations/submissions on the contents of this paper.

Kindly acknowledge receipt of this letter and its enclosure by stamping, signing, and returning the duplicate.

Yours faithfully,

*EWL*  
**GERIVIA ADVOCATES LLP**



*2 Tunho/SAIM  
please do it  
22/9/20*



**GIGIRI:**

📍 House Number 161, Wispers Avenue,  
Off United Nations Avenue-Gigiri  
☎ +254 700 139 999

**JKIA:**

📍 Office Suite B 1.1., Fourth Season Centre,  
1st Floor, JKIA Cargo Centre  
☎ +254 700 135 555

**PARTNERS:**

George Karuthui Kamau  
Susan Wairimu Munene  
Sylvia Wambui Waiganjo

The Clerk of the National Assembly  
Office of the Clerk, Main Parliament Buildings  
Parliament Road  
P.O Box 48142-00100  
**NAIROBI**

Dear Sir,

RE: **FEEDBACK ON THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

**Introduction**

1. The aim of the Bill is to nationalize Kenya Airways. The short title of the Bill states that it is, *"An Act of Parliament to provide for the establishment of the National Aviation Council, Kenya Aviation Corporation and its Operating Entities; to provide for their powers, functions and management and for connected purposes."*
2. Kenya Airways (KQ) is established as an Operating Entity under Section 23 while Kenya Airports Authority (KAA) is established as an Authority under Section 26 of the Bill.
3. The Bill comes against the background of the rejection by Parliament of the Privately Initiated Investment Proposal (PIIP) by Kenya Airways which (in a nutshell) sought to have Kenya Airways take over the operations of the Kenya Airports Authority (KAA). The PIIP was rejected with good reason since the handing over of a state entity and its valuable public assets to a loss-making private entity owned largely by private individuals/shareholders would have amounted to enriching private individuals using state resources and would be outright plunder.
4. It is reasonable that if colossal amounts of public funds are to be invested towards the rescue of Kenya Airways, then it might as well be converted to a state entity. It has been argued that most national airlines are rarely profitable entities and that their benefits should not only be viewed from the narrow lenses of profitability but rather in appreciation of the other numerous benefits that they bring to a country.

**GIGIRI:**

📍 House Number 161, Wispers Avenue,  
Off United Nations Avenue-Gigiri  
☎ +254 700 139 999

**JKIA:**

📍 Office Suite B 1.1., Fourth Season Centre,  
1st Floor, JKIA Cargo Centre  
☎ +254 700 135 555

**PARTNERS:**

George Karuthui Kamau  
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Sylvia Wambui Waiganjo

5. These other benefits include opening up the country to the world by bringing in visitors, marketing the country abroad and promotion of national pride and sovereignty. While these other benefits may not be easy to quantify in monetary terms, it is clear that promotion of tourism and investment, easy movement of cargo in and out and marketing the country abroad definitely have quantifiable economic value to the country.
  
6. Against this background and noting that Kenya Airways has struggled with profitability as a private company, then this Bill is a welcome attempt to rescue our national carrier. The Bill should however seek to increase provisions for accountability and scrutiny to ensure better utilization of the invested state resources and a return to profitability (or breaking even at the very least).

#### Our General Overview of the Proposed Bill

7. As pointed out, the genesis of the Bill is the report of the Departmental Committee on Transport, Public Works and Housing dated 17<sup>th</sup> June 2019 (“the Pkosing Report”). The Committee recommended the following:
  - a. Formation of Aviation Holding Company which will own the following subsidiaries:
    - i. JKIA company which will own JKIA the Hub and run related services including ground handling and catering;
    - j. KAA which shall run other aerodromes;
    - k. KQ as the national carrier; and
    - l. Aviation college/institute.
  
  - b. The nationalization of KQ;
  
  - c. Resources of Aviation Holding Company be utilized for mutual benefit of all the subsidiaries;



- d. Changes in the law to exempt KQ from certain legislation including the Public Finance Management Act (PFMA) and the Public Procurement and Asset Disposal Act (PPADA); and
- e. Other legal changes to enable the operation of the above structure.

### The Proposed Structure in the Bill

- 8. The Bill at Section 6 proposes establishment of Kenya Aviation Corporation (KAC) which will hold assets and oversee the operations of the operating entities. For clarity, these Operating Entities are:
  - a. Kenya Airways
  - b. Kenya Airports Authority
  - c. Aviation Investments Corporation
- 9. KAC will mainly steer the Government agenda/strategy with regard to aviation sector (Section 9). The most important agenda however is that it controls the assets of the group. This means that all the monies collected by any of the Operating Entities (OE) will be administered by KAC.
- 10. We have noted that each of the Operating Entities will also have a leadership structure including a board of management and management personnel in each case led by a Managing Director.
- 11. We wish to submit as follows with regard to the structure:
  - a. There is a risk of excessive bureaucracy in decision implementation due to the complex and burdensome leadership structure in the sector. We shall pick one example.
  - b. Each operating entity is allowed to have subsidiaries operating under them. Each subsidiary may have a director who is appointed by the Board upon nomination by the by the CEO of KAC.



- c. We note that there lacks clarity as to whether this person(s) is nominated upon interviews by the Managing Director of the OE or it is direct nomination by the CEO noting the exemption of the entities from the State Corporations Act.
  - d. The director will however be reporting directly to the Managing Director of the OE despite the fact that he is not the appointing person.
  - e. It is important to appreciate there are human behaviour factors involved in leadership and the fact that the CEO will appoint the Managing Director could lead to unwarranted rivalry, cronyism, and nepotism among other public service vices.
  - f. On bureaucracy, it is clear that the Managing Director of the OE does not have a final word on most issues - they have to be escalated to the Board through the CEO. It therefore means that the director of the subsidiary has to escalate the issue to the Managing Director of the OE, who will then escalate it to the CEO.
  - g. The CEO might find it necessary to escalate the issue to the Board and if the Board raises any issues that require clarification, noting that subsidiary entities' directors do not sit in the Board, it will require a corresponding process in reverse to seek such clarification.
12. We further observe that the structure could be complicated to run and even to evaluate performance. The fact that the entity which collects the revenue will not necessarily get the priority in allocation of funds, and that the entity that gets the lion share of allocation might not bring corresponding returns negates the natural and simple principle that *"hard work only pays off when it meets the right plan of action"*.

13. We again bring up the fact that governance is undertaken by natural persons. In this case, Kenya Airways has a lot of liabilities. There is no guarantee that the Act will make the liabilities go away or indeed bring about recovery of the airline.
14. What is clear however is the fact that equitable sharing of the Fund means that the money available from Air Passenger Service Charge (APSC) might end up covering the liabilities of the airline. What then will be the motivation of the KAA team to work hard on the sector strategy they have been allocated.
15. **Tying up of all the sector players together, in our view, is not good practice and in the long run we could have a wholesome collapse of the industry if one OE mismanages the finances.** We note that the Board will be in a position to mobilize finances across the group. The risk exposure of the Group is rather high as the misfortunes of one OE affects the entire Group as opposed to the current situation where faltering by one member cannot incapacitate the industry.
16. More critically is the fact that, in our view, it has not been demonstrated how the intertwined structure will lead to obvious short term and long-term benefits for the industry. We see that the risk and the negative elements outweigh the benefits likely to accrue to the public.
17. We therefore oppose the structure as laid out in the bill.

#### Summary of other Issues to be Considered before Comprehensive Reforms

##### **Innovation in Development and Management of Facilities**

18. The Government should look into the possibilities of deliberate application of Public Private Partnerships Act (PPPA) to develop the infrastructure at the airport. Reading the Pkosing Committee Report, KQ's main complaint is lack of infrastructure at the airport including terminal buildings, runways, and taxiways.

19. While the Government may invest in runways and taxiways, there is absolutely no reason to prevent a third party from investing in a terminal building for the exclusive use of Kenya Airways.

*Simple example: Dedication of 1USD or Kshs. 100 of every ticket by KQ on annual passenger number of around 5,000,000 will yield Kshs. 500,000,000 annually and Kshs. 10b over a period of 10 years. There is no reason why KQ should not have a long-term partner with whom it can develop facilities with. The idea of targeting public funds (Air Passenger Service Charge - APSC) is somewhat lazy and non-strategic.*

20. Similarly, KAA could adopt the same model in engaging a partner to develop the facilities and recover their monies through direct charges to airlines or dedication of part of the income to such a project.

21. More importantly, such arrangements will relieve these bodies of the burden of maintaining facilities, procurement procedures among others as it is the burden of the third-party investor to deliver a fully functional facility.

#### **Review of Tendering Processes and Strategies**

22. Still on the Pkosing Report and complaints about the facilities, we note that KAA has been affected by tendering processes especially on the high capital tenders like terminal buildings, duty free shops, fire tenders, among others. We propose that internal governance issues with regard to procurement be looked into.
23. There is a danger in excluding from the PPADA a Government body which is unable to properly handle public procurement within the existing legal framework and give it a free hand. We believe these are issues that affect KAA (and others) as a body and not a reason to interfere with its work but rather a call to look into the structures of such public bodies.



24. Similarly, there is a danger in allowing KQ, which will be 100% Government owned to operate outside Government tendering systems. If anything, we need to respect the spirit of Article 227 of the Constitution regarding public procurement.

Our Proposal for Reform- Formation of JKIA Limited

25. We find that in the entire structure, the reform for KAA would involve removal of JKIA from the rest of the corporation for efficiency. As correctly noted by the Pkosing Report, JKIA is the main revenue earner for KAA but the money is spread out across KAA including loads of loss-making airstrips.
26. Of significance to us however is the fact that the running and management of JKIA, which carries over 80% of the weight, still runs the 20% of the other operations. These are spread far and wide across the country and as stated, are insignificant in terms of revenue.

Simple illustration:

*The Managing Director of KAA on a normal morning needs to address the issue of hydrant failure at JKIA leading to delay of a flight to Amsterdam at 8 am. This is being treated as an emergency by KAA, Kenya Pipeline and the concerned airline as it will complicate passenger connections at Amsterdam onwards. At the same time, the contractor undertaking re-sealing of the runway at Lokichogio Airport left some debris on the runway, as a result, the only scheduled aircraft for the day has been forced to land in Lodwar occasioning great inconvenience on the 8 passengers on board. It is a bit of a stretch that the same Managing Director dealing with the Amsterdam flight has to deal with the errant contractor at the Lokichogio Airport upon escalation of the issue to his office.*

27. We therefore propose that JKIA and its facilities as currently stands be converted into a 100% state owned entity, JKIA limited, with a Managing Director and a Board of Directors



to exclusively operate and manage JKIA. KAA can on the other hand be relocated to Wilson Airport to manage the rest of the aerodromes in the country.

28. This will not only free up management of JKIA from excessive responsibilities of the non-revenue generating ventures, it will also make KAA be innovative and deliberate in raising money to develop aerodrome infrastructure for other aerodromes. It must be appreciated that some of these aerodromes like Wilson, Eldoret, Kisumu, Moi, Nanyuki, Ukunda, Manda, Malindi, Mandera, Lamu among others have huge potential for commercial activity but continue to languish in the shadow of JKIA.
29. We further propose that in running JKIA, the company should look for strategic partners, competitively recruited, to free itself up to run administrative issues while at the same time reaping maximum benefits out of such services.

*Illustration*

*The parking services and duty-free concession are now managed by third parties. Electronic point of sale system allows KAA to have a view of monies collected by these concessionaires and to achieve its fair share of revenue. These two services only now pay KAA in excess of Kshs. 500 million per year (all factors constant) in minimum annual guarantee, rent and concession rates. There is further a significant improvement in quality of duty-free shopping experience in Terminal 1A since concession as opposed to other terminals which pay rent only. Similarly, there is huge improvement in parking systems including removal of delay-causing payments at the exit gates and expansion of lanes at exits. These are clear gains of good concession practices through employment of systems that allow KAA to dwell on proper administration of its core mandate while allowing functional, accountable and smooth operation of services.*

KQ- Proposal of a case for Internal Reforms

30. We observe that the Committee picked five issues that have led to KQ being in the dire financial situation it is finds itself in:
- a. Leasing of aircraft at exorbitant prices;
  - b. Poor fuel hedging strategy;
  - c. Expensive tickets;
  - d. Deployment of small aircraft in otherwise busy routes; and
  - e. Limiting of baggage from 2 pieces of 23 kg to one piece thereby losing out to other airlines which allow two.
31. **Respectfully, we find these to be issues that call for reform of the airline and not a case for nationalization.** We hold the view that the Government, even if it intends to nationalize, should look into why KQ continues to make such obvious missteps that make it less competitive as opposed to employing drastic measures while addressing the root causes of the issues.
32. KQ could start reforming itself through adopting better policies through careful, sincere, honest and strategic thought processes to see exactly where the rot comes in. The proposed targeting of Air Passenger Service Charge (APSC) will only lead to more loss of public funds through payment of private debt by the public. The loss of public funds risks being even higher noting that the Bill seeks to exempt KQ (and the entities under KAC) from some of the laws that would make it accountable. We plead with Parliament not to allow this to happen.
33. Long term reform of KQ will lead to long term solutions. Reduction of its size in terms of route structure, staffing size, running costs among others will bring long term benefits to the airline as opposed to random injection of public finances.

General Commentary on the Text of the Bill

**1 Section 4 - Guiding Principles**

These should include financial accountability and profitability.

**2 Section 5**

2.1 Section 5(1) - the President of the Republic should not serve in National Civil Aviation Council. The reasoning here is that this Council is expected to handle issues specific to one sector. This in our view limits the view of the presidency which is expected to be broad, national and integrative.

2.2 The decisions of this Council may be subject to examination, scrutiny or questioning by the Parliament which raises the question as to whether the president would then be summoned to answer to a Committee of the Parliament. This could lead to an awkward/embarrassing legal dilemma.

2.3 Inclusion of the President in the Council should have a clear benefit and/or weight that his participation brings in. In the present case, this is not apparent. This country has operated the aviation industry for over half a decade. There is adequate expertise to run the sector. The presidency has never been involved in the running of the sector and we are certain with good organization, the President will be of more use guiding policy at cabinet level as is the case today.

**3 Section 8**

3.1 Section 8 (2) - it should be clear that the re-appointment of the non-executive directors for a further term of three years shall only be upon a favourable evaluation of their performance and that it is not automatic. Board members who do not add value should not be re-appointed.



**4 Section 10 and 11 - Qualifications of the Chairman and Board Members of the Kenya Aviation Corporation**

- 4.1 Since 10 (a) requires that the Chairman should hold a bachelor's degree in aviation, business administration, finance, audit, law, engineering or other related field. Section 11 (b) on Board members should also require the same qualifications. The only difference between the qualifications of the Chairman and board members should be the number of years of experience that are required of the board members, which should be less than that of the Chairman.
- 4.2 Section 10 (b) - experience of ten years is not sufficient for the Chairman considering the task at hand which is chairing a corporation that has major operating entities like the troubled Kenya Airways and Kenya Airports Authority (KAA). The minimum experience for the Chairman should be at least 15 years' experience.
- 4.3 The academic qualifications of the Chairman should be at least a Master's Degree in a relevant field. Note that the CEO of the Corporation is expected to have at least a Master's Degree (see Section 13) and the Chairman should match or even exceed the CEO's qualifications.
- 4.4 The Chairman should be someone who can command the respect of the Board and the CEO of the Corporation, and also the Managing Directors of the Operating Entities and their Subsidiary Companies.

**5 Section 9 - Functions of the Board**

- 5.1 The functions of the Board should be in line with the proposals of the Mwongozo Code of Governance. In that regard, there should be a clear distinction between the functions of the Board and that of CEO and Management of the Corporation and the Operating Entities.



- 5.2 The functions of the Board should be more in terms of reviewing, evaluating and approving strategies, policies, frameworks and not development or establishment of such policies.
- 5.3 Add the following functions to the Board:
- 5.3.1 Evaluate and approve an internal system of controls and ensure it is maintained.
  - 5.3.2 Protection of stakeholders /shareholders' interests and optimizing shareholder value.
  - 5.3.3 Review and approve the organizational structures of the operating entities.
- 6 Section 10 and 11
- 6.1 The requirement in Section 11 (c) on avoidance of conflict of interest for Board Members should also be applicable to the Chairman i.e. *The chairman "should not hold a position or have such interests that are likely to place him or her in a position of conflict of interest or impose undue influence in the performance of his or her obligations under the Act."*
- 6.2 Section 11 (b) - include the minimum number of years of experience for Board Members. If the years of experience of the Chairman are increased to 15 years, then Board members should be required to have at least 10 years of experience.
- 7 Section 12 (c) - the CEO of the Kenya Aviation Corporation should in addition to communicating the Board's policies and guidelines ensure that they are implemented by the Operating Entities.

- 8 Section 20 (4) - in the absence of the Corporation Secretary, the person who the Board appoints to replace the Corporation Secretary should also be a member of the Institute of Certified Secretaries and in good standing.
- 9 Section 27 - Does KAA still have the power to approve establishment of private airstrips and control their operations? This power is there in the KAA Act but the Bill only mentions maintaining aerodromes on an agency basis for Government departments.
- 9.1 Section 27 (2) - the reference to subsection (1) (k) (i) is wrong. It should be 1 (p) (i).
- 10 Section 56 - Envisages opening and operating of new bank accounts. It is assumed that they can continue operating their existing accounts?
- 11 Charges by KAA to KQ - Will KQ be paying KAA any monies for use of the aerodrome facilities?
- 12 Other Concerns

**12.1 Regulatory role of the Kenya Civil Aviation Authority**

The Bill should ensure that the Regulatory role of the Kenya Civil Aviation Authority (KCAA) over the Kenya Aviation Corporation and its Operating Entities is clear. If need be, the KCAA Act should be amended to reflect the necessary changes.

**12.2 Application of the Public Finance Management Act to the Entities under the Bill**

It should be clear that the provisions of the PFMA apply to the Act and the entities thereunder. Under the Act, the Cabinet Secretary in charge of a state corporation is expected to comply with the requirements therein on state corporations, including monitoring their performance and reporting to cabinet as per the requirements in that Act.

**12.3 First Schedule**

Add that the Board shall develop a Board Charter to guide its operations.

To ensure Board efficiency, board inductions, continuous board training and board evaluations must be conducted regularly as agreed upon by the Board.

## 12.4 Second Schedule

### Exemption from the Public Procurement and Asset Disposal Act, 2015

This general amendment to Section 4 of the Public Procurement and Asset Disposal Act (PPADA), 2015 is misguided and could be abused. It is recommended that Parliament should not agree to this proposal for the following reasons:

12.4.1 If public money is involved, as it will be in rescuing Kenya Airways and in running the Operating Entities and their Subsidiaries under the Bill, then there must be oversight of the procurements of these entities under the PPADA. Decisions of the Public Procurement and Administrative Review Board and even the courts have made this clear.

12.4.2 The PPADA does not in any way hamper the operations of state entities. If the aim of the exemption is to ensure speedy procurements, there are various procurement procedures under the PPADA that can be used to facilitate this e.g. Direct Procurement (section 103) and Specially Permitted Procurement Procedures (section 114A). The latter procedure, "Specially permitted procurement procedures", Section 114A of the PPADA are relevant to this case and are reproduced below for ease of reference.

#### *114A. Specially permitted procurement procedure*

- (1) A procuring entity may use a procurement procedure specially permitted by the National Treasury.*
- (2) The National Treasury may allow the use of specially permitted procedure –*
  - (a) where exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and the Regulations;*
  - (b) where the market conditions or behaviour do not allow the effective application of the Act and Regulations made under the Act;*
  - (c) for specialized or particular requirements which are regulated or governed by harmonized international standards or practices;*
  - (d) where strategic partnership sourcing is applied;*



*(e) where credit financing procurement is applied; or*

*(f) in such other circumstances as may be prescribed.*

*(3) The Cabinet Secretary may prescribe the procedure for carrying out specially permitted procurements under this section.*

12.4.3 Rather than offer a blanket exemption for the entities created under the Bill from all the useful oversight provisions of the PPADA, the Cabinet Secretary should consider the application of the above provision to cater for the special needs of the entities created under the Bill. Allowing for exemptions from the PPADA for the aviation sector generally may set a bad precedent for other ministries to follow.

12.4.4 Based on the explanation in paragraph 12.4.2 above, the only logical explanation behind this exemption from the PPADA is to avoid scrutiny in procurement proceedings by the Public Procurement and Administrative Review Board (PPARB) and even the courts. Lack of integrity in Procurement is a problematic issue in Kenya and the country should not take the general direction of avoiding or discouraging scrutiny in this area.

12.4.5 The amendment is quite broad and beyond exempting the Kenya Aviation Corporation and all the operating entities such as Kenya Airways and KAA and the subsidiaries, there is a risk of it being extended to other state entities under that ministry. Already, the procurement processes for KAA as a State Parastatal are governed by the PPADA and there is no reason why they should be exempted now, or why the aviation sector generally should be exempted from the provisions of the Act.

12.4.6 The nationalization of Kenya Airways has been necessitated by its poor performance as noted in losses amounting to billions of shillings in recent



years. It is common knowledge that there have been allegations that the misfortunes of Kenya Airways are not just linked to the challenging aviation environment globally but that they could be linked to incidences of mismanagement and embezzlement of funds, some which have been highlighted through the media and in various reports. Until a forensic audit rules out the allegations of mismanagement and embezzlement, it is not clear why we should lower the oversight bar by exempting such an entity from scrutiny under the Act. It is noted that KAA has also had its share of allegations when it comes to accountability in finances and procurement, even as noted by poor quality of works in some of its airports. It is ironical that the entities that the Bill is seeking to exempt from scrutiny are in dire need of scrutiny.

12.4.7 Finally, if the exemptions must apply, there should be safeguards such as only exempting them from certain provisions of the Act or exempting them only for a certain duration of time or even for specific procurements upon application to the relevant authorities. Another option would be for Parliament to introduce some form of safeguards such as requiring oversight of all the procurements of those entities by the Public Procurement Regulatory Authority (PPRA). This could be in the form of notifications and/or seeking clearance from the PPRA before the Procurement processes.

#### **12.5 Amendment of Section 10 of the Companies Act**

The special proposed amendments under the Bill to suit the needs of the entities thereunder should be looked into carefully, analysing their pros and cons. Of specific concern is the provisions of Section 10L, which make it clear that other provisions of the Companies Act shall not apply to the state-owned entities.

This provision, coming after the earlier one in this Bill seeking to exempt the entities under the Act from the provisions of the PPADA is worrying. Why the “special treatment” to the entities under the Bill, and more in the direction of avoiding good governance and accountability? If other entities, private or public comply with the relevant laws, why does the Bill seek to exempt the entities from oversight?

There is no indication that the poor performance of any of the entities in the Aviation sector is linked to stringent governance and accountability mechanisms or laws. Parliament should interrogate what mischief these exemptions from certain important laws that promote good governance and accountability are meant to cure or facilitate.

#### **12.6 Formatting and Editorial Errors**

The Bill may benefit from further editing e.g. formatting of paragraphs in 12 (3) (c), 19 (1) (e); 19 (3) (d); 27 (1) (c); 41 (g); 41 (f) – delete one “of the” etc.

#### **CONCLUSION**

Parliament should be generally careful about provisions of the Bill that seek to exempt the state entities created under the Bill from certain provisions of the law, including the provisions seeking to exempt the entities from the provisions of the Companies Act.

Of concern is that the amendments to the various laws i.e. PPADA and Companies Act, which are introduced under the Bill, will also be applicable to other entities in the future. The amendments are not just restricted to the entities under this Act.

With such broad exemptions, the country risks ending up with entities that are barely regulated or oversighted due to their amorphous nature i.e. neither government nor private and hence not governed by the laws related to government entities or the laws related to private entities.

Whichever exemptions that Parliament eventually agrees on, there must be sufficient scrutiny of all the entities created under the Bill, keeping in mind that granting exemptions from laws to some entities in one sector might create a bad precedent for other entities and ministries.



Please note that we are available to make oral representations/submissions on the contents of this paper.



**Drafted By:**



Gigiri Office: 161 Wispers Avenue, Off United Nations Avenue, Gigiri  
JKIA Office: Office Suite B.1.1, Fourth Season Centre, 1<sup>st</sup> Floor, JKIA Cargo Centre  
Email: [legal@gerivia.co.ke](mailto:legal@gerivia.co.ke) | Tel: +254 700 135 555 / +254 700 139 999  
P.O Box 64859-00620  
**NAIROBI**





*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

### **3. Kenya Association of Air Operators (KAAO)**



# KENYA ASSOCIATION OF AIR OPERATORS

CHAIRMAN:  
MR. MBUVI NGUNZE  
EXECUTIVE SECRETARY:  
COL. (Rtd) E K WAITHAKA



P.O. BOX 27592 - 00506  
NAIROBI  
KENYA

KAAO/11

21<sup>st</sup> September 2020

Mr. Michael R. Sialai, EBS  
Clerk of the National Assembly  
Parliament buildings  
P.O Box 41842, 00100

**NAIROBI**

Dear Sir,



*(1) D/ants.  
see deal CMA  
22/9/20*

**SUBMISSION OF MEMORANDUM ON THE AVIATION MANAGEMENT BILL 2020**

Kenya Association of Air Operators (KAAO) is a National umbrella body whose role is to promote, foster, enhance, and protect the interests of those engaged in Aviation Industry and allied businesses in Kenya. The Association encourages adherence and maintenance of high civil aviation safety standards and practices, through strict compliance with our Members' Code of Ethics.

The membership of the Association is comprised of operators engaged in International and Domestic air operations, [Passenger, Medevac, Cargo, Mail], Approved Maintenance Organisations, Approved Training Organisations as well as Private Aerodrome Operators. Our members form Over 80% of all registered Air Operators [please see the attached members list].

As key stakeholders in matters Aviation, we wish to submit the attached memorandum which contains key issues of concerns and a matrix of observations and proposals in the AVIATION MANAGEMENT BILL 2020 for consideration by Parliament.

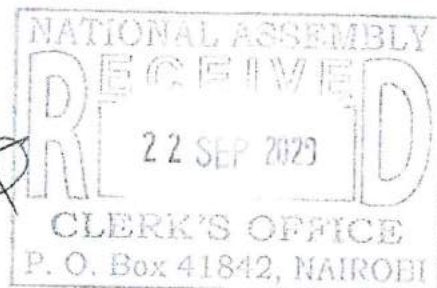
Please acknowledge receipt.

Yours Faithfully

**COL. [RTD.] E K WAITHAKA**  
**EXECUTIVE SECRETARY**

*(2)*

*TUNAO/SALIM  
Please do it  
FMA  
22/9/20*



**ATTACHMENTS**

- 1, MEMORANDUM
- 2, OBSERVATIONS AND PROPOSALS
- 3, KAAO MEMBERSHIP LIST

## MEMORANDUM

### BY KENYA ASSOCIATION OF AIR OPERATORS' [KAAO] ON THE NATIONAL AVIATION MANAGEMENT BILL, 2020

#### 1. PREAMBLE

KAAO is a National umbrella body whose role is to promote, foster, enhance, and protect the interests of those engaged in Aviation Industry and allied businesses in Kenya.

The Association encourages adherence and maintenance of high civil aviation safety standards and practices, through strict compliance with our Members' Code of Ethics.

This memorandum is therefore in response to the invitation by the NATIONAL ASSEMBLY for the public to submit views and concerns that our Members have. Kenya Airways (KQ) is a member of the Association, and has provided its own memorandum. The views expressed here are those of the wider membership of the Association who also have a view on the proposed bill separate from those of Kenya Airways.

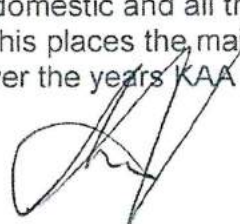
Our interest is encompassed in our vision which is to create a safe, efficient, and economically viable National Civil Aviation Industry, through promotion and enhancement of safe and sustainable operations and provisions of aviation services.

#### 2. BACKGROUND TO THE AVIATION SECTOR IN KENYA

The aviation industry in Kenya is mainly engaged in the following activities.

- Domestic and International passengers, cargo and mail transportation on scheduled and non-scheduled flights.
- Charter operations (private service providers or for the likes of UNHCR, WFP, Tullow amongst others)
- Medical evacuation [Medivac] service provision
- Aerial surveillance service provision
- Agricultural crop spraying
- Approved Training Organizations (ATOs)
- Approved Maintenance Organizations (AMOs).
- Hot air balloon operations
- Aero sports
- Unmanned Aerial Vehicles (UAV) or RPAS
- Aerodromes operations – both public and private

The country has over 490 out of which about 300 are public Aerodromes which are fairly well distributed all over the country making it easy to access even the remote parts of Kenya. Out of the 300 public aerodromes 8 are International and rest are domestic and all these fall under the management of KAA in accordance with the KAA Act. This places the maintenance responsibility of these crucial aviation assets under the care of KAA. Over the years KAA has continued to carry out





these responsibilities fairly well thereby ensuring that the Kenyan Public can enjoy the essential safe and rapid air transportation anywhere in the country. We wish to point out that this is a critical service that must not be withdrawn but rather be enhanced for the benefit of the national Economy.

There are over 1200 registered aircraft, out of which only 33 form the KQ fleet. The aviation industry employs over 10,000 personnel who support more than 40,000 family members.

### 3. ECONOMIC IMPACT


Estimates from around the world indicate that aviation has up to an 8 times multiplier effect on the economy. Air transport to, from and within Kenya creates several types of economic benefit, the principal of which is the benefit created for the customer, the passenger or shipper, using the air transport service. In addition, the connections created between cities and markets represent an important infrastructure asset that generates benefits through enabling foreign direct investment, business clusters, specialization and other spill-over impacts on an economy's productive capacity. The key benefits of aviation to Kenya may be summarized as follows:

- Consumer benefits for passengers and shippers;
- Driving local, regional and African economic integration and growth;
- General support of GDP and GNP growth.

**Enabling long term economic growth:** A key benefit of aviation to any country, is as enabler of long-term economic growth; transport being a fundamental factor contributing to economic growth. Kenya's integration into the global air transport network has transformed the possibilities for the Kenyan economy by:

- Opening up foreign markets to Kenyan exports;
- Being a hub service provider to the region and continent for aviation charter assets as well as technical and service provision
- Lowering transport costs, particularly over long distances, helping to increase competition as suppliers can service a wider area and potentially reduce average costs, through increased economies of scale;
- Increasing the flexibility of labour supply, which should improve efficiency and reduce unemployment;
- Encouraging Kenyan businesses to invest and specialize in areas that play to the economy's strengths;
- Expediting the adoption of new business practices, such as just-in-time-inventory management that relies on fast and reliable delivery of essential supplies; and
- Raising productivity and hence the economy's long-run supply capacity

**Global aviation competition is now system based:** As part of Kenya's long-term strategy to grow and diversify the economy, amongst other ways, the country must maintain and grow its position as an integrated regional hub, similarly to the strategy pursued by other locations such as the Gulf States, Turkey, China and Ethiopia. This requires that government policy and vision must be aligned if the above is to be achieved. Kenya is blessed with an ideal geographical position and a very good business position which should favor an integrated approach to country strategy towards the Aviation Sector.





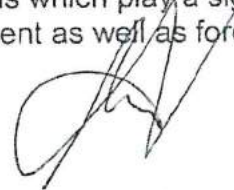
#### 4. RECOMMENDATION:

We recommend the withdrawal of this Bill as presented for the following reasons:

- a) A fundamental starting point of any Bill as important as this is to define policy. What is the bill attempting to address? Do we have a clear National Aviation Policy? Kenya Airways [KQ] is not equal to the Aviation sector in Kenya. There are over eighty [80] licensed Air Operators [KQ being one], over 20 Aviation Training Organizations, over sixty [60] Approved Aircraft Maintenance Organizations and all contributes to Kenya Aviation Industry. Apart from KQ there are about 10 other Designated National Carriers registered and operating out of Kenya. If there is a desire to make Kenya competitive from an Aviation stand point, the whole Aviation eco-system needs to be addressed. The benefits that will accrue to Kenya Airways from the proposed bill must accrue to other players in the eco-system to ensure they are all competitive and contributing to team Kenya.
- b) Has an economic study been conducted on the aviation sector in Kenya and its inter-linkages? Could the bill as proposed be undermining the bigger benefit that could be had by taking a more holistic view on the back of a well thought out strategy? The position of Ethiopia, Qatar or Emirates is different given they do not have the vibrancy of other operators that we do here, and even the number of operating areas e.g. aerodromes as we do in Kenya.
- c) The proposals being fronted in this Bill should be carefully reviewed before rushing to implementation. Nationalizing the airline alone is not the answer, we know this from the performance of Kenya Airways during the period following its privatisation in 1996 during which it fared favourably, even expanded to a medium sized outfit. The challenges post expansion related to the ambitious Project Mawingu are well documented as well as the significantly changed competitive landscape in the same period. This has been further exacerbated by the COVID 19 crisis and recovery of airlines across the world will take a long time. Is this included or taken into account in the thinking?
- d) Rather than merge KAA with a struggling airline, the idea of making Jomo Kenyatta International Airport a hub for aviation is the most viable business option. We should therefore re-model Kenya Airports Authority and strengthen it to urgently and vigorously work to make Nairobi a strong regional hub for passenger and freight transportation. This is the competition that we need to get into earnestly. We must debunk the misguided thinking that the national airline builds the hub, a hub is built by providing modern, efficient and affordable facilities that lure international operators to use it and by creating an efficient eco-system within the country's aviation players.
- e) The aviation industry in Kenya unlike in Ethiopia and in the Gulf nations is comprised of many operators who are competitors within a global setup. The Kenya Association of Air Operators representing many operators including Kenya Airways has over the years made petitions to the Government to review the tax regime so as to provide the needed relief to the industry players in order to give them a fighting chance in their fierce regional and international competition. In the past when tax breaks were granted by government, the industry managed to get access to newer, modern aircraft, a fact that has played a major role in enhancing the safety standards. Let these petitions be considered not selectively, but across the board so as to support the

entire industry. Tax policy is a key enabler of competitiveness in Aviation and unfortunately, the country has not created a favorable regime recently for investment. In addition, given that the Bill proposes the creation of the Kenya Aviation Corporation Fund, sourced mainly from Passenger service charges and government funds, a portion of such support should go to the entities in aviation that directly support the linkages to KQ in the local economy.

- f) The Bill has in a subtle manner introduced a seismic shift in the aviation system by proposing the establishment of the National Aviation Council which will be comprised of top civil servants, the Air Force Commander and will be chaired by the President. This, notwithstanding the lack of evidence of its objects and purposes for the industry, is a move away from the ICAO recommended structure that we are contracted to. This change has the potential to cause conflict, especially considering that the involvement of the President will have a watering down on the oversight role of the Civil Aviation Authority. This will present itself as a significant safety finding during subsequent surveillance by ICAO resulting in possible black listing of the country. This would affect the entire industry as it would ground all our international operations. It also seems to negate the role of the Ministry of Transport. Has the Ministry failed in its policy role?
- g) Finally whenever we consider the civil aviation industry, we must look beyond Kenya Airways to the many vibrant operators and maintenance organizations which play a significant role in tourism and regional transportation, which support employment as well as foreign exchange earnings.

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5. OUR DETAILED COMMENTS ON THE BILL

PART	SUB-HEADING	COMMENTS	PROPOSED ACTION
1. PART I PRELIMINARY	1. Short title and commencement.	The title of this Bill in Section 1 (1) sighted as "The National Aviation Management Act, 2020" is misleading as Kenyan aviation is comprised of diverse organizations some of which are in private ownership.	As this Bill seeks to form a Corporation which will be just one of the players in the Kenya Aviation System this Bill should rather be "Nationalisation of Kenya Airways and merger with the Kenya Airport Authority Act."
2. Part 11 – ESTABLISHMENT OF NATIONAL AVIATION COUNCIL	4. Guiding Principles	The guiding principles do not capture the important and critical concerns.	Guiding Principles of the Act should include at 4(c) - the enhancement and/or development of JKIA as a regional / international hub. This has always been one of the key strategies to enable Kenya capture the aviation market in the region
		There is no purpose or aim stated for forming this council.	An entity such as the proposed council should only be formed to correct a failure in the existing civil aviation system.

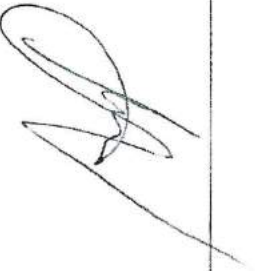




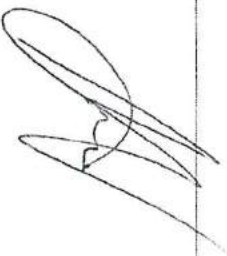
		<p>The formation of a council of such stature should have a separate Bill and not be made to ride on this Bill.</p> <p>The formation of such a powerful council will bring direct conflict with the safety oversight system comprising of the Kenya Civil Aviation Authority.</p> <p>The formation of the Council will contradict the provisions of the Convention on International Civil Aviation (ICAO doc. 7300) which mandates the establishment and management of a State Safety Oversight System (ICAO doc. 9734).</p>	<p>We recommend that this idea be subjected to more discussion with stakeholders prior to policy change.</p> <p>If a council is to be formed, it should be a National Aviation Business Council with mandate in commercial affairs and totally divorced from safety affairs. It would also benefit from including persons with the knowledge and expertise in aviation.</p> <p>ICAO doc. 9734 Section 2.3 State Safety Oversight System envisages this to comprise of a Civil Aviation Authority:</p> <p>Para 2.3.3 states "should be established in the primary aviation legislation and specific operating regulations and put into practice as a matter of policy and methodology of the CAA."</p> <p>Section 2.4 State Commitment to Aviation Safety:</p> <p>Para 2.4.5 recommends "Thus, States need to find a balance between the cost of establishing and sustaining their CAA and the ability of the industry and stakeholders to contribute to the funding of such a system."</p> <p>Amend and specify.</p>
<p>3. PART III ESTABLISHMENT OF THE KENYA AVIATION CORPORATION</p>	<p>7. Functions and Powers of the Corporation</p>	<p>Functions conferred under 7 (1) (c) and (d) can be mis-constructed to be undertaken on behalf of the entire aviation industry, yet this is not possible since the Corporation cannot represent the interest of the rest of the players</p>	



4.	PART IV MANAGEMENT OF THE CORPORATION	9. Functions and Powers of the Board	<p>in the industry some of whom it shall be in direct competition with.</p> <p>9. (b) control over assets including airports which are national assets for the benefit of all players will not be objective.</p> <p>9 (c) implementing government's strategy in relation to the national aviation sector suggests an overreaching mandate which the board cannot have.</p> <p>9. (m) This sub-section gives the Board of the Corporation powers to approve and publish fees, rates, levies and all other charges to be levied and collected by the Operating Entities. These being such like landing / parking / passenger departure / franchise charges will be subjective especially as seen by other players, some being competitors.</p> <p>9. (n) This insinuates the board can advise the Cabinet Secretary on matters covering development of the entire aviation sector in Kenya independent of consultation with other players.</p>	Delete or amend appropriately.
		10. Appointment of the Chairperson	10 (a) Restriction for the Chairman to have knowledge and experience of similar business will be subjective.	Include objective reviews.

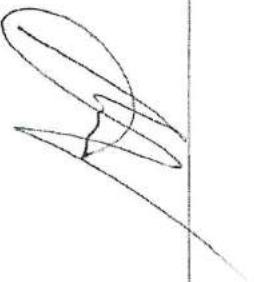


<p>13. Qualifications for appointment as the Chief Executive Officer</p>	<p>13. (a) What is the significance of the requirement for a Master's degree for CEO</p>	<p>Relevant experience is necessary and more important. Longer senior management experience is required. Normally a Bachelor's degree should suffice with a Masters qualification as added advantage</p>
<p>14. Tenure of Chief Executive Officer</p>	<p>The tenure of 5 years and eligibility for a further term of 5 years for the Chief Executive Officer is too long -</p>	<p>Recommend a shorter term of say 3 years renewable to give room for another appointment of someone with fresh ideas/strategies, should this be deemed necessary.</p>
<p>15. Ground of Removal of Chief Executive Officer</p>	<p>These do not reflect failure to comply with Chapter 6 provisions of the Constitution.</p>	<p>Add matters relating to integrity, corruption, and fraud as well.</p>



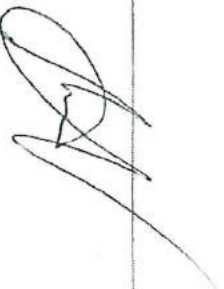


	22. Common Seal and Execution of Contracts by the Corporation	The Business Laws (Amendment) Act, 2020 (the "Amendment") came into effect in March and abolished the use of Common Seals by Companies. In view thereof, subject to the interpretation of Section 36 [Operation of the Companies Act to Operating Entities] this Section should clarify that this Amendment does not apply to the Corporation if that is the intention.	Make requisite amendment
5. PART V ESTABLISHMENT OF THE OPERATING ENTITIES	24. Functions of Kenya Airways	1 (a) Amend phrase "to carry on business as carriers of air passengers and goods" to read "to carry on business as carriers of air passengers, freight, cargo transport services and other related services".	Add also maintenance, repair of Aircraft and other functions normally carried out by an MRO which is an important part of any airline. What about ground handling services?

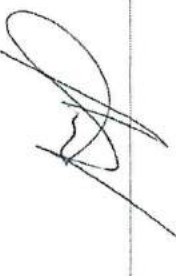




<p>27. Functions of Kenya Airports Authority</p>	<p>The functions which shall be undertaken under the direction of the Board of the Corporation are all the functions undertaken by the KAA now as a government institution not connected to any operator. We see difficulty related to objectivity and conflict of interest especially as relates to: 27 (1) (f) control of airports; 27 (1) (g) collect charges and levies.</p>	<p>The Section vests in the entity of the Corporation such functions as holding or disposing of land. This function should as a result transfer to a neutral party such as the Ministry of Transport</p>
<p>29. Establishment of Aviation Investment Corporation.</p>	<p>(2) (b) The assets include land for development of aerodromes which are national assets.</p>	<p>Should be done after consultation and approval of the National Treasury.</p>
<p>30. Powers and Functions of the Aviation Investment Corporation</p>	<p>30 (b) intends to place government entities in direct competition with other private organizations which are not given equal opportunity such as exemption from application of Companies Act.</p>	<p>This does not promote fair competition.</p>
<p>37. Application of the Companies Act to the Operating Entities.</p>	<p>Given the passing of the Business Laws (Amendment) Act, 2020 indicates whether [or not this] provision is retrospective in application.</p>	



	38. Stakeholder consultation by the Operating Entities in setting fees and incentives.	This provision though intended to protect other users, has by experience been found to be misused at the detriment of the users. It will result in subjective application due to direct conflict of interest.	The responsibility for setting fees must be done by a neutral entity which does not stand to directly gain from the fees.
6. PART VI MANAGEMENT OF THE OPERATING ENTITIES	40 Qualifications  43. Tenure of Office for a Managing Director	Why masters? More important relevant senior level experience.  The tenure of 5 years and eligibility for a further term of 5 years for the Managing Director.	Recommend a shorter term of say 4 years renewable to give room for another appointment of someone with fresh ideas/strategies, should this be found necessary.  Minimum qualifications to change
7. PART VII OPERATING ENTITY SUBSIDIARIES		Does this part aim to make provision for creating subsidiaries which will benefit from the exemption from application of Companies Act?	
8. PART IX THE ESTABLISHMENT AND MANAGEMENT OF THE FUND	58. Sources of money into the Fund.	Among the sources is the Passenger Service Charge, landing and parking fees. None of these funds should be used for shoring up the fortunes of one operator all in the quest to have a "flag carrier".	The passenger service charge should be used for the purpose of improving the experience of passengers at our airports. The landing/parking fees should go towards developing the airports into viable entry points and creation of a regional hub.
	59. Payment out of the fund.	The provision permits expenditure of funds for the purpose of the entities.	Considering that the Corporation is by extension a competitor to other airport users, this would possibly go against the principles of the Competition Act.





9. PART X FINANCIAL PROVISIONS	61. Borrowing Powers	1) After the phrase "issue any security ...." Add the words "indemnity, guarantee....." to cover the guarantees already in place in KQ and subsidiaries.	
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**6. ADDITIONAL QUESTIONS TO BE ADDRESSED AND ANSWERED**

When we presented our Memorandum to the Parliamentary Committee last year on the proposed P1IP arrangement, we asked a number of questions, which still remain unanswered and are recapped below:

1. How will other airports under KAA be managed – operationally and financially, considering that most of them do not have the traffic sufficient to fund their operations, while it is not a secret that hitherto they have been supported from the funds accruing from the JKIA?
2. What assurance do we have from KAA that these other airports, some being international, will retain the requisite standards as prescribed by ICAO without an additional cost to the already over-burdened operators?
3. What is the current revenue per airport for KAA and expenditure per airport? The Parliamentary Committee report indicates that there will be a shortfall on approximately K. Shs 3. 7 billion in KAA expenditure if the JKIA revenue is removed and if the concession fee is "only" K. Shs 2. 6 billion, although they do not seem to have taken into account earnings from the other airports
4. What about Ground services, security, duty free shops, cargo, other concessions? How will these be handled given there exists competitors to the proposed Holdco?
5. How would Capex plan and funding be approached in the new construct? The broader need to address the development / redevelopment of JKIA if it wants to successfully compete with the new Addis and new Rwanda airports? What about the key gateways of Wilson, Eldoret, Mombasa amongst others?
6. What will be the relationship between the new holdco and existing Kenyan operators at JKIA?



7. As we approach this effort to secure Kenya Airways against the emerging commercial competition, have we considered the regional/global competitive context in the light of the treaties that Kenya has signed in the past? We have in mind some within the African Union.

8. Kenya is a contracting State of the International Civil Aviation Organization [ICAO] which is a UN Agency. One of its principles is to encourage fair and healthy competition in international commercial Air Operations. Would running of JKIA by KQ which also runs International commercial flight operations, not pose a large measure of conflict of interest in provision of Airport services to its competitors in International flight operations?

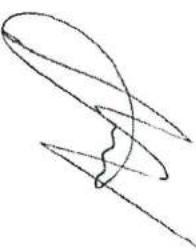
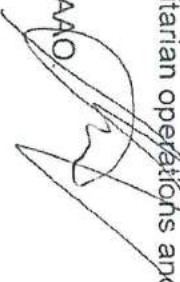
**Other questions to be addressed:**

1. Wilson Airport is the second largest General Aviation airport in Africa after Lanseria in South Africa. Most aviation operators in Kenya are based out of Wilson. Given this unique position and contribution to aviation, should we not have a similar plan for enhancing Wilson Airport and its vital role in the region?
2. KAAO has raised regularly questions to KAA and the Ministry on under-investments at Wilson which undermine its potential as well as safety e.g. Taxiways and aprons, access to hangars, land for expansion of hangars et al. This requires taking into account in a well crafted masterplan.

**7. CONCLUSION**

As the umbrella body for Air Operators in Kenya, we wish Kenya Airways all the best in their regional war for dominance, but this must be done without jeopardizing the rest of the industry that is quite vibrant and plays a pivotal role in tourism, cargo as well as international humanitarian operations and employs many Kenyans.

FOR KAAO





MEMBERS OF KENYA ASSOCIATION OF AIR OPERATORS

- 1 WILFREIGHT EXPRESS CARGO LTD
- 2 AEROSAFE AFRICA CONSULTANTS
- 3 ADVENTURE ALOFT
- 4 AMREF AVIATION
- 5 COMMUTER AIR SVCS LTD
- 6 SICHAM AVIATION LTD
- 7 GOVERNORS AVIATION
- 8 AIRSPRAY KENYA LTD
- 9 SCENIC AIR SAFARIS LTD
- 10 VIPINGO RIDGE LTD
- 11 BLUESKY AVIATION LTD
- 12 AIM AIR INTERNATIONAL
- 13 FLIGHT TRAINING CENTRE
- 14 LADY LORI (K) LTD
- 15 MORIGI E FORNO
- 16 SAFARI EXPRESS CARGO
- 17 YELLOW WINGS
- 18 BALLOON SAFARIS LTD
- 19 MOMBASA AIR SAFARI LTD
- 20 FARMLAND AVIATION LTD
- 21 SKYWARD EXPRESS LTD
- 22 AVMAX SPARES E A LTD
- 23 ORLY AIRPARK LTD
- 24 SAMARITAN'S PURSE
- 25 SAC (K) LTD
- 26 99'S FLYING CLUB
- 27 FREEDOM AIRLINE EXPRESS LTD
- 28 AIRTRAFFIC LTD
- 29 KASAS LTD
- 30 Z BOSKOVIC AIR CHARTERS LTD
- 31 MISSION AVIATION FELLOWSHIP
- 32 ASTRAL AVIATION LTD
- 33 TROPIC AIR LTD
- 34 KWS AIRWING
- 35 SILVERSTONE AIR SERVICES
- 36 DAC AVIATION (E A) LTD
- 37 AIRKENYA EXPRESS LTD
- 38 BLUEBIRD AVIATION LTD
- 39 ALS LTD
- 40 SAFARILINK AVIATION LTD
- 41 KENYA AIRWAYS
- 42 AERO CLUB OF E A LTD
- 43 PHOENIX AVIATION LIMITED
- 44 VECTORS AEROSPACE

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*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

## **4. Kenya Airline Pilots Association (KALPA)**





# KENYA AIRLINE PILOTS ASSOCIATION

② Tunao/SALIM  
Please deal  
AAA  
22/9/20



## KALPA

Member of the International Federation of Airline Pilots Association  
(IFALPA)  
ALL CORRESPONDENCE FOR THE GENERAL SECRETARY



Off Airport North Road, Embakasi  
P.O. Box 57509 - 00200 Nairobi, Kenya  
Email: kalpa.kenya@gmail.com  
Website: www.kalpa.org

Office Mobile: 0722-778844  
Facebook kalpa kenya  
kalpakenya

Our Ref: KALPA/NA/04/2020

21<sup>st</sup> September 2020

Clerk of the National Assembly,  
Kenya National Assembly,  
Parliament Buildings,  
P.O Box 41842 00100,  
Nairobi, Kenya

① Draft  
has been sent to  
committee.  
CMA  
22/9/2020

Dear Sir

RE: THE NATIONAL AVIATION MANAGEMENT BILL, 2020.

The above-mentioned subject matter refers.

Please find attached our draft proposed amendments.

We kindly request you to advise us on the date and time at the earliest possible opportunity, when we can make our submissions at the National Assembly.

Yours Faithfully,  
For and on behalf of KALPA

Captain. Murithi Nyagah  
GENERAL SECRETARY & CEO





To the Clerk of the National Assembly,  
 Kenya National Assembly,  
 Parliament Buildings,  
 P. O. Box 41842—00100,  
 Nairobi, Kenya.

Dear Sir,



**RE: THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

We refer to the above subject.

**1. Draft Proposed Amendments**

No.	Aspect	Actual Provision	Proposed Provision	Justification
1.	Establishment of the Council.	<p>5. (1) There is established a council to be known as the National Civil Aviation Council which shall comprise of—</p> <p>(a) the President, who shall be the Chairperson;</p> <p>(b) the Cabinet Secretary responsible for matters relating to transport;</p> <p>(c) the Cabinet Secretary responsible for matters relating to internal security;</p> <p>(d) the Cabinet Secretary responsible for matters relating to the National Treasury;</p> <p>(e) Attorney-General; and</p> <p>(f) the Kenya Air force Commander.</p>	<p>5. (1) There is established a council to be known as the National Civil Aviation Council which shall comprise of—</p> <p>(a) the President, who shall be the Chairperson;</p> <p>(b) the Cabinet Secretary responsible for matters relating to transport;</p> <p>(c) the Cabinet Secretary responsible for matters relating to internal security;</p> <p>(d) the Cabinet Secretary responsible for matters relating to the National Treasury;</p> <p>(e) Attorney-General;</p> <p>(f) the Kenya Air force Commander;</p> <p>(g) The Director General of the Kenya Civil Aviation Authority</p>	<p>The NCAC is a critical body in the running of the new entity and as such needs to be representative of the civil aviation sector regulator (KCAA) as an integral part of the equation</p>

2.	Interpretations.	2 ...	2 "Stakeholders" means a person or body with an interest or concern in aviation industry including but not limited to tourism, agriculture, floriculture, trade unions, professional bodies etc	To provide for clarity on the meaning of the term as applied in the Bill.
3.	Functions and powers of the Corporation.	7.(1) The functions of the Corporation shall be—  (h) to promote the development of the Kenyan aviation sector and the Group;	7.(1) The functions of the Corporation shall be—  (c) to promote the development of the Kenyan aviation sector in the Group in consultation with relevant stakeholders (KALPA, Tourism sector, Agriculture and Horticultural Sector, General aviation operators and traders associations)	To ensure that measures aimed at developing the Kenya Aviation Sector are ratified through a consultative approach.
4.	Board of Directors.	8. (1) There shall be a Board of Directors of the Corporation which shall be the governing body of the Corporation and shall consist of—  (g) four Independent Non-Executive Board members appointed by the Cabinet Secretary.	8. (1) There shall be a board of directors of the corporation which shall be the governing body of the corporation and shall consist of —  (g) <i>Eight independent non-executive board members each with the following specific aviation expertise and nominees of the relevant stakeholders' bodies</i>  a) A nominee of the Kenya Airline Pilots Association with over ten years of International Flying experience.	To provide for inclusion of a representative of the Kenya Airlines Pilots Association in the Board membership.  To infuse knowledge in Aviation management, international Flying



			<p>b) Aviation maintenance science expert or a licensed aircraft engineering expert.</p> <p>c) Aircraft acquisition, lease agreement and maintenance reserves expert.</p> <p>d) A nominee of the Hotels and restaurants associations of Kenya.</p> <p>e) A nominee of the Horticulture, floriculture and agriculture associations.</p> <p>f) Air cargo management expert.</p> <p>g) A nominee of the Kenya Aviation Medical Association.</p> <p>h) Aviation Auditor expert.</p> <p>The above mentioned persons should each meet the requirements of Chapter Six of the Constitution and Mwongozo code of conduct.</p> <p>There shall be a transparent and competitive hiring process for the experts.</p> <p>A nominee under the above provisions should either be elected by the relevant stakeholder body or nominated in accordance with their organisations regulations.</p>	<p>experience, aeronautical science and safety.</p>
5.	Qualifications for appointment as the Chairperson.	10. A person shall be qualified for appointment as the Chairperson if that person—  (a) holds at least a bachelors degree in aviation, business administration,	10. A person shall be qualified for appointment as the Chairperson if that person—  a) holds at least a bachelors degree in aviation management or aeronautical	To provide for qualifications and experience relevant to aviation.

	<p>finance, audit, law, engineering or any other related field;</p> <p>(b) has knowledge and experience of at least ten years in business, aviation, engineering or other related field;</p> <p>(c) is not a public officer; and</p> <p>Meets the requirements of Chapter Six of the Constitution and Mwongozo code of conduct.</p>	<p>engineering or an Airline Transport Pilot License (ATPL)</p> <p>b) has knowledge and experience of at least ten years in aviation related field;</p> <p>c) is not a public officer; and</p> <p>d) meets the requirements of Chapter Six of the Constitution and the Mwongozo code of Governance.</p> <p>e) Tenure of the chairman shall be for a 3 year period with a possible extension of a further 3 years based on performance, profitability and growth of the organisation.</p> <p>f) There should a transparent and competitive hiring process for this position</p> <p>This position should be approved by the Parliament of Kenya and appointed by the President of Kenya.</p>	
<p>6.</p> <p>Qualifications for appointment as the CEO.</p>	<p>13.</p> <p>(a) holds at least a bachelor's degree in business, aviation, engineering or other related field;</p> <p>(b) has knowledge and experience of at least ten years in business, aviation, engineering or other related fields; and</p> <p>(c) meets requirements of Chapter Six of the Constitution</p>	<p>13.</p> <p>a) holds at least a bachelor's degree in aviation management or aeronautical engineering or an Airline Transport Pilots License (ATPL)</p> <p>b) holds a Master's Degree</p> <p>c) has knowledge and experience of at least ten years in aviation related field;</p> <p>d) is not a public officer; and</p>	

			<p>e) meets the requirements of Chapter Six of the Constitution and the Mwongozo Code of Governance.</p> <p>D) There should be a transparent and competitive hiring process for this position.</p> <p>g) The above appointment to be made by Minister for the time being responsible for the aviation industry upon successful interview by the board of directors.</p> <p>h) Tenure of the chairman shall be for a 3 year period with a possible extension of a further 3 years based on performance, profitability and growth of the organisation.</p>	
7.	Stakeholder consultation by the Operating Entities in setting user charges.	38. Prior to the determination of the user charges, the relevant Group Entity, shall publicize the proposed user charges and shall take into consideration of the views of the users of its services or facilities and other relevant stakeholders prior to publication by the Cabinet Secretary in the <i>Gazette</i> .	38. Prior to the determination of the user charges, the relevant Group Entity, shall publicize the proposed user charges and shall take into consideration the views of the users of its services or facilities and other relevant stakeholders including the <i>Kenya Airlines Pilot Association and the Consumer Federation of Kenya</i> prior to publication by the Cabinet Secretary in the <i>Gazette</i> .	To provide for consultations between the relevant Group Entity and the Kenya Airlines Pilots Association in setting user charges.



8.	Qualifications of Managing Director.	<p>40. A person shall be qualified for appointment as a Managing Director if that person—</p> <p>(a) holds at least a master's degree from a university recognized in Kenya or its equivalent in a relevant field;</p> <p>(b) has at least ten years work experience in the relevant industry;</p> <p>(c) has proven business management or other professional experience; and</p> <p>Meets the requirements of Chapter Six of the Constitution.</p>	<p>40. A person shall be qualified for appointment as a Managing Director if that person—</p> <p>(a) holds at least a bachelor's degree in aviation management or aeronautical engineering or Airline Transport Pilots License (ATPL)</p> <p>(b) holds a master's degree</p> <p>(c) has knowledge and experience of at least ten years in aviation related field;</p> <p>(d) is not a public officer; and</p> <p>(e) meets the requirements of Chapter Six of the Constitution and the Mwingozo code of Governance.</p> <p>(f) has proven, successful business management or other professional experience.</p> <p>(g) There should be a transparent and competitive hiring process for this position</p>	International Best practice and research shows that aviation expertise is critical in MD position due to subject matter expertise
9.	Tenure of office of a Managing Director.	<p>43. A Managing Director shall hold office for a period of five (5) years and shall be eligible for re-appointment for one further term of five (5) years subject to satisfactory performance.</p>	<p>43. A Managing Director shall hold office for a period of four (4) years and shall be eligible for re-appointment for one further term of four (4) years based on performance, profitability and growth of the organisation.</p>	
10.	Review of the terms of service of employees of the Operating Entities.	<p>53. Notwithstanding anything in this Act or in any other law, the Board may, in accordance with the applicable law, review and amend the salaries, wages or</p>	<p>53. Notwithstanding anything in this Act or in any other law, the Board shall in consultation with the Kenya Airline Pilots Association and any other associations of employees of the</p>	To provide consultation between the Board and representative associations of employees of the Group.



	<p>other terms and conditions of service of employees of the Group as may be necessary to ensure parity and compliance with the Constitution and other laws relating to employment in Kenya.</p>	<p><i>Group</i>, review and amend the salaries, wages or other terms and conditions of service of employees of the Group as may be necessary to ensure parity and compliance with the Constitution and other laws relating to employment in Kenya.</p> <p>Provided that terms of employment shall be reviewed only, where the proposed new terms are more favorable to the employees than the prevailing terms.</p>	
<p>11. Employee endangering safety.</p>	<p>67. Any employee who, while on duty endangers the safety of any person, aircraft or vehicle by—</p> <p>(a) contravening any of the provisions of this Act;</p> <p>(b) contravening any lawful order, direction or rule given to such employee or made in respect of his service;</p> <p>(c) being under the influence of alcohol or drugs; or</p> <p>(d) any rash or negligent act,</p> <p>commits an offence and shall be liable upon conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three years, or to both.</p>	<p>See annexure attached ( ICAO Annex 13)</p>	<p>Remove or edit this clause as it goes against Annex 13 of ICAO (accident investigations).</p>

12.	Arrest of an employee.	<p>69. (1) Where the safe operation of any Aerodrome or any service ancillary thereto, would be endangered by the immediate arrest, whether with or without a warrant of any employee thereof, the police officer whose duty is to make such arrest shall—</p> <p>(a) request the office in charge of such aerodrome to <b>RELIEVE</b> such employee from his duties as soon as practicable; and</p> <p>(b) ...</p>	<p>69. (1) Where the safe operation of any Aerodrome or any service ancillary thereto, would be endangered by the immediate arrest, whether with or without a warrant of any employee thereof, the police officer whose duty is to make such arrest shall—</p> <p>(c) request the office in charge of such aerodrome to <b>RELIEVE</b> such employee from his duties as soon as practicable; and</p> <p>(d) Define "safe" and "safety" as per international Civil Aviation Authority in the proposed aviation bill.</p>	<p>RELIVE means remember or recall a thing or an event. RELIEVE means release or discharge from a responsibility.</p> <p>To avoid ambiguity and obviate abuse of the word safety and safe.</p>
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*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

## **5. Kenya Aviation Workers Union (KAWU)**







# Kenya Aviation Workers Union

All correspondents should be addressed to the Secretary General

Airport Complex Ltd.  
JKIA Cargo Village,  
P.O.Box 19157-00501,  
Nairobi, Kenya.  
Tel: 0729 039 242

8<sup>th</sup> July, 2020

The Clerk of the National Assembly  
P.O. Box 41842-00100,  
**NAIROBI.**

*Ms. Tunso*  
*pse deal,*  
*CNA*  
*K/9/20*

NATIONAL ASSEMBLY  
RECEIVED  
15 SEP 2020  
CLERK'S OFFICE  
P.O. BOX 41842, NAIROBI

Dear Sir,

**RE: MEMORANDUM BY KENYA AVIATION WORKERS UNION TO THE HOUSE TRANSPORT COMMITTEE ON THE KENYA AVIATION MANAGEMENT BILL, 2020**

**1. INTRODUCTION**

Kenya Aviation Workers Union (KAWU) is a trade union legally registered in accordance with the provisions of Section 19 of the Labour Relations Act, 2007. It is the trade union that represents unionisable employees in the entire aviation sector in Kenya.

KAWU has valid Recognition Agreements and consequential Collective Bargaining Agreements (CBA'S) with employers in the aviation sector including Kenya Airways PLC (KQ), Kenya Airports Authority (KAA), Kenya Civil Aviation Authority (KCAA) and Tradewinds Aviation Services, Swissport Kenya LTD, Bollore Transport & Logistics among others. By virtue of the Recognition Agreements entered with the said employers in accordance with the provisions of Section 54 of the Labour Relations Act 2007, all matters concerning the terms and conditions of service of unionisable employees in the aviation sector are subject to negotiation and agreement between the respective employers and the Union. KAWU is therefore a key stakeholder in all matters directly or indirectly affecting employees in the sector, including the obvious implications that the Kenya Aviation Management Bill will have when it is enacted.

This memorandum therefore represents the official position of all unionisable employees in the aviation sector numbering over 10,000(Ten Thousand)who might be directly or indirectly affected by the proposed Bill.

**2. KAWU'S SUPPORT FOR RESTRUCTURING OF THE AVIATION SECTOR**

- a) For close to ten years now, Kenya Airways PLC has been sailing through financial turbulence brought about by a combination of many factors. The once profitable and lucrative airline slowly sunk into financial doldrums leading to heavy losses in the tune of



billions of shillings year in year out. It has been a very sad story for Kenyans to watch the “Pride of Africa” plummet so deep into perennial debt.

- b) This scenario spells doom not only to the country which relies on the airline as one of its key drivers of the economy, but also to the employees whose jobs have constantly been at risk. Indeed, employees have borne the brunt of KQ’s free-fall with redundancies having rendered thousands of our members jobless since 2012.
- c) There have been several attempts made in the past to save the airline from its perennial financial challenges but none seems to have been successful. We have in the past stated openly that KQ’s turn-round will only be achieved by deep diving into the root causes of the airlines financial troubles which range from deliberate mismanagement brought about by inept and poor leadership at the top levels, hostile operating environment due to the proliferation of external airlines eating into the domestic and regional market with government support, unfavourable tax regime, irregular procurement procedures and volatile fuel prices.
- d) It is for the above reasons, among others, that we support the initiative to nationalise the airline and restructure the entire aviation sector with a view to strategically repositioning it to make it successful and attractive to spur growth and attract investment that will make Kenya the undoubted regional economic hub.
- e) The world’s most successful airlines, including Emirates, Qatar, Ethiopian and Etihad are all state owned and enjoy substantial government subsidies in terms of taxes and other charges that usually make privately run airlines uncompetitive. In Africa, which constitutes the bulk of KQ’s network, there are successful airlines which operate under the state model presented in the Bill. Below are some examples:

#### **Egypt**

- In Egypt, the government wholly owns the Egyptian Holding Company for Airports and Air Navigation (EHCAAN) with its subsidiaries being:
  - Egyptian Airports Company which manages 19 regional airports with a volume of 22 million passengers annually which is equivalent to 60% of the total traffic
  - Cairo Airport Company which manages Cairo International Airport
  - National Air Navigational Services Company which serves as the industry regulator
  - Aviation Information Technology
- EHCAAN is an independent entity which operates on commercial terms and its mandate included development and expansion of aviation facilities and infrastructure to support economic activities.
- Egypt Air, the national carrier, is 100% Government owned and is now the largest airline operator in the continent by traffic numbers.

## **Morocco**

- The Moroccan Airports Authority is 100% Government owned.
- It operates airport infrastructure as well as Air Navigational Services.
- Royal Air Morac is the Moroccan national carrier and is 100% Government owned

## **Ethiopia**

- In Ethiopia, the Ethiopian Aviation Holding Group is 100% Government owned with the following subsidiaries:
  - Ethiopian Airlines Group which is the national carrier for both passengers and cargo business
  - Ethiopian Airports Enterprises which runs the national airports
  - Logistics Company
  - Aviation Academy
  - Inflight Catering Services;
  - Maintenance, Repairs and Overhaul Services; and
  - Ethiopian Hotel and Tourism Services.
- Therefore the airline and the airports management are all wholly owned by the government

## **Rwanda**

- In Rwanda, the Rwanda Aviation, Travel and Logistics Limited is 100% Government owned with the following subsidiaries:
  - RwandAir which is the national carrier
  - Rwanda Airports Management Limited which manages the national airports
  - National Logistics Company Limited
  - Hospitality and Travel Management Limited; and
  - Akagera Aviation Academy

### **3. COMMENTS AND RECOMMENDATIONS ON SPECIFIC SECTIONS OF THE BILL**

While we support the enactment of the Bill, we nevertheless wish to highlight some specific sections of the Bill which we consider necessary to either amend or clarify before enactment.

#### **a) PART I - PRELIMINARY:**

- **Section 4 – Guiding Principles**

We support the provisions of this section which gives the broad guidelines which every person is mandated to uphold in the performance of the functions and in exercising the powers under the Act.



- We however single out **Sub-section (f)** which spells out one of the guiding principles to be the *“promotion of increased employment opportunities in the Kenyan aviation sector”*. We are encouraged that the Act is specifically clear on this aspect which we hope will safeguard not only the existing jobs from being lost upon the transition to the new order, but also compel the Corporation and its Operating Entities to create more job opportunities for Kenyans and other nationals where its operations are based.
- We further hope that this section assures us that each and every employee of the Transferring Entities will be absorbed into the Operating Entities once the Act becomes enacted and operational.

**b) PART III – MANAGEMENT OF THE CORPORATION:**

- **Section 7 (1) – Composition of the Board**

We note that the Act provides for inclusion of five (5) Independent Non-Executive Board Members. In this regard, we recommend that out of the 5 independent non-executive board members, one slot be reserved for the Trade Union that represents the majority of the employees in the aviation sector. Currently, KAWU has a combined total membership of over 10,000 members drawn from the Transferring Entities of Kenya Airways PLC and Kenya Airports Authority in addition to Kenya Civil Aviation Authority, Tradewinds Aviation Services and Swissport Kenya Limited. This is a large constituency which forms the back bone of the Group and the largest single stakeholder whose interests would be well catered by getting a seat in the Board.

- **Section 8 (k) – Powers and Functions of the Board**

The Bill lists various functions of the Board. Among them is to *“consider and approve any variations in salaries, wages or other terms and conditions of service of employees of the Group”*. We are of the view that whilst the Board will have the power to approve terms and conditions of service of the employees of the Group, the said terms and conditions of service should be subject to negotiation and agreement between the Corporation and/or the specific Operating Entities and the Union. We recommend that an amendment be made to Sub-section (k) to read *“consider and approve any variations in salaries, wages or other terms and conditions of service of employees of the Group provided that the said salaries, wages and terms and conditions of service have first be negotiated and agreed with the Union”*.



c) **PART IV: ESTABLISHMENT OF THE OPERATING ENTITIES**

• **Section 28 (1) – Establishment of the Aviation Investment Entity**

We are not convinced that there is need to establish this Entity. The powers and functions of this Entity as listed under Section 29 are superfluous and vague. The same functions are replicated under the other 2 Operating Entities (Kenya Airways and Kenya Airports Authority). We are of the view that these functions can well be performed by the other 2 entities satisfactorily without being duplicated under a separate entity. Indeed the investment portfolio is clearly vested in the other 2 entities thus nullifying the justification for establishment of the Aviation Investment Entity.

d) **PART VII: TRANSFER OF UNDERTAKINGS TO THE OPERATING ENTITIES**

• **Section 49 – Details to be set out in a Vesting Order**

Under Sub-section (c), it is provided that a Vesting Order shall at the minimum set out *“a list of the contracts, assets, liabilities, functions, powers, rights, obligations and undertakings of the relevant Transferring Entity to be transferred to the relevant Operating Entity under the Vesting Order by virtue of this Act”*. Whilst we have no reason to believe that there will be deliberate omissions when it comes to listing the instruments to be vested by the Transferring Entities to the Operating Entities, we nevertheless wish to request that the following, among other specific instruments be included in the Vesting Order to both Kenya Airways and Kenya Airports Authority:

- i. The respective Recognition Agreements
- ii. The existing Collective Bargaining Agreements (CBAs)
- iii. The existing Memorandum of Agreements (MOAs)
- iv. The existing Memorandum of Understanding (MOUs)
- v. All Rulings, Judgements and Awards of the Court in favour of KAWU which the respective Transferring Entities have not honoured
- vi. All existing Court Orders obtained by KAWU against the respective Transferring Entities to the extent that the same have not been spent.
- vii. All existing court cases filed by KAWU against the respective Transferring Entities
- viii. All existing trade disputes filed by KAWU against the respective Transferring Entities
- ix. All individual employee employment contracts entered between the unionisable employees and the respective Transferring Entities

x. All other Industrial Relations instruments

- **Section 50 (g) – Effect of Vesting Order**

We note with satisfaction that the employment terms and conditions of service of the Transferring Entity shall on the Vesting Date be transferred to the relevant Operating Entity. We further note the specific provision that *“an employee of a Transferring Entity whose terms of service are listed in the Vesting Order shall become an employee of the relevant Operating Entity on the same or improved terms and conditions of service and subject to any subsisting notice of dismissal, resignation or variation and such employment with the relevant Transferring Entity and the Operating Entity shall be deemed to be a single continuing employment”*. It is our hope that this provision shall not be altered or amended before enactment. It assures employees that their terms and conditions of service will be either same or better upon transfer to the Operating Entities. Further, it ring fences the employees’ length of service with the Transferring Entities to be continuous with the Operating Entities. Therefore, each employee will be deemed to have transferred their service without loss of seniority and/or benefits that go with such service.

- **Section 51 – Review of the terms of service of employees of the Operating Entities**

This section provides that *“the Board may review and amend the salaries, wages or other terms and conditions of service of employees of the Group as may be necessary to ensure parity and compliance with the Constitution of Kenya, 2010 and other laws relating to employment in Kenya”*. Whilst we have no reason to believe that the Board will arbitrarily embark on reviewing salaries, wages and other terms and conditions of service of the employees, we seek the Committee’s assurance that such reviews and amendments shall only be guided by reason and shall be subject to negotiation and agreement with the Union as per the law.

- We further seek the assurance of the Committee that the Board shall respect all the existing Industrial Relations instruments and procedures which form the framework upon which the day to day relationship between the Operating Entities and the Union/employees is founded.
- If and when it becomes necessary to harmonise the terms and conditions of service of employees of the Group, we recommend that the specific terms of the Transferring Entity as listed in the Vesting Order to the Operating Entity be adopted to be the preferable terms applicable to the rest of the employees of the



Group provided that the said terms are superior to the comparable terms of the other Operating Entity.

#### **4. CIVIL AVIATION REGULATIONS (KCARS)**

We note that the Bill provides for amendment of various Civil Aviation Regulations. We seek the Committees assurance that such amendments shall, where they affect the existing Fleet Agreement forming an annexure to the CBA, be discussed and agreed with the Union before the said Fleet Agreement is similarly amended by parties upon agreement.

#### **5. CONCLUSION**

We urge the Committee to consider the above comments and recommendations. We nevertheless support to the extent that it is consistent with the existing agreements between ourselves and any of the new entities envisaged under the proposed Act. We are confident that the Bill, when enacted into law, will spur the aviation industry to greater heights and position the sector to become competitive, efficient and beneficial to the national economy.

Yours faithfully,



**Moss Ndiema**  
**Secretary General**







# Kenya Aviation Workers Union

All correspondents should be addressed to the Secretary General

Airport Complex Ltd.  
JKIA Cargo Village,  
P.O.Box 19157-00501,  
Nairobi, Kenya.  
Tel: 0729 039 242

## ADDITIONAL MEMORANDA

The Clerk of the National Assembly,  
PO Box 41842-00100,  
Nairobi.  
Email:clerk@parliament.go.ke

27<sup>th</sup> September, 2020

Dear Sir,

Pursuant to Article 118 (1) (b) of The Kenyan Constitution, The National Assembly Standing Order 127(3) and your request vide News Paper advert for the members of the public to submit their comments on the National Aviation Management Bill (National Assembly Bill No.18 of 2020).

We do hereby submit additional comments for consideration on the various sections of the Bill as follows which are marked **red** and the **green** ones are deletions:-

### **PART I—PRELIMINARY**

Interpretation.

1. In this Act, unless the context otherwise requires—

“Union” means as defined in the Labour Relation Act 2007

“Recognition Agreement” means as defined in the Labour Relation Act 2007

“Collective Bargaining Agreement” means as defined in the Labour Relations Act 2007

### **PART II—ESTABLISHMENT OF THE NATIONAL CIVIL AVIATION COUNCIL**

Establishment  
of the  
Council.

5—(1) There is established a council to be known as the National Civil Aviation Council which shall comprise of—

(a) the President, who shall be the Chairperson;

(b) the Cabinet Secretary responsible for matters relating to transport;

(c) the Cabinet Secretary responsible for matters relating to internal security;

- (d) ~~the Cabinet Secretary responsible for matters relating to the National Treasury;~~
- (e) ~~Attorney General;~~
- (f) ~~the Kenya Air force Commander.~~

(2) ~~The Council shall—~~

- (a) ~~integrate policies relating to aviation sector and the other sectors of the economy to enable all the national organs and the sectors of the economy requiring access and support of the civil aviation sector to cooperate and work with the sector to ensure the effective performance of its mandate; and~~
- (b) ~~assess and appraise, the objectives, commitment and the risks to the country in respect of actual and potential civil aviation capabilities. ( we do propose deletion of the whole section based on the following:~~
  1. ~~There's the board of management who are appointees of the president~~
  2. ~~Worldwide there's no such practice in the aviation sector~~

#### PART IV—MANAGEMENT OF THE CORPORATION

Board of  
the  
Directors.

- 8 (1) There shall be a Board of Directors of the Corporation which shall be the governing body of the Corporation consisting of—
- (g) ~~four Independent Non-Executive Board members appointed by the Cabinet Secretary. (one from tourism board and one from horticultural sectors)~~
  - (h) ~~union with majority membership~~
  - (i) ~~the cabinet secretary responsible for matters relating to internal security~~

#### PART V—ESTABLISHMENT OF THE OPERATING ENTITIES

Establishment of the  
Aviation  
Investment  
Corporation

29 (1) ~~There is hereby established an entity to be known as the Aviation Investment Corporation.~~

(2) ~~The Aviation Investment Corporation shall be a body corporate with limited liability, perpetual succession, a common seal and shall be capable in its own name of—~~

- (a) ~~suing and being sued;~~
- (b) ~~taking, purchasing and disposing of movable and immovable property subject to the provisions of this Act;~~
- (c) ~~holding shares in any company or other body; and~~

~~entering into contracts:~~

~~(d) —~~

~~(3) The Registrar of Companies shall enter into the register of companies the Aviation Investment Corporation and issue the Aviation Investment Corporation with a certificate of registration noting its status as a state owned entity established under this Act.~~

~~30. The Aviation Investment Corporation shall have broad powers to carry on businesses in relation to aviation activities and any other business related to or ancillary to the aviation sector as may be determined by the Board and to undertake all necessary activities necessary to construct, operate and manage such businesses:~~

Powers and functions  
of the Aviation  
Investment  
Corporation:

~~(a) — to carry on businesses in relation to aviation training schools, maintenance and repair organisation, aircraft handling, flight catering, aviation medical services, tour and holiday management services and any other business related to or ancillary to the aviation sector as may be determined by the Board and to undertake all necessary activities necessary to construct, operate and manage such businesses;~~

~~(b) — to undertake any activities within a special economic zone or an export processing zone in accordance with applicable law; and~~

~~(c) — to engage in any other activities that may be necessary for the performance of its functions under this Act and as may be assigned by the Board from time to time~~

Share capital of the  
Aviation Investment  
Corporation

~~31. The initial share capital of the Aviation Investment Corporation shall be one million (1,000,000) shillings divided into fifty thousand (50,000) ordinary shares as may be varied from time to time in accordance with the provisions of the Companies Act, 2015. ( We propose deletion of section 29, 30, and 31 due to duplication of the functions of Kenya Airports Authority, through operators who have signed concessions with the latter. Find the attached concession order)~~



**PART VI—MANAGEMENT OF THE OPERATING ENTITIES**

49 (1) Subject to section 50, this Act shall without further instrument, notice, or act transfer the undertakings (including all their businesses, assets, liabilities and contracts, add 'employees' and "concession agreements with Kenya Airports Authority") of the Transferring Entities to the Operating Entities as follows:—

- (a) .....
- (b) .....
- (c) Add "Transfer of the entire contractual obligations including:-
  - i. the Collective Bargaining Agreements,
  - ii. the Recognition Agreements,
  - iii. Memorandum Of Agreements,
  - iv. Memorandum Of Understanding,
  - v. All Court Rulings, Judgements,
  - vi. Existing Court Cases Filed,
  - vii. Existing Labour Trade Disputes and Current individual employee employment contracts entered labour disdutes with Kenya Airports Authority and Kenya Airways Plc to the new operating entities (Kenya Airways and Kenya Airports Authority).

*We propose the above addition of clause (c) to directly cover the Labour employment related obligations with Kenya Airways and Kenya Airports Authority have with the Labour Unions*

**PART VIII—TRANSFER OF UNDERTAKINGS TO THE OPERATING ENTITIES**

SECTION 51

- (a) .....
- (b) .....
- (c) a list of the contracts, "add concessions, employees, employment terms of service", assets, liabilities, functions, powers, rights, obligations and undertakings of the relevant Transferring Entity to be transferred to the relevant Operating Entity under the Vesting Order by virtue of this Act.

Review of the terms of service of employees of the Operating Entities.

53. Notwithstanding anything in this Act or in any other law, the Board ~~may~~, in accordance with applicable law, review and amend the salaries, wages or other terms and conditions of service of employees of the Group ~~add~~ "in accordance to the subsisting collective bargaining agreements, memorandum of agreements, memorandum of understanding, all rulings, awards and judgment from the courts" as may be necessary to ensure parity and compliance with the Constitution and other laws relating to employment in Kenya.

**THAT'S all we wish to submit**

I appeal to you if possible to guarantee me another opportunity to represent my case to the committee.

Yours faithfully,

Moss Ndiema  
Secretary General.



CHAPTER 395

KENYA AIRPORTS AUTHORITY ACT

SUBSIDIARY LEGISLATION

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*List of Subsidiary Legislation*

	<i>Page</i>
1. Kenya Airports Authority (Vesting) Order, 1994.....	27
2. Kenya Airports Authority Concession Order, 1996.....	29

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**KENYA AIRPORTS AUTHORITY (VESTING) ORDER, 1994**

[L.N. 201/1994.]

1. This order may be cited as the Kenya Airports Authority (Vesting) Order, 1994.
  2. All Government property previously administered by the now Erstwhile Department of Aerodromes, Office of the President, is transferred to the Kenya Airports Authority.
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## KENYA AIRPORTS AUTHORITY CONCESSION ORDER, 1996

[L.N. 189/1996.]

1. This order may be cited as the Kenya Airports Authority Concession Order, 1996 and shall be deemed to have come into operation on 1st July 1996.

2. In addition to the rental fees, other charges and rates levied by the Authority the following business categories shall attract a Concession Rate in every gazetted airport.

Business Category	Concession Rate—p a (Gross Turnover)	Guaranteed Minimum Fee (p. a.)
		KSh
Ground Handling Cargo and Passenger .....	7% to 12%	1,000,000
Ground Handling (Cargo) .....	7% to 10%	1,000,000
Ground Facilitation and Co-ordination .....	8%	600,000
Air Charter and Brokerage .....	—	250,000
Aircraft Technical Service .....	8%	250,000
Aviation Fuel Uplift Sales .....	350 per m <sup>3</sup>	—
Duty Free Shops .....	10%	US\$200 per sq. m
Catering Services (Inflight Catering) .....	3-10%	—
Bars and Restaurants .....	—	100,000
Business Centres .....	6%	100,000
Tours and Travel Desks .....	6%	150,000
Taxi Counters .....	6%	100,000
Hotel Booking Booths .....	6%	150,000
Forex Bureaux .....	—	125,000
Reserved Lounges for Airlines .....	—	150,000
Advertising Billboards and Hoardings .....	50%	—
Advertising (Others) .....	25%	—
Car Rentals .....	6%	—
Clearing and Forwarding (Airfreight Services) .....	6%	150,000
Courier Services .....	6%	150,000
Cargo Consolidation .....	6%	250,000
Banking Services .....	—	250,000 per unit
Left Luggage .....	6%	100,000
Cargo Handling (WAP) .....	KSh. 6 per kg	—
Self-Handling Aircraft .....	—	US\$2,500 per flight





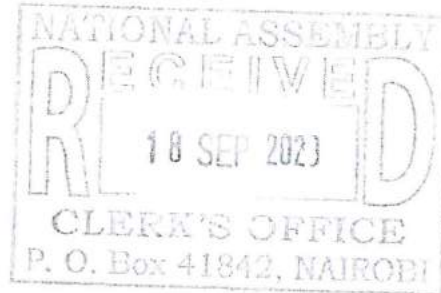
*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

## **6. Kenya Association of Travel Agents (KATA)**



Date: 18<sup>th</sup> September 2020,

To.  
The Clerk of the National Assembly,  
P.O Box 41842 – 00100,  
Main Parliament Buildings  
Nairobi, Kenya.



Dear Sir,

*Tungo pro deal card*  
*of b/w*

**RE: SUBMISSION OF MEMORANDA ON THE NATIONAL AVIATION MANAGEMENT BILL [NATIONAL ASSEMBLY BILL NO. 18 OF 2020] BY THE KENYA ASSOCIATION OF TRAVEL AGENT (KATA).**

Following the re-advertisement notice for the public participation in the submission of memoranda in the matter of the consideration by the National Assembly of the National Aviation Management Bill No. 18 of 2020, the Kenya Association of Travel Agents which is a member body for Travel Agents registered in Kenya wishes to submit its views and recommendations on the bill as per the summary below:

National Aviation Bill Review - Contributions from the Kenya Association of Travel Agents (KATA)			
Clause Number	Current Clause	Proposed Amendment	Rationale/Justification
8. (1) (g)	There shall be a Board of Directors of the Corporation which shall be the governing body of the Corporation consisting of - (g) four independent non-executive Board Members appointed by the Cabinet Secretary.	There shall be a Board of Directors of the Corporation which shall be the governing body of the Corporation consisting of - (g) Three independent non-executive Board Members and the Kenya Association of Travel Agents (KATA) to have a standing board position enshrined within the National Aviation Management Bill, 2020.	KATA members contribute to over 75% of the total Passenger Number Bookings on Kenya Airways. KATA members play a critical role in the promotion and development of the Kenya Aviation Sector by driving sales through passenger bookings. KATA has over 40years professional and in-depth understanding of the Travel industry with extensive technical expertise on the sector including knowledge on IATA matters, Commercial Aviation matters that would contribute to the strategic development of the Kenya Aviation Corporation. By failing to onboard KATA as a standing board member the Kenya Aviation Corporation will deny itself an opportunity to benefit from the specialised expertise, networks and knowledge that the KATA body presents, limiting it from optimising the full potential for growth and reaching sustainable impact for the travel and aviation industry.



18. (1)	A Board member shall avoid any situation in which such member would have a direct or indirect interest that conflicts, or may conflict, with the interests of the Corporation.	A Board member shall avoid any situation in which such member would have a direct or indirect interest that conflicts, or may conflict, with the interests of the Corporation. The standing KATA Board Position will be represented by the Chief Executive Officer for KATA for the avoidance of conflict of interest.	KATA represents its members fairly and equally. The CEO position ensures that the interest of the KATA members are represented uniformly without any prejudice. The CEO's role is a professional appointee based on merit and the CEO is not an investor/operator in the travel and aviation industry. The CEO will articulate key strategic contributions on behalf of the KATA members intended to support and drive the growth of the Kenya Aviation Corporation.
58 (2)	The Board may invest any part of the Fund not immediately required for use by the Operating Entities as the Board may deem fit as approved by the National Treasury.	The Board may invest any part of the Fund not immediately required for use by the Operating Entities as the Board may deem fit as approved by the National Treasury. The Board will allocate 3% monthly of the total Passenger Service Charge as provided for in the Air Passengers Service Charge Act to the Kenya Association of Travel Agents for use in Marketing Promotion Activities and Educational forum for KATA members e.g. IATA Accredited Courses.	The promotion of the development of the Kenya Aviation Sector is dependent on the Travel Agents who contribute 75% of the Passenger Number Bookings on Kenya Airways. KATA members require continuous publicity and promotion of their businesses in order to increase their brand share at the marketplace and achieve positioning locally, regionally and globally. Education is a key pillar for enabling continuous growth and strategic competition with exposure to the latest technologies and innovations that will catalyse the growth of the Travel and Aviation sector in Kenya. KATA members account for over 300,000 employees who are young men and women contributing to the promotion of Kenya as business and leisure destination, while promoting Outbound travel to key leisure and business destinations globally.

It is our humble prayer that the departmental committee to which the bill is committed will take into consideration the KATA views and recommendations in its report to the House.

Yours Sincerely,



**Ms. Agnes Mucuha**  
Chief Executive Officer



*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

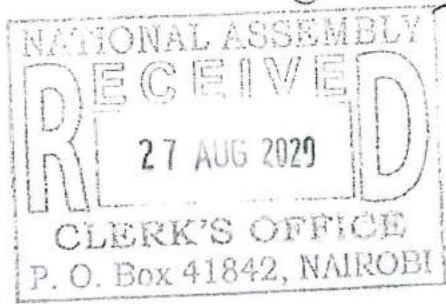
**7. Mr. Fredrick A. Opot**  
*Aviation Consultant*



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② TUNGO  
Please deaf  
from  
01/9/20

① Director  
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21/08



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

**THE NATIONAL AVIATION MANAGEMENT BILL, 2020**  
**A letter to Parliament.**

I write to parliamentarians because the above proposal is before you with the intention to make changes to the aviation industry. Secondly I write due to my misgivings on the fundamental process of public participation so far applied on this potentially critical change. We need to give opportunity in a structured manner to listen to aviation experts.

**The Civil Aviation System**

The modern civil aviation system has evolved over the last 117 years since the first recorded maned flight by the Wright brothers and 75 years since the move to promote the safe and orderly development of international civil aviation throughout the world by ICAO. The foregoing have resulted in the formation of a standardized safe, efficient system operated in an orderly and economical way to serve the various destinations worldwide.

**Aviation in Kenya**

The growth of aviation in Kenya since the first recorded flight in 1926 has been phenomenal, placing the country at the forefront in Africa, only behind South Africa in terms of registered activities.

The civil aviation industry in Kenya is a critical driver of the economy contributing in the sector of transportation of passenger and freight both locally and internationally, in support of the large tourism industry. It is involved in the support of international humanitarian operations, in wildlife and forestry management, agricultural crop spraying for pest management and facilitation of internal security to the remote areas of the country. In 2019 it is estimated to have provided employment to approximately 6000 staff.

**The proposed Bill**

What is seen as the forerunner to this proposed Bill was the unexpected announcement in 2019 by Kenya Airways Board proposing to merge its struggling operations with those of the Jomo Kenyatta International Airport as a panacea for the major financial loses they had made for several consecutive years. Unexpected, because the financial losses by the airline came following some good performances after its formation in 1996 when the airline was transformed from a loss making parastatal to a private entity, albeit with some Government owned shares (23%). This proposal obviously encountered strong headwinds simply because it was not a transparent and well explained idea. It subsided even before it was subjected to public opinion.

This National Aviation Management Bill, 2020 started off as the Kenya Aviation Management Bill, 2020. The small difference however is the introduction into the Bill to now establish the National Aviation Council.



Reviewing the list of proposed entities in this Bill reveals a plan to now merge the Kenya Airways, the Kenya Airports Authority and an Aviation Investment Entity into the proposed Corporation.

### **Purpose of legislation**

Legislation exists to bring order to various processes and aspects of life. Therefore the introduction of any law or subsidiary legislation should aim to improve a system or to cure or prevent a potential hazard. Considering that the promulgation of any legislation has the side effect of introducing additional bureaucracy and/or cost of doing business, it is good practice that the proposal must be demonstrated to add value and this should be done through a robust process of public discussion. The adage – if it is not broken, do not fix it is very significant.

### **Comments on the proposed changes**

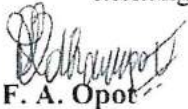
1. Up till now the industry players and professionals have not been appraised of the purpose of these apparently major changes and what they intend to resolve. To most aviators this seems to be a culmination of the original proposal made by Kenya Airways Board in the first place.
2. If we merge the Kenya Airports Authority with one Operator (Kenya Airways) it raises serious concerns of the management and operations of the airports in the country regarding conflict of interest and equality of opportunity to other operators using the same facilities, whilst being business competitors to one of the Corporation entities.
3. This Bill proposes to exempt Kenya Airways (an entity) from certain provisions including taxation while leaving the rest of the industry, which would be tantamount to unfair competition.
4. This proposed management system is known to be a copy of what obtains among some of the competitors of Kenya Airways from jurisdictions such as Ethiopia, Rwanda as well as the Middle East nations. What may not have been factored in however, are the comparative legal and governance style applicable in those jurisdictions.
5. Kenya, unlike all those countries mentioned above boasts of a robust and diverse mix of aviation operations, private and public among its industry players. Therefore in Kenya, sorting out issues of the industry, (and these have been communicated to the government before) ought to take into consideration the diversity beyond the plight of Kenya Airways alone.
6. As earlier stated about the Bill, it has in a subtle manner introduced a seismic shift in the system by proposing the establishment of the National Aviation Council which will be comprised of top civil servants, the Airforce Commander and will be chaired by the President. This is in itself a shift from the object and purpose of the Bill (section 3) which is to establish the Kenya Aviation Corporation and its Operating Entities.
7. Notwithstanding the merits of the proposed Council, is this not such a major addition that in itself merits a separate Act?
8. What value is the Commission going to add to the aviation system in Kenya? This is a fundamental matter that requires an honest and exhaustive discussion. The aviation systems are fashioned and standardized according to the Convention on International Civil Aviation. This envisages the Minister in charge of aviation being the “Aeronautical Authority” and an Aviation Regulatory Authority to oversight the safety standards of each contracting state.



- What role will this proposed Council play in the aviation system in Kenya that is not currently fulfilled?
- Considering the stature and constitution of the Council, would its relationship with KCAA – the Regulatory Authority not introduce undue conflict to the detriment of safety of the airspace?
- Would this new arrangement not bring questions during subsequent ICAO country audits (USOAP)?

### **Recommendations**

1. The notion of a “flag carrier” is a post-independence fad that we should not continue to waste our scarce resources to maintain at any cost. Airlines worldwide are a business that are heavily capitalized but very fickle in nature when considering profit making. It is known that without a strict fiscal regime assisted by certain tax incentives any airline can very easily shift from profit making to loss making.
2. The idea of making Jomo Kenyatta International Airport a hub for aviation is the most viable business option. We should therefore re-model Kenya Airports Authority and strengthen it to urgently and vigorously work to make Nairobi a strong regional hub for passenger and freight transportation. This is the competition that we need to get into earnestly. We must debunk the misguided thinking that the national airline builds the hub, a hub is built by providing modern, efficient and affordable facilities that lure international operators to use it.
3. The aviation industry in Kenya is comprised of many operators who are competitors within a global setup. The Kenya Association of Air Operators representing many operators including Kenya Airways has over the years made petitions to the Government to review the tax regime so as to provide the needed relief to the industry players in order to give them an edge in their fierce regional and international competition. In the past when tax breaks were granted by government, the industry managed to get access to newer, modern aircraft, a fact that has played a major role in enhancing the safety standards. Let these petitions be considered to support the industry.
4. The proposals being fronted in this Bill should be carefully reviewed before rushing to implementation. Nationalizing the airline alone is not the answer, we know this from the performance of Kenya Airways during the period following its inception in 1996 during which it faired favourably, even expanding to a medium sized outfit. The problems started in 2012 shortly after the rather ambitious Project Mawingu. We need to revisit the various audit and investigative reports to resolve the problems of Kenya Airways.
5. Whenever we consider the civil aviation industry, we must look beyond Kenya Airways to the many vibrant operators and maintenance organizations which play a significant role in tourism and regional transportation and support employment as well as foreign exchange earnings.



**F. A. Opot**

**Aviation Consultant.**

**P. O Box 51800-00200**

**NAIROBI.**

Email: [opotfa@yahoo.com](mailto:opotfa@yahoo.com)



*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

**8. Meat and Livestock Exporters Industry Council  
of Kenya (KEMLEIC),  
Kenya Livestock Marketing Council (KLMC)  
and Kenya Camel Association (KCA)**

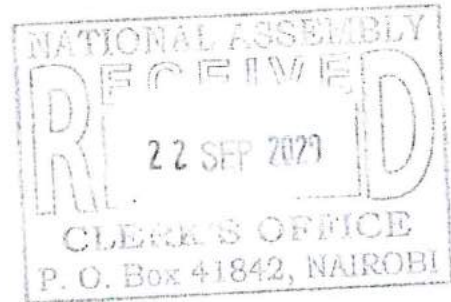






② TUNGO/SALIM  
Please clear  
for  
21/9/20

To: The Office Clerk of the National  
Assembly  
Main Parliament Building Nairobi.



① Dlamini 21/9/20

**WRITTEN MEMORANDUM ON THE NATIONAL AVIATION MANAGEMENT BILL-  
NATIONAL ASSEMBLY BILLS NO. 18 OF 2020**

**SUBMISSION BY: KEMLEIC (MEAT AND LIVESTOCK EXPORTERS INDUSTRY  
COUNCIL OF KENYA), KLMC (KENYA LIVESTOCK MARKETING COUNCIL) AND,  
KCA (KENYA CAMEL ASSOCIATION)**



**21<sup>ST</sup> SEPTEMBER  
2020**

**SUBMISSION OF MEMORANDA (THE NATIONAL AVIATION MANAGEMENT BILL- NATIONAL  
ASSEMBLY BILLS NO. 18 OF 2020 )**

## 1. Introduction

The National Assembly through a newspaper advertisement invited the public to submit their comments on the National Aviation Management Bill (the 'Bill').

### **About the Meat Livestock Exporters Industry Council of Kenya (KEMLEIC), Kenya Livestock Marketing Council (KLMC) and Kenya Camel Association (KCA)**

The Meat Livestock Exporters Industry Council of Kenya (KEMLEIC), Kenya Livestock Marketing Council (KLMC) and Kenya Camel Association (KCA), are umbrella associations of livestock producers, traders, transporters, slaughterhouses and abattoirs in arid and semi-arid areas of Kenya and Kenya at large. Their main objective is to enhance development of the livestock sector through enhanced service delivery across the value chain, including EXPORTS, value addition, knowledge management and sharing, lobbying, advocacy and increasing Kenyas' presence and recognition in the global meat and livestock industry sphere.

As the associations representing livestock producers, traders, transporters, slaughterhouses and export abattoirs in arid and semi-arid areas we believe that our voice should be heard as any changes affecting efficiency of meat and livestock exports could be detrimental to exports denying Kenya FOREX. Case in point: Kenya exported meat and livestock products worth over \$7.8 million in 2019 which is a drop in the ocean compared to a country like New Zealand which exported \$7.7billion worth of meat in 2019.

### **Review of particular clauses:**

In the event that Kenya National Assembly is considering adoption the Bill in its current form, which we strongly oppose, we would suggest further refinement of the Bill as follows:

## 2. Objections to the Bill and proposed amendments

Section	Contents	Proposed Amendments
5	National Civil Aviation Council	<b>Inclusion of</b> The Director General of the Kenya Civil Aviation Authority as this is a critical stakeholder on matters aviation
7	Functions of the Corporation	<b>Inclusion of</b> in consultation with relevant stakeholders including KALPA, Tourism sector, Agriculture, Horticultural Sector, Meat Exporters Council-KEMLEIC, General aviation operators and Ministry of Trade and Industry
8	Board of Directors.	<p><b>Deletion of</b> four Independent Non-Executive Board members appointed by the Cabinet Secretary</p> <p><b>Inclusion of</b> Nine independent non-executive board members each with the following specific aviation expertise and nominees of the relevant stakeholders' bodies:</p> <ol style="list-style-type: none"> <li>1. A nominee of the Kenya Airline Pilots Association with over ten years of International flying experience.</li> <li>2. Aviation maintenance science expert or a licensed aircraft engineering expert.</li> <li>3. Aircraft acquisition, lease agreement and maintenance reserves expert.</li> <li>4. A nominee of the Hotels and restaurants associations of Kenya.</li> <li>5. A nominee of the Horticulture, floriculture and agriculture associations.</li> <li>6. A nominee of the meat and livestock exports associations.</li> <li>7. Air cargo management expert.</li> <li>8. A nominee of the Kenya Aviation Medical Association.</li> <li>9. Aviation Auditor expert.</li> </ol> <p>A nominee under the above provisions should either be elected by the relevant stakeholder body or nominated in accordance with their organizations regulations.</p>
Section	Contents	Proposed Amendments
10	Appointment as the Chairperson	<p><b>Inclusion of</b></p> <ol style="list-style-type: none"> <li>a) holds at least a bachelors degree in aviation management or aeronautical engineering or an Airline Transport Pilot License (ATPL)</li> <li>b) is hired through a transparent and competitive hiring process</li> </ol>



Section	Contents	Proposed Amendments
40	Appointment as a Managing Director	<b>Inclusion of</b> (a) holds at least a bachelor's degree in aviation management or aeronautical engineering or Airline Transport Pilots License (ATPL) (b) has knowledge and experience of at least ten years in aviation related field; (c) is not a public officer; and (d) has proven, successful business management or other professional experience. (e) is hired through a transparent and competitive hiring process
43	Managing Director re-appointment	<b>Inclusion of</b> Re-appointment will be based on profitability and growth achieved
53	Review and amendment of the salaries, wages or other terms and conditions of service of employees of the Group	<b>Inclusion of</b> in consultation with the Kenya Airline Pilots Association and any other associations of employees

### 3. Conclusion:

Based on the foregoing, we request the National Assembly to reject the Bill on the following grounds:

- a) The Bill as is does not add value to the aviation industry
- b) The Bill as is does not address the issue of billions of losses incurred in aviation industry
- c) The Bill as is does not add value in the development of Kenyas' meat and livestock exports

21<sup>st</sup> September 2020.

KEMLEIC (Meat and Livestock  
 Exporters Industry Council of Kenya)



*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

## **9. Kenya Meteorological Department**







REPUBLIC OF KENYA  
MINISTRY OF ENVIRONMENT AND FORESTRY  
KENYA METEOROLOGICAL DEPARTMENT

Dagoretti Corner, Ngong Road,  
Telephone: 254-020-3867880-5  
Fax: 254-020-3876955  
E-mail: director@meteo.go.ke

P. O. Box 30259, 00100  
G.P. O, Nairobi, Kenya,  
<http://www.meteo.go.ke>

Ref: No. Met. 13/14 Vol. 6 (42)

Date: 8 September 2020

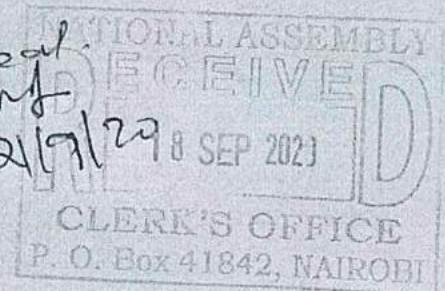
**The Clerk**

National Assembly  
Parliament Buildings, Parliament Road  
P.O. Box 41842  
Nairobi 00100

Thru'

Dr. Chris Kiptoo, CBS  
The Principal Secretary  
Ministry of Environment & Forestry  
P.O. Box 30126-00100  
Nairobi 00100

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P.S. deal.  
21/9/20  
PS 15/9/2020



**KENYA METEOROLOGICAL DEPARTMENT'S MEMORANDUM ON THE NATIONAL AVIATION MANAGEMENT BILL (2020)**

The attention of the Kenya Meteorological Department (KMD) is drawn to the above referenced subject tabled in the National Assembly by the Leader of Majority as Bill No. 18 of 2020 and published in the Special Gazette Issue No. 93 dated 15<sup>th</sup> June 2020.

The mandate of the KMD is to provide timely early warning weather and climate information for safety of life, protection of property and conservation of the natural environment. This mandate is anchored on Executive Orders on the structure and organization of the Government of Kenya and the World Meteorological Organization (WMO) Convention. The Convention also recognizes the National Meteorological Service (NMS) to be single and authoritative voice and source on matters of severe weather and extreme climate events among WMO's member countries.

Meteorological services for aviation are key, critical and essential to the safety, regularity and operations of the aircrafts during take-off, cruise, approach and landing phases of both civil and military aircrafts as outlined in the International Civil Aviation Organization (ICAO) Annex III (*Meteorological Services for International Air Navigation*), ICAO Document 8896 (*Manual on Aeronautical Meteorological Practice*), WMO Document 904 (*Guide to Aeronautical Meteorological Services Cost Recovery Principles and Guidance*) and ICAO Document 9377 (*Manual on Coordination between Air Traffic Services,*

Please address all replies to the Director of Meteorological Services



*Aeronautical Information Services and Aeronautical Meteorological Services*). These services as provided include:

1. Meteorological Information Services provided for **Approach and Landings** phases of the aircrafts. These information is provided to the operators through the Air Traffic Services in preparation for landing at the port of arrival and alternates. They include; Terminal Area Forecasts (TAFs), METARs/SPECIs, Landing (TREND) forecasts, Aerodrome Warnings, Wind Shear Warnings, Clear Air Turbulence Warnings (CATs).
2. Meteorological information services provided for **Take-offs and Cruising** phases of the Aircrafts from the port of departure. These information is provided directly to the operators upon logging into KMD Pilot-Web-Briefing portal and also through the Air Traffic Control platforms and includes; METARs/SPECIs, TAFs, TREND, ROFORs, AIRMETs, GAMETS, Meteorological Folder(s), Upper Air Winds, Temperature and Pressures (WINTEMP at different flight levels (FL) depending on each aircraft and the prevailing ATC conditions.
3. Meteorological information services provided for **Air Navigations** during En-Route phases of aircrafts for those passing over the Kenya's airspace without stopping. These information includes; Volcanic Ash Advisories (VAACs), Tropical Cyclone Advisories (TCACs), Severe Weather Advisories (SWXs) Clear Air Turbulent (CATs) Icing Advisories (IAWs) Warnings, and Space Weather Advisories (SWXs). These information is transmitted for inflight safety and regularity against hazardous weather phenomena in digital format such as VOLMET, D-VOLMET and IWXXML ICAO Aeronautical Meteorological Exchange platforms

To ensure conformity and compliance to ICAO regulations and requirements, the Kenya Civil Aviation Authority (KCAA) conducts periodical quarterly and regular audit findings and in its reports, Kenya Meteorological Department has scored highly in discharging of its duties and mandates. Lack of a legal framework for cost recovery for Meteorological Information Services has strained the Department beyond its limit and therefore this calls for the urgent enabling legislation for cost recovery of the Meteorological Services provided for International Air Navigation as provided for in the ICAO Document 9082 (*Policies on Charges for Airports and Air Navigation Services*) and WMO No 904 (*Guide to Aeronautical Meteorological Services Cost Recovery Principles and Guidance*).

Considering the foregoing as highlighted above, I wish to submit my comments/views on the Aviation Management Bill (2020) as follows:

Part	Clause	Comments/views
II. Establishment of the National Civil Aviation Council	5 (i) There is established a council to be known as the National Civil Aviation Council	Amend to read 'National Civil Aviation and Meteorology Council' Amend Membership of the council to include the Cabinet Secretary responsible for matters relating to Meteorology
III. The establishment of the Kenya Aviation Corporation	6 (1) There is hereby established a corporation to be known as the Kenya Aviation Corporation	Amend to read 'Kenya Aviation and Meteorology Corporation'
V. Establishment of the operating entities	Insert new clause at 29	Establish the Kenya Meteorological Authority as an operating entity under

Please address all replies to the Director of Meteorological Services



		this bill taking into account the critical role of meteorological services to the aviation sector
IX. The establishment and management of the fund	56. (1) There is established a fund to be known as Kenya Aviation Corporation Fund..	Amend to read 'Kenya Aviation and Meteorology Corporation Fund'
	58. (1) (a.) Apportioned proceeds from the passenger service charge as provided under the Air Passengers Service Charge Act	Provide for 30% of Air Passenger Service Charge as apportioned proceeds for Recovery of costs and charges for meteorological services provided for Aviation.
	58. (1) (g.) Monies from any other lawful source	Recovery of costs and charges for meteorological services provided for Air Navigation Services. Refer to the Part VI of the ICAO Document 9082 ( <i>Policies on Charges for Airports and Air Navigation Services</i> ) and the KAA Act (1991) in its definition (sic):
		<ul style="list-style-type: none"> <li>• Communication services, whether ground to air or ground to ground, provided for the safety of aircraft;</li> <li>• Navigational services, that is to say radio, radar and visual aids to navigation;</li> <li>• Air traffic services provided for the safety of aircraft; and</li> <li>• <b>Meteorological services</b> provided for the safety of aircraft and for the regularity of flight.</li> </ul>
Recovery of costs and charges for meteorological services provided as Meteorological folders to operators (Pilot Web-briefing system) in accordance with WMO Document No 904 ( <i>Guide to Aeronautical Meteorological Services Cost Recovery Principles and Guidance</i> ) and ICAO Document 9082 ( <i>Policies and Charges for Airports and Air Navigation Services Sect II, Part VI</i> )		
	Cargo flights charges computed as weight of the aircraft and distance covered	
	59. Payments may be paid out of the fund monies for the expenditure of operating entities as may be necessary to execute their functions and	Recovery of costs and charges for meteorological services to be apportioned thus 20% ANS; 30% AIS ( <i>Air Passenger Service Charge</i> ) and Meteorological folder USD 100

Please address all replies to the Director of Meteorological Services

	operations under this Act and as may be apportioned by the board from time to time	(International operators) USD 50 (Domestic operator)
		Cargo flight charges for scheduled operators USD 300 (international) and USD 100 (domestic) and Non-scheduled operators USD 500 (international) and USD 200 (domestic)
		Contributions towards Support and maintenance of the aviation meteorological infrastructure at all airports in line with the WMO technical Document NO. 49 part II and ICAO Document 8896 ( <i>Manual of Aeronautical meteorological practice</i> )

Please Accept the expression of my highest consideration.



Stella Aura, MBS  
**DIRECTOR OF METEOROLOGICAL SERVICES**

*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

# **10. SESLaw Advocates LLP**





THE NATIONAL ASSEMBLY  
**RECEIVED**  
22 SEP 2020  
DIRECTOR COMMITTEE SERVICES  
10:37 AM

18th September, 2020

**Michael R. Sialai, EBS**  
The Clerk of the National Assembly  
Main Parliament Buildings  
Parliament Road  
PO Box 41842-00100  
**NAIROBI, KENYA.**

①  
Evans  
to facilitate  
CMA

Dear Sir,

**In the Matter of Consideration by the National Assembly  
The National Aviation Management Bill, 2020 [National Assembly Bill No. 18 of 2020]**

22/9/20

We refer to the advertisement appearing in the daily newspapers inviting submission of Memoranda in respect to the National Aviation Management Bill, 2020.

We reiterate the contents of our Memorandum dated 8th July, 2020 and request for a Hearing date so as to make our presentation before the **Departmental Committee on Transport, Public Works and Housing.**

We shall be most grateful if you may kindly let us know in good time when we may appear for our oral submissions of our Memorandum before the said Committee.

Yours faithfully  
For: **SESLaw Advocates LLP**

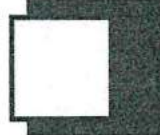
Evans  
**Evans Lagat, FCI Arb.**  
**MANAGING PARTNER.**

②  
Tungo/SHIM  
please deal  
AAA  
22/9/20

NATIONAL ASSEMBLY  
**RECEIVED**  
21 SEP 2020  
CLERK'S OFFICE  
P. O. Box 41842, NAIROBI







**SESLaw  
ADVOCATES LLP**

July 8, 2020

Michael R. Sialai, EBS  
The Clerk of the National Assembly  
Main Parliament Buildings  
Parliament Road  
PO Box 41842-00100  
NAIROBI, KENYA.

①  
Dlcoms  
Please deal.

08/08/20

②  
TUNAO  
Please deal  
FAA

07/18/20



Dear Sir,

**MEMORANDUM ON THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

We refer to the advertisement appearing in the daily newspapers inviting submission of memoranda in respect to the National Aviation Management Bill, 2020.

We have reviewed the Bill and set out our comments hereinbelow in the form of a written memorandum to the distinguished Committee on Transport, Public Works and Housing of the National Assembly (the Committee) for their consideration.

**Introduction**

The National Aviation Management Bill (the "Bill") having been published,<sup>1</sup> Parliament has invited views from the public via written Memoranda on the Bill.

The Memorandum of Objectives<sup>2</sup> of the Bill states that the Bill aims at giving effect to the Parliamentary Report by the Department of Transport Public Works and Housing Works (dated 17<sup>th</sup> June 2019) on the inquiry into the Kenya Airways Privately Initiated Investment Proposal (the "PIIP") to Kenya Airports Authority (KAA) which recommended the nationalization of Kenya Airways.

It is noted that Kenya Airways which was a government owned enterprise since 1977 was privatized in 1996. The attempt of the proposed Bill is therefore to **re-nationalize** Kenya Airways on the one hand and **merge** it with Kenya Airports Authority on the other.

Cognizant that a significant number of people in the aviation sector are likely to be detrimentally affected by the proposed re-nationalization and merger, we present this Memorandum as concerned Kenyan citizens knowledgeable in the law both on our behalf and in the public interest..

<sup>1</sup> Dated 15<sup>th</sup> June 2020

<sup>2</sup> Memorandum of Objects and Reasons to the National Aviation Management Bill, 2020.





This Memorandum highlights the legal issues that arise from the resultant nationalization and merger. The Memorandum is in three parts; namely

- a) Part I – Executive Summary of the grounds for rejection of both Nationalization/Merger Process & the Bill - This part lays down legal and constitutional issues arising against the Re-nationalization/Merger process as well as for the rejection of the Bill in its entirety;
- b) Part II – Detailed Review of the Bill. This part gives a detailed review of the Bill and in so doing it points out the flaws in the Bill which are so fundamental that the only logical conclusion is the rejection of the Bill *in toto*; and
- c) Part III - The conclusion and summary of recommendations

## **PART I - Executive Summary – General Legal & Constitutional Issues**

### **1. Policy Making Process**

- 1.1. The initial process of nationalization of Kenya Airways and the attendant merger with Kenya Airports Authority did not meet the minimum requirements of the Constitution on public participation. Such weighty decisions ought to originate from a Policy Paper and not through a private proposal as was the case here. This peculiarity prompted a report by a Committee of National Assembly following an inquiry. At present, there does not appear to be any discernible policy, yet re-nationalization of a strategic asset is an issue of great national importance.
- 1.2. It does not sit well given that Parliament gave the public only **5 days** to present their views. A Notice inviting memoranda from the public was published in respect to the Bill together with another bill<sup>3</sup> in the Newspapers on 2<sup>nd</sup> July 2020 required members of the public to submit their representations within 5 days.
- 1.3. The Kenya Institute of Public Policy and Research, an autonomous public institution whose mandate includes providing advisory and technical services on public policy issues to the Government and other agencies of the Government sets out the process of formulation of public policy as :
  - (i) Problem identification- This allows for clear definition of the problem: the nature and magnitude of the problem, why it came about and why it continues, the immediate and underlying problems and proposed solutions,
  - (ii) Policy Design- analysis, planning and resource scheduling. Development of an effective course of action to reach policy goals through specific programmes and activities and allocation of resources. Technical input and financial appraisal of the proposed solutions. Public participation at this stage ensures that the stakeholders input is incorporated in the final draft policy;
  - (iii) Parliamentary approval and assent- The Cabinet Secretary in charge presents the draft policy to Parliament for scrutiny and further consideration and approval;
  - (iv) Publication- Upon assent by the President, the policy is published as a *White Paper* (a statement of intent and a detailed policy plan, which often forms the basis of

<sup>3</sup> The Social Assistance (Repeal) Bill (National Assembly).



legislation). The Executive is expected to widely circulate the policy and keep the public informed of the likely effects of the Policy; and finally

- (v) Draft Bill/Legislation- to the extent that a new law/laws are required to achieve the policy objectives, a legislative proposal is drafted and tabled to Parliament as a Bill.

- 1.4. Further, the **Kenya Law Reform Commission** has published a guideline on the legislative process in Kenya<sup>4</sup> where it has sought to identify, consolidate and simplify the mandatory tenets, values and principles of the Constitution that ought to be applied and considered by all actors involved in one way or the other in the legislative process.
- 1.5. It is best practice for policy to precede law. In fact most legislation including subsidiary legislation trace their foundation or anchorage on a policy framework. A policy sets out goals and activities required to achieve a certain purpose. Policy discussions resolve the question of whether or not a law is needed to achieve the aims set out in the policy or the most appropriate approach to resolve a problem.
- 1.6. Kenya Airways was incorporated in 1977 as the Kenya's flag carrier and over the next 15 years it accumulated massive losses and crippling debt forming the basis of its identification for privatization in 1992 through a Commission that had been formed by the President. The Government engaged the International Finance Corporation (IFC) to advise on the privatization process of Kenya Airways in 1994 culminating in the eventual privatization in June of 1996. The success of the privatization saw Kenya Airways double its passenger traffic and cargo by 2003.
- 1.7. It is therefore clear that the privatization of Kenya Airways was as a result of a conscious policy choice from Commission that the Government had set up which informed the eventual decision to privatize. It was not just a whimsical or arbitrary decision. This careful process of arriving at the decision to privatize should also be applied in the re-nationalization of Kenya Airways and the proposed merger. There ought to be a more robust consultation before a final decision is taken.
- 1.8. One of the mandatory tenets of law reform process is the requirement for a Regulatory Impact Assessment.<sup>5</sup> None has been undertaken leading up to the merger as proposed in the Bill.

## 2. Public Participation

- 2.1. Public participation is a core and non-derogable value in the law-making process set out under articles 10, 118, 124, 201 and 221 of the Constitution of Kenya 2010 and the National Assembly Standing Orders 120-139. Public participation in the making of law gives rise to the sovereign will of the people and generates many benefits including more citizen empowerment, enhancing citizen-government relations, generation of diverse and innovative ideas among others. This duty is more onerous in matters involving public finance and expenditure of taxpayers' money.

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<sup>4</sup> A guide to the Legislative Process in Kenya.

<sup>5</sup> Law Reform Commission has set out a guideline to legislative process in Kenya



### **3. Public Finance Management**

- 3.1. The Constitution requires prudent management of resources and accountability and transparency in fiscal management. The Public Finance Management Act requires prior cabinet approval based on the National Treasury's advice regarding the financial implications of the transaction, prior to the establishment of a State Corporation. There is no information that has been provided to the public by the policy makers on the financial implications of the proposed re-nationalization of Kenya Airways and its merger with Kenya Airports Authority.
- 3.2. In view of the foregoing, we recommend that the formulation of this Bill should have been preceded by development of a Policy/Position Paper approved by Cabinet before the Bill could be initiated and after conduction extensive public consultations and debates. To the extent this did not happen, the Bill is improperly before the Committee and need be shelved and await this prior process.

### **4. Competition Law**

- 4.1. The formation of a non-operating holding company to hold the three operating entities namely Kenya Airways, Kenya Airport Authority and the Aviation Investment Corporation means that the holding company may restrict the use of airports and other facilities by other airlines and airport operators who are already concessionaires of Kenya Airports Authority. Further, the operating entities, as direct competitors to other operators, may unfairly charge other external airlines and airport operators for use the facilities. This raises critical competition concerns. It also raises concerns on the likely abuse of a dominant position by Kenya Airways which already holds a substantive stake in the domestic airlines market and also in the cargo and passenger flights into and out of Kenya. We are of the considered view that there is potential for abuse of competition policy in this case. The Competition Authority of Kenya (CAK) has not been consulted on the likely effect of the proposed nationalization and merger of KQ and KAA on competition within the aviation sector and potential unfair trade practices that may arise from the monopoly that the Bill creates.
- 4.2. More importantly, it is not clear to other stakeholders how the new structure and dominance of Kenya Airways will compete with, restrict and/or adversely affect their business and operations at JKIA and in future.
- 4.3. We recommend full disclosure of the intended business and oversight operations of Kenya Airways in the intended Re-nationalization/merger and that Clause 6 of the Bill be deleted to the extent that it creates an aviation holding corporation. In effect therefore, if the Government intends to re-nationalize Kenya Airways, then this should not affect the operations of KAA and as such the Bill is not necessary as the entities could easily operate independently. In any event, since there is no merger approval from CAK we recommend that the Bill should be shelved. The passing of a legislation to effect a restructuring would, in effect, preclude CAK from exercising its mandate to assess the propriety of a restructuring of this nature and magnitude. This may be contrary to public interest and/or to the detriment of other interested parties in the aviation sector and concessionaires.

### **5. Amendment of other Laws**



- 5.1. Finally, we take issue with the fact that the Bill purports or attempts to amend other enacted statutes that are not necessarily related: (a) to it in a manner that unduly and unreasonably expands the remit of the Bill and; (b) through a procedure that is inconsistent with the rationale of the Bill. In this case the subject matter of the Bill is nationalization of the airline and the establishment of an institutional framework to realize this. Yet, other amendments such as the amendment to Section 4 of the Public Procurement and Asset Disposal Act that affect other entities have been sneaked in contrary to the law. The Bill also rather surreptitiously exempts the three operating entities (KA, KAA and Aviation Investment Corporation) as well as other state-owned entities or parastatals from complying or being bound by the Companies Act 2015 which is the main framework relating to corporations thereby presenting a danger of a breach of corporate governance procedures and violating transparency requirements.
- 5.2. We recommend that the Second Schedule of the Bill should be deleted in as far as it purports to amend other substantive provisions of other parliamentary enactments such as the Public Procurement and Disposal Act 2015 and the Companies Act 2015.



## PART II - DETAILED REVIEW OF THE BILL - CONTENTIOUS CLAUSES:

### 6. Conflicting Provisions with other Laws & Statutory Bodies

- 6.1. Under Clause 5(2) of the Bill, the objective of the newly formed NCAC usurps some of the powers of the **Kenya Civil Aviation Authority (KCAA)** set out in section 7 of the **Civil Aviation Act 2013**.
- 6.2. Section 6 of the **Civil Aviation Act** provides that the KCAA's objective is to economically plan, develop and manage civil aviation, regulate and operate a safe civil aviation system in Kenya.
- 6.3. Section 7 of the Act sets out KCAAs roles including: "*advising the Government on matters concerning civil aviation; safety, economic and technical regulation of civil aviation; performing economic oversight of air services, protecting consumer rights and ensuring fair trade practices; any other roles that may be conferred by the Cabinet Secretary or any other written law.*"
- 6.4. Further, in discharging its responsibility for aviation safety and security, the KCAC is required to co-ordinate with other government departments including the KAA, the Department of Defence and the National Police Service. The effect is a regulatory overlap or dissonance, conflict of interest and potential international derision; a position the Kenya Civil Aviation Authority (KCAA) shared when it made its presentation to the this committee by confirming that there is no precedent globally where an airline has been merged with an Air Navigation Service Provider (ANSP) because such a situation would result in conflict of interest.
- 6.5. Globally, international civil aviation relies on bilateral air services agreements negotiated between sovereign States and implemented by national airlines through global airline alliances. The focus on national protectionist measures seems to have dissipated in recent years as the consideration of maintaining national operation and control of national carriers were based on the 1944 Chicago Convention.<sup>6</sup> Its restrictive rationale (national security, defence and economic development of civil aviation) 'may not be immediately intelligible today'.<sup>7</sup> Thus, the perception that the Kenyan aviation sector is overly nationalistic may jeopardize international cooperation. A peculiar governance structure and conflicted mandate of the provision of Air Navigation Services may lead to JKIA appearing as a less competitive or attractive hub than its competitors

### 7. Corporate Governance

- 7.1. As far as the composition of the Council is concerned, it is curious to note that the Council does not have representation from the Corporation yet the Corporation is a key stakeholder in the aviation sector on behalf of Government.
- 7.2. Clause 5(1) of the Bill sets out the composition of the National Civil Aviation Council (the **Council or NCAC**). In particular, it incorporates the Kenya Air Force Commander as a

<sup>6</sup> See Convention on International Civil Aviation *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 7, 1947).

<sup>7</sup> Antigoni Lykotrafiti, 'A Comprehensive Study of Air Transport Liberalization through the Lens of Strategic Airline Alliances', 44 (4/5) (2019) *Air & Space Law*, 1-46.



member of the **National Civil Aviation Council**. The Council is a body which is distinct from and does not regulate military aviation matters. It is worth noting that the aerodromes under the Kenya Airports Authority and the air transport services provided by Kenya Airways which are the key functions under the Bill relate to civil aviation. It therefore follows that the role of the military through the Kenya Air Force Commander in the KCAC is not only misplaced but is an attempt to militarize an otherwise civil function. The aerodrome is not a military installation and neither are the other aviation assets which are currently under the control of KAA.

- 7.3. The Bill also seeks to exempt the Kenya Aviation Corporation, Kenya Airways, Aviation Investment Corporation and any other entity under the Bill from the application of the State Corporations Act and the Companies Act both of which statutes have provisions on corporate governance practices. It, therefore, means that the said Corporations in the aviation sector will not be subject to any corporate governance practices. State Corporations are required to adhere to corporate governance guidelines as set out under the **Mwongozo<sup>8</sup> guidelines**. On the other hand, state entities incorporated under the Companies Act are subject to corporate governance requirements under the Companies Act. The entities created under the Bill will therefore not be adhering to any set guidelines or laws on corporate governance. Currently Kenya Airways being a public listed company is subject to the **Code of Corporate Governance Practices for Issuers of Securities to the Public<sup>9</sup>** by the Capital Markets Authority.
- 7.4. It is recommended that while it may be necessary to improve managerial autonomy in the Corporation and the Operating Entities, they it should not be shielded from requirements of accountability and adherence with corporate governance guidelines.
- 7.5. There seems to be conflict of roles between the Corporation and the Council given that the Council seems to be the ultimate or supreme organ as far as the organizational structure of the Group is concerned yet the Bill does not provide any nexus between the Council and the Corporation. The functions of the Corporation under Clause 7 of the Bill do not make any reference to the Council. In fact, Clause 7(1)(d) provides that the Corporation advises the Government<sup>10</sup> while paragraph (d) states that the Corporation shall perform such functions or duties as shall be conferred to it by the Cabinet Secretary without any reference to the Council. The Council appears superfluous in the structure of the Group
- 7.6. **Recommendations:**
- a) Clause 5 of the Bill which establishes the National Civil Aviation Council together with Clause 7 of the Bill which sets out the functions of the Kenya Aviation Corporation be deleted in their entirety given that the functions set out therein are in conflict with and touch on regulatory functions of KCAA which are in line with international standards on aviation management.

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<sup>8</sup> The Code of Governance for State Corporations, 2015.

<sup>9</sup> Code of Corporate Governance Practices for Issuers of Securities to the Public, 2016.

<sup>10</sup> Section 7(1)(d) of the Bill



- b) In support of the recommendation for deleting Section 5 in regards to the National Civil Aviation Council, it is recommended that the President who is the Commander-in-Chief of the Armed Forces, and the Kenya Air Force Commander should not be part of the proposed Council since management of civil aviation policies and system should be separate from military operations.

## 8. Procedure of nationalization of Kenya Airways and Merger with KAA

- 8.1. The proposal to nationalize Kenya Airways through the Bill is premised on a PIIP presented to KAA by Kenya Airways, which was the subject of an inquiry by the Parliamentary Committee whose recommendations proposed nationalization of the airline.
- 8.2. There is a lingering question on what happens to Kenya Airways PLC upon nationalization. Clause 50 of the Bill proposes a nationalization process through which the Government will acquire 100% equity in Kenya Airways PLC. The intended process of delisting and the negotiation with the shareholders ought to be made public and transparent while ensuring that that the public is able to obtain Value for Money.
- 8.3. Questions on valuation of these shares (especially for an ongoing process and with the global airline industry in decline during the Covid-19 period) are unclear. What minority shareholder protections would be put in place? What would be the value of the shares? Is there a statutory formula instead of a current market price scenario? A static price for a volatile industry may either lead to imprudent use of public funds by overpaying shareholders or prejudice current KQ shareholders by paying less than the market price. In as much as nationalization may be justifiable on grounds of national interest, expropriation should not prejudice existing shareholders. Therefore, the valuation of the shares ought to be made transparent.
- 8.4. In the early 1960s, many newly independent African states founded their own airlines partly with the purpose of asserting their status as independent nations. Market protection to sustain such carriers proved to have detrimental effects on liberalization, air traffic growth, aviation safety and security, as well as coordinated infrastructure development efforts. Kenya for instance in a bid to improve performance and efficiency of KQ proceeded to privatize it in 1996 as a result of which KQ became profit making for many years until 2012. The privatization was preceded by an elaborate process assisted by IFC and Cabinet and a Commission which made recommendations for KQ's privatization as an express policy choice. Privatization was indeed preceded by a Policy Paper on *Public Enterprises Reform and Privatization* in 1994 which informed the eventual privatization of KQ in 1996. Re-nationalization should, likewise, be based on similar reasons for privatization namely: well designed and sequenced reforms; the implementation of complementary policies; the creation of regulatory capacity; attention to poverty and social impacts; and strong public communication.<sup>11</sup>
- 8.5. The current process of re-nationalization of KQ seems to lack the procedural coherence that characterized its privatization. KQ with the support of Government commenced and proceeded with a PPP process of Privately Initiated Proposal (PIP), which upon meeting headwinds

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<sup>11</sup> Saul Estrin, Adeline Pelletier, Privatization in Developing Countries: What Are the Lessons of Recent Experience?, *The World Bank Research Observer*, Volume 33, Issue 1, February 2018, Pages 65-102



during the Parliamentary Inquiry then changed course to the current path of nationalization. Nationalization is a significant policy instrument which calls for rigorous review at various levels including National Treasury, Cabinet, Stakeholders and eventually Parliament. The process of KQ re-nationalization is obscure. It is riding on an incomplete PPP process that resulted in a policy shift from PPP to Nationalization. Government ought to have commenced the Nationalization process properly by engaging all necessary parties.

- 8.6. One of the timeless Policy Papers that speaks to the question of nationalization in Kenya is Sessional Paper No. 10 of 1965.<sup>12</sup> The paper states that Nationalization is to be considered if the need is urgent, if other less costly controls are ineffective and if it is understood that most industries nationalized will not be operated at a loss.
- 8.7. This Sessional Paper contemplated that all takeover options ought to be comprehensively reviewed; including proposals on how to turnaround unprofitable businesses. In the current case, it is difficult to envision how profitability rests on the proposed merger. Although the creation of national airlines is a global feature, so are the inconsistent returns. The aviation industry is characterized by marginal and cyclical profitability,<sup>13</sup> with sustained losses expected for the airline industry in the post-Covid 19 period.
- 8.8. Even assuming, for argument's sake, that the nationalization is justified, the current merger is fraught with diverse legal and practical hurdles that may be difficult to rationalize as highlighted below. There appears to be an assumption that the revival or profitability of KQ is synonymous with national or public interest. What is the long-term effect of the nationalization of KQ and its merger with KAA on other enterprises that operate at JKIA and to the economy in general? Has a comprehensive cost-benefit analysis undertaken to justify the cost to the taxpayer and use of public funds to finance the restructuring? Moreover, it seems that Government embarked on a nationalization process as an afterthought during the Parliamentary inquiry on the PIIP process.
- 8.9. In its submission, the ministry of Transport urged the Committee to view KQ as more than just another corporate body but as a national entity that carries the national flag. This cannot be the basis upon which the Committee should view KQ because the trend in the world has shown that Airlines with 100% government shareholding include those belonging to the likes of India, Romania, Zimbabwe, and Pakistan - all of which are still in debt to the tune of billions. Many of the world's most prominent national airlines, such as Air Canada, Qantas, Lufthansa, and British Airways, are no longer owned or even majority controlled by the countries in which they originated. Some, like Air France, are partially privatised - with government still holding on to minority stakes.

## **9. Transfer of Assets and Shares – Valuation and Acquisition Complexities**

- 9.1. The Holding Company being the Kenya Aviation Corporation (KAC) would need to acquire the equity and, arguably, the debt of Kenya Airways and KAA.

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<sup>12</sup> Paragraph 77, African Socialism and its Application to Planning in Kenya, Sessional Paper No. 10 of 1965.

<sup>13</sup> Doganis R (2001): *Airline Business in the 21<sup>st</sup> Century*, Routledge.



- 9.2. There would be need to undertake valuation of the assets and review of the liabilities of the former KAA and former Kenya Airways PLC before the same are transferred to the new Operating Entities. With a change of ownership, it is foreseeable that the debt and liabilities would crystallize/immediately fall due; leading to huge payouts from public funds. Alternatively, if the debts are not immediately paid, current creditors/ bondholders/lenders would require a Government guarantee that their dues will be paid; at the expense of the public.
- 9.3. The Bill merely provides for transfer of undertakings between the former entities to the new entities under the Bill without taking into account a valuation of assets and review of liabilities. This is very simplistic.
- 9.4. Some transfers (such as assignment of licenses) may require regulatory approvals. In particular, KCAA submitted to the Parliamentary Committee that Certificates issued under ICAO guidelines are not transferrable. Hence, any transfer of undertakings between the former entities to the Operating Entities will result in loss of the certificate for provision of Air Navigation Services.
- 9.5. For prudent management of resources (discussed below under public finance management), transparency, and accountability, it is necessary to assess and disclose the nature of liabilities and market value of liquidating these debts. Are there any early repayment clauses and penalties for some debts? Are there any existing hedged arrangements that would be adversely affected by the nationalization and merger with KAA? What becomes of the agreed price, currency fluctuation, and interest rate of contracts that will be affected by the proposed nationalization?

#### **10. Objectives of the PIIP (subject matter of the Parliamentary Report)**

- 10.1. The PIIP made by Kenya Airways sought to cure the underinvestment by KAA in JKIA which made the latter less competitive compared to its peer airport facilities. KQ's argument was that less investment by KAA is as a result of diversion of funds. Kenya Airways proposed a number of investments including rehabilitation of taxiways, upgrading of the runways and remodeling of the Terminals, which would increase the overall capacity of the airport in passenger-handling.
- 10.2. The recommendations of the Parliamentary Report being nationalization of Kenya Airways and subsequent merger with KAA do not provide a viable solution to the problem statement presented in the PIIP. In fact, the proposed merger is only likely to result in lower profits for the Aviation Corporation, leaving even less reserves for infrastructural investments at JKIA. For instance Kenya Airways reported a Sh12.9 billion loss for the financial year ended December 2019. This loss would completely wipe out KAA profits of approximately sh 2.5 Billion resulting to a net loss of over sh 10 Billion. This would contribute to joint collapse of both Kenya Airways and KAA.

#### **11. Public Finance Management Issues**

- 11.1. The Constitution requires prudent management of resources and accountability and transparency in fiscal management.



- 11.2. **The Public Finance Management Act** operationalizes Article 206 of the Constitution. Section 86 of the Act provides that: "A state corporation may be established or dissolved only with the prior approval of the Cabinet, which approval may be given only after taking into account any recommendations made by the National Treasury regarding the financial implications of establishing or dissolving the corporation. It further provides that "Regulations shall prescribe the criteria to be used in establishing or dissolving state corporations and the regulations shall be tabled in Parliament for approval."
- 11.3. Section 87 goes on to state that (1) The national government or national government entity may not invest— (a) in a state corporation; or (b) in a government-linked company, without the prior approval of the Cabinet, which approval may be given only after taking into account any recommendations of the National Treasury regarding the financial implications of the investment.
- 11.4. It is clear from the foregoing that investments by the Government in state entities must be preceded by recommendations of the National Treasury on their financial implications.

## 12. Public Participation in Finance Matters

- 12.1. Article 201 of the Constitution provides that there shall be openness and accountability, including public participation in financial matters; while Article 10 prescribes the national values and principles of governance in that bind all State organs in enactment of laws and public policy decisions. These include: good governance, integrity, transparency and accountability<sup>14</sup>;

## 13. Policy Making

- 13.1. The preceding stages of the law-making allows for determination of the best course of action by taking into account the root cause of the problem and examining the technical and financial feasibility of the proposed solutions- This would prevent a situation where **Management Issues** are resolved through regulatory solutions. The Parliamentary report fails to explain how the proposed restructure of the entire aviation industry in Kenya will resolve the management problems facing the airline.
- 13.2. Management issues have plagued Kenya Airways for a long time and it seems they have not been addressed. In 2015, a *Senate Select Committee into the Affairs of Kenya Airways Limited and its Subsidiaries* under the Chairmanship of Prof. Anyang Nyong'o conclusively pointed out that the problems that bedeviled the airline were management issues resulting from bad decisions.<sup>15</sup> Some of the management decisions that had cost Kenya Airways included the expansion plan then dubbed *Mawingu*, a 10 year project which landed the Company into unsustainable debts and a diminishing market share as well as a loss inflicting fuel hedging regime. It was on that basis that the Select Committee then recommended that any capital restructure should be done on condition that management issues are dealt with

<sup>14</sup> Article 10(2)(c)

<sup>15</sup> [http://www.parliament.go.ke/sites/default/files/2017-05/Thursday\\_3rd\\_December\\_2015\\_-\\_Morning.pdf](http://www.parliament.go.ke/sites/default/files/2017-05/Thursday_3rd_December_2015_-_Morning.pdf)



including reconstitution of the Board, restructuring the management team and hiring a new commercial director.<sup>16</sup>

- 13.3. The Transport Committee, in considering the PIIP, invited various stakeholders including: the Kenya Civil Aviation Authority, the Kenya Airports Authority, the Kenya Aviation Workers Union, the Kenya Airline Pilots Association and the Kenya Association of Airline Operators to make submissions on the report. Among the submissions made by the stakeholders to the Committee was a submission by the Cabinet Secretary Transport, Infrastructure, Housing and Urban Development that the Cabinet had considered a Memorandum jointly drafted with the CS Treasury and that the White Paper "*Strategy for continuous and Sustainable operations of Kenya Airways PLC*" which sought to restructure the aviation sector and give Kenya a competitive edge was to be submitted to Cabinet for approval. The policy paper was however neither tabled in Parliament for approval nor subjected to public participation.
- 13.4. Comparatively, in South Africa, it is a requirement that that where an administrative action may '*materially and adversely*' affect the rights of the public, then an administrator **MUST** hold a public inquiry or follow a notice and comment procedure
- 13.5. We are of the opinion that if the Government has a policy to restructure the entire aviation sector through nationalization and merger, the same is material in nature and therefore adequate public participation should be conducted so as to take into account views from the various actors and players in the sector as well as ordinary Kenyans as the same relates to spending of taxpayers money.
- 13.6. In the United Kingdom, public participation is one of the rule making methods used which typically follows the following process:
  - a) Public inquiry commences with a general notice by the state agency to the public and notification to persons particularly affected and discloses the reasons and explanation for the proposed rules;
  - b) A hearing is conducted including receiving testimony from experts and departmental representatives;
  - c) Once the hearing process is completed, a decision is recommended to the Minister;
  - d) In making his/her decision, the Minister may consult other persons and make policy judgements;
  - e) Where the Minister differs on any fact finding or takes new factual evidence or expert opinion into consideration, the minister is required to provide an opportunity for the public to make contrary written representations or reopen the inquiry.
- 13.7. In designing public participation procedures, the aim is to balance administrative efficiency and fairness. There needs to be meaningful public comment. While some have favoured paper hearings/written proposals, it has been argued that in a complicated subject matter, paper hearings are not adequate and hence it has been proposed that public inquiries would be most appropriate especially where the factual issues are localized or where potentially differing views from various regions of the country need to be heard.

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<sup>16</sup> [http://www.parliament.go.ke/sites/default/files/2017-05/Thursday\\_3rd\\_December\\_2015\\_-\\_Morning.pdf](http://www.parliament.go.ke/sites/default/files/2017-05/Thursday_3rd_December_2015_-_Morning.pdf)



13.8. We take the view that the subject matter of the Bill is of a complex nature, touches on various regions especially those with aerodromes, etc and as such require full public hearing the COVID-19 pandemic notwithstanding.

13.9. Kenya Airways proposes a merger with KAA so as to inject capital expenditure (capex) to upgrade the JKIA features. This is not likely to be achieved by the merger. In any event, a merger with an unprofitable entity will likely divert much needed resources towards bailing out the weaker subsidiary, thus leaving even less cash for reinvestment. In any event, a carving out of JKIA from KAA is independent of nationalization of Kenya Airways and the proposed merger. Similar trends of public funding and restructuring for flag carriers are common and all result in total failure. For example Italy's Alitalia cost taxpayers USD 7 billion in the last decade, and it was ultimately forced to sell 49% of its business to Etihad Airways.

#### **14. Right to Information**

14.1. The right to access information is crucial to public participation and to the well-functioning of a democracy. It is a right under the Constitution (Article 35 (1)), which is operationalized through the Access to Information Act, 2016. The Constitution guarantees citizens access to information held by the state and relevant private entities. Other legislation also provides for access to information which is vital for the achievement of meaningful and effective public participation. Access to information empowers and enables citizens to hold the duty bearers to account.

14.2. The failure by the relevant government ministries to publish the contents of the policy white paper which informed the recommendations of the Parliamentary Report and the Bill was a breach of the citizens right to information. The process was shrouded in opaqueness and thus did not meet the minimum criteria required of policy making process.

#### **15. Establishment of the Kenya Aviation Corporation Fund**

15.1. The Act establishes the Kenya Aviation Corporation Fund into which among other monies will be paid apportioned proceeds from the passenger service charge as provided for under the Air Passengers Service Charge Act. These proceeds were previously payable to KAA and there is a current default by KQ on payment of more than 5.4 billion shillings.

15.2. There is lack of clarity on how the monies paid into the fund shall be apportioned to ensure that all the Entities under the Corporation deliver on their respective mandates.

15.3. As submitted by the KCAA in the Parliamentary inquiry, the proposed merger will likely result in a reallocation of resources from the security and safety aspects of the KAA operations to the airline. There is need for a mechanism to ring-fence the funds paid into the fund to ensure that a minimum threshold is used in maintenance of airport facilities to the appropriate standards

#### **15.4. Recommendations**



- a) The White Paper "*Strategy for continuous and Sustainable operations of Kenya Airways PLC*" referred to in the Parliamentary Report as approved by Cabinet should be published so as to enable informed debate on the proposed Bill. The policy paper should explain the financial benefits to be derived from the proposed merger, and the effect of the proposed merger on employment and competition. Parliament should subject the Bill to public participation upon availing of all the relevant information.
- b) The recommendations by the National Treasury on the financial implications of the proposed formation of a state entity known as Kenya Airways should be tabled before Parliament for consideration by the Public Investments Committee, prior to debate on the Bill.
- c) There is need for an independent audit to determine the true value of KQ and an analysis by financial experts on whether it can feasibly be operated as a going concern. There is an imminent risk that there may be pilferage and loss of public funds- especially given the debt situation of the airline should nationalization and merger will proceed unchecked.
- d) KQ should make full disclosure of all businesses and operations that it intends to undertake under the new arrangement.
- e) There should be full disclose and determination of the extent to which contracts, permits, leases, and other legal obligations and operations will be affected; especially those involving third parties.
- f) There should be clear provisions in the Bill on the appropriation and utilization of funds paid into the Aviation Corporation Fund.
- g) There is need for clear safeguard measures to address issues of competition and aviation regulation as guided by ICAO. These should be tabled before parliament for scrutiny.

#### **16. Employment Issues:**

- 16.1. While Clause 54 of the Bill provides for a transfer of all employment contracts to the newly formed entities, there is need for a clear analysis (which would be provided by a Policy Paper preceding the Bill) on the effect that the merger is likely to have on employees including redundancies expected and/or new jobs to be created, if any. Furthermore, the rights of employees of KAA who are currently employed by a financially stable corporation and who are now proposed to be transferred into a potential loss-making aviation Group ought to be safeguarded. Moreover, even if the resultant company were to turn a profit, would it be proper and just to dismiss long-suffering employees who have sustained the company through its years of hardship without due consideration? This would be contrary to the conventional wisdom of nationalization, which is to prevent unfair exploitation of employees and large-scale job losses.

#### **17. Competition Laws**

- 17.1. It is not clear that the current proposed Bill promotes the spirit and objectives of the Competition Act, which are set out in Section 3. The aim of the Act is to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya, in order to:
- a) increase efficiency in the production, distribution and supply of goods and services;
  - b) promote innovation;
  - c) maximize the efficient allocation of resources;



- d) protect consumers;
- e) create an
- f) environment conducive for investment, both foreign and local;
- g) capture national obligations in competition matters with respect to regional integration initiatives;
- h) bring national competition law, policy and practice in line with the best international practices; and
- i) promote the competitiveness of national undertakings in world markets.

17.2. The proposed re-nationalization and merger do not appear to promote objectives (d), (e), (f), (g), and (h) above.

17.3. The Competition Act applies to all persons including the Government, state corporations and local authorities in so far as they engage in trade. The Competition Authority is mandated to "study government policies, procedures and programmes, legislation and proposals for legislation so as to assess their effects on competition and consumer welfare and publicise the results of such studies"<sup>17</sup>

17.4. Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya are prohibited by the Act.<sup>18</sup>

17.5. It is highly likely that the effect of the KAA and Kenya Airways merger would result in reduction or at least distortion of competition in the aviation sector in Kenya. There should be separation of roles of the KAA as a semi-regulator which controls the aerodrome facilities at the airports with an entity which makes use of the said facilities so as to ensure fairness to other players in the sector. By allowing an airline to operate aerodrome operations, it gives it an unfair advantage over their competitors, a position that is contrary to Competition Policy.

17.6. The issue of competition is widely highlighted by IATA. According to IATA strong, robust, independent and effective economic regulation is necessary to protect airlines and their

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<sup>17</sup> Section 9(1)(h) Competition Act

<sup>18</sup> Section 21(1)



passengers from airports' and air navigation services providers' abuse of their dominant position.

#### **18. Effect on Small and Medium Businesses (SMEs)**

18.1. The incorporation of an Aviation Holdco with 100% interest in KQ and KAA constitutes a merger under the Competition Act 2010. The merger meets the financial threshold prescribed, and therefore requires approval from the Competition Authority through a Gazette Notice. Lack of such an approval invalidates the proposed transaction. Among the Authority's consideration in granting approval or conditions for a merger approval are: (i) the extent to which the proposed merger would be likely to prevent or lessen competition acquiring a dominant position in a market or strengthening a dominant position in a market; and (ii) and assessment of the impact on the ability of small undertakings to gain access to or to be competitive in any market.

18.2. The Aviation Investment Corporation established by Clause 29 of the Bill has the powers to carry on business with respect to aviation training schools, maintenance and repair, aircraft handling, flight catering, aviation medical services, tour and holiday management services and other businesses incidental thereto. These activities are currently undertaken by various small businesses who are tenants of KAA. Incorporation of a new entity as a subsidiary to KAA's Holdco to take over these activities will effectively drive the small and medium enterprises out of business. Clause 33 allows the Board to establish additional operating entities via proposed legislative amendments- this means that the objects of the State corporation and the services it could take over are essentially unlimited. This may be used to predate on any new entrants to the aviation sector who are profitable.

18.3. The merger will have the effect of strengthening KQ's already dominant position in the airline sector. Undue concentration of economic power may have a detrimental impact on the economy which out-weighs any advantages to be gained.

#### **18.4. Recommendations**

- a) There should be full disclosure on how the current nationalization and merger promotes and/or protects effective competition or prevents unfair conduct that may result in a dominant market position in the aviation sector in Kenya.



- b) The Competition Authority should exercise its mandate to investigate the effects of the proposed Bill on Competition Laws and publish its findings which should inform Parliament in debating the Bill.

## 19. Public Participation

- 19.1. As highlighted above, public participation is a key tenet in the law-making process; both under the Constitution of Kenya 2010 and Standing Orders 120-139 of the National Assembly Standing Orders.
- 19.2. Article 201 (a) of Constitution of Kenya requires that there should be openness and accountability, including public participation in financial matters.
- 19.3. The Constitution further states in Article 232(1) (d) & (f) that the values and principles of public service include the involvement of the people in the process of policymaking and transparency and provision to the public of timely and accurate information
- 19.4. Kenyan Courts have interpreted legal provisions and affirmed the primacy of public participation in the legislative process as follows:
- a) In the case of ***the Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 15 Others (2015) eKLR*** the appropriate threshold for public participation was stated to be that which *"accords with the nature of the subject matter, is innovative, enables access to relevant information, is inclusive and does not usurp the role of the office holders of an authority."*
- b) ***In Robert N. Gakuru & Others vs. County Government of Kiambu County (2014) Eklr*** it was held that public participation should be real both quantitatively and qualitatively and not merely a formality for the purposes of fulfilment of the Constitutional dictates. The court further stated that where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous.
- c) ***In Mui Coal Basin Local Community & 17 Others v Permanent Secretary Ministry of Energy & 15 Others [2015] e KLR***. *Rather that there ought to be evidence of "intentional inclusivity" in the participation program and which, on the face of it, took into account the principle that "those most affected by a policy, legislation or action must have a bigger say: and their views more deliberately sought and put into account..... In the final analysis, the rule of the thumb is that a reasonable opportunity is given to the public and all interested parties, with timely access to information that is relevant to a process of legislation to facilitate the appreciation of the issue for consideration, and an opportunity to make a response"*
- d) To afford the public unrealistic period to air their views, in view would defeat the spirit of Article 10 and render it a dead letter of the law. *This was the judgement of the Court of Appeal in Martin Nyaga Wambora v County Assembly of Embu & 37 others [2015]*



eKLR. The court, citing the determination from the High Court, emphasized the need to consider reasonableness in the circumstances in making a determination whether there has been compliance with the duty to facilitate public participation: "The factors that would determine reasonableness would include the nature of the business conducted by legislative body and whether there are timelines to be met as set by the law." Insufficient time for public participation and failure to disseminate information relating to the business under consideration amount to meet the requisite constitutional threshold for public part.

19.5. In the circumstances, the 5 day period accorded to citizens to air their views on the proposed Bill<sup>19</sup> concerning nationalization of a debt-ridden private entity does not meet the Constitutional threshold of public participation required in law making because: (i) there is lack of information on the government policy informing the Bill and (ii) the financial implications of the transaction are obscure.. Furthermore, the timing of the Bill at the time when the country- and the world in general- is faced by the ongoing COVID-19 pandemic is suspect and appears to be geared towards limiting the level and quality of public participation in this Bill.

## **20. Irregular Amendments to Other Laws – Amendment of the Public Procurement and Asset Disposal Act and the Companies Act Constitutional Requirements**

20.1. Article 227 of the Constitution requires that public entities should conclude contracts for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The Public Procurement and Asset Disposal Act, 2015 operationalizes the Article by providing a framework and policy on procurement and disposal of public assets. In particular, Sections 68(3), 125(5), 138, and 179 of the Act provide for: transparency of the procurement process including requirements for procuring entities to publicly avail procurement records after closure of proceedings, publicise notice of intention to enter into contract on websites and public notice boards, publish, and publicise all contract awards.

20.2. Any law that is inconsistent with the constitution is void, to the extent of the inconsistency<sup>20</sup>

20.3. The amendment to section 4 of the Public Procurement and Asset Disposal Act 2015 to provide room for exemption of a state organ or public entity from the application of the Act by a Cabinet Secretary opens room for abuse and disposal of public assets cheaply and in an opaque manner as they will not be bound by principles of value for money and open tendering that are stipulated under the Act. There are wider public interest concerns that are protected by the Constitution and thus a public entity cannot opt to procure out of the legal requirements.

20.4. It is concerning that the Bill purports or attempts to amend other enacted statutes that are not necessarily related to it in a manner that unduly and unreasonably expands the subject of the Bill and in a manner that is not appropriate or in logical sequence to the subject matter of the Bill. In this case the subject matter of the Bill is nationalization of the airline and the

<sup>19</sup> Publication in the Daily Nation on 2<sup>nd</sup> of July 2020 with a submission deadline of 8<sup>th</sup> of July 2020

<sup>20</sup> Art 2(4) of the Constitution



establishment of an institutional framework to realize this. Yet, other amendments such as the one highlighted above of the Public Procurement and Asset Disposal Act are sneaked in contrary to the law. This amendment would have far reaching implications on other unrelated entities. In our view, this attempt is contrary to Standing Order 133(5) of the National Assembly Standing Orders which read: *'No amendment shall be permitted to be moved if the amendment deals with a different subject or proposes to unreasonably or unduly expand the subject of the Bill, or is not appropriate or is not in logical sequence to the subject matter of the Bill'*.

20.5. The Bill also rather surreptitiously exempts the three operating entities (KA, KAA and Aviation Investment Corporation) as well as other state-owned entities or parastatals from complying or being bound by the Companies Act 2015 which is the main framework relating to corporations; thereby presenting a danger of a breach of corporate governance procedures and violating transparency requirements.

#### 20.6. Recommendation

a) Deletion of Schedule 2 whose effect is unconstitutional.

#### 21. Dissonance with International Obligations

Pursuant to Article 2(5) of the Constitution of Kenya, International Treaties that have been ratified by Kenya form part of Kenyan law.

##### Chicago Convention

21.1. The Convention on International Civil Aviation (the 'Chicago Convention') contains various guidelines on Competition. Under the Convention, states commit to the development of international civil aviation in a safe and orderly manner and establishment of international air services on the basis of equal opportunity.

21.2. The Convention calls upon State Parties to ensure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airline. It further seeks to avoid discrimination between contracting States.

21.3. ICAO Assembly resolutions encourage Member States to incorporate the basic principles of fair and equal opportunity to compete, non-discrimination, transparency, harmonization, compatibility and cooperation set out in the Chicago Convention and embodied in ICAO's policies and guidance in national legislation, rules and regulations, and in air services agreements.<sup>21</sup>

21.4. States are called to bear in mind that provision of State aids/subsidies which confer benefits on national air carriers but are not available to competitors in the same market may distort trade in international air services and may constitute unfair competitive practices.<sup>22</sup>

##### Yamoussoukro Declaration

<sup>21</sup> In A38-14, Appendix A, Section V, operative clause 2,

<sup>22</sup> ATConf/4: Agenda item 2.3 Part II



21.5. The **Yamoussoukro Declaration** addresses the liberalization of access to air transport markets in Africa. It provides that *State Parties shall ensure fair opportunity on non-discriminatory basis for the designated African airline, to effectively compete in providing air transport services within their respective territory.*<sup>23</sup>

21.6. Kenya is required to uphold the letter and spirit of the International law in making domestic laws. The proposed nationalization of KQ which allows the state to inject additional capital to the airline and the proposed merger of an airline and an aerodrome manager of the major international airport in the country raises concerns that KAA may give preferential treatment to KQ in aerodromes management amongst other unfairly favorable contractual terms which would be in violation of international obligations,

#### 21.7. Recommendation

- a) That the proposed merger should not be implemented since there's a perceptible risk that this will give rise to situation of conflict of interest and a breach of Kenya's international obligations on ensuring fair and equal opportunity, transparency and non-discrimination to other players in air transport services.

## 22. Potential for Triggering International Disputes

22.1. There is no doubt that the Kenyan government can nationalize Kenya Airways as long as the acquisition is for a public purpose, complies with due process, is not discriminatory and reasonable compensation is paid. Since the current proposal to nationalize Kenya Airways does not meet this criteria, any aggrieved foreign Kenya Airways shareholders could challenge the proposed nationalization and (de) valuation of their shareholding/compensation for the government acquisition in an international forum under a Bilateral Investment Treaty (BIT), if their country of origin or incorporation has a valid BIT with Kenya. Kenya is party bilateral treaties, intended to promote investment by providing various protections to international investors. Such treaties generally provide that in the event of lawful expropriation, the host state must pay "prompt, adequate and effective" compensation. The Bill as currently drafted does not clearly determine how this compensation will be determined. Under such bilateral treaties, a disgruntled investors can bring claims against Kenya, outside the country and governed by international law. The government cannot rely on its own legislation including this Bill, if its actions are inconsistent with such treaties.

22.2. For example KLM which is a significant shareholder in KQ, is the flag carrier airline of the Netherlands. On the assumption that KLM is deemed as being incorporated in Netherlands and hence its home state is Netherlands, then it can bring an Investor-State Dispute based on a treaty-based breach. Kenya has an existing BIT with the Netherlands which was signed in 1970 and entered into force on 11<sup>th</sup> June 1979.

22.3. Several other foreign investors could also file claims under relevant BITs that apply to them. If foreign investors feel mistreated by the government here, that will be likely to trigger

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<sup>23</sup> Article 7



hundreds, if not thousands, of claims against Kenya, for which the Kenyan taxpayers will pay the price. The long-term consequences are equally troubling since the appeal of the Kenyan economy as a stable investment destination will be damaged to the advantage of the same regional competitors that are being blamed for KQ woes in the aviation industry.

22.4. Moreover, the current nationalization may be in conflict with investment protection measures in Free Trade Agreements (FTA) that have either been signed or are under negotiation, thereby scuttling negotiations or triggering potential international disputes for agreements in force.

22.5. **Recommendations:**

- a) The Government should disclose the international agreements that concern the current nationalization process and provide a guarantee that its existing international obligations and current FTA negotiations are not impugned by the nationalization process; and
- b) The proposed nationalization and merger should put in place measures to ensure that the Aviation Corporation entities transactions do not infringe on its international obligations on ensuring fair and equal opportunity, transparency and non-discrimination to other state partners in air transport services.

**23. International Best Practices**

23.1. While airport and airline ownership generally rests on the state, management tends to be independent of state control. Ethiopian Airlines, which is wholly owned by the Government of Ethiopia, has traditionally been unfettered by government intervention, even during times of significant turmoil and domestic hardship.

23.2. Over the last few decades, there has been progressive movement globally towards commercialization and corporatization of airport management and private sector involvement. The Initial PIIP by KQ was premised on this trend and made a proposal for privatization of the operations of KAA through a concessionary agreement. Privatization of Airports through concessionary agreements, based on numerous case studies in Europe, Brazil, Japan and China, has proven to be the most efficient mode of airport management, leading to increased passenger traffic and spurring economic growth in the respective countries<sup>24</sup>. The only downside to the PIIP was that it was made by an airline operator with huge losses resulting from mismanagement and no previous experience in the field of airport management.

23.3. According to Airports Council International (ACI), there is a strong case for privatization of airports since it provides higher operational efficiency as well as better service standards for the users and end-users. *Privatization can alleviate the State burden for airports development and transfer risks to the private sector. But most importantly, privatization represents a solution to gain capitals from external sources for infrastructure investments. It*

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<sup>24</sup> Steer Davies Gleeve 'Study on airport ownership and management and the ground handling market in selected non-EU countries'



*is a policy that enables airport development which, in turn, facilitates the economic development of a region.*

- 23.4. There is enough evidence supporting the thesis about private companies being more successful in managing corporate assets and assuring high standards of customer service. Private companies not only seek for the efficient sources of financing investments but are also profit-oriented. The profit motive is a natural incentive for effective costs management and ambitious revenue generation, especially outside the traditional aeronautical domain on the commercial side.
- 23.5. The proposed merger is therefore not only against best management practices based on global studies, it also denies KAA a chance to enter into similar concession agreements with better placed independent international companies, which would inject much needed capital to the Authority without recourse to public funds.



**Part III - SUMMARY AND RECOMMENDATIONS:**

23.6. Having considered the process leading to drafting of the Bill, its specific provisions and effects thereof, it is our opinion that there are significant constitutional, legal and public policy issues arising which militate against the consideration of the Bill. These concerns therefore make a strong case for the shelving of the Bill. .

23.7. These can be summarized as:

- a) Failure to follow due process in making of the Bill, including having a policy paper informing nationalization;
- b) Lack of adequate information/ transparency on the nationalization and proposed merger;
- c) Failure to meet constitutional thresholds of public participation in law making.
- d) Failure to adhere to established principles of public finance management;
- e) Failure to conduct a comprehensive feasibility study on the financial viability of the nationalization of KQ and its Merger with KAA;
- f) Failure to adhere to competition law and policy;
- g) Potential for infringement on International Obligations; and
- h) Illegalities arising from unlawful/irregular amendment of other Laws.

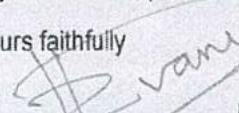
23.8. We therefore recommend that:

- a) The Bill should not be passed. It should be rejected in its entirety.
- b) In the event the Government is minded to proceed with nationalization of Kenya Airways, then a suitable Policy paper giving clear justification based on the financial implications, effect on competition, employment, international laws and the aviation sector in Kenya as a whole should be tabled in Parliament to enable effective public participation on the matter.
- c) The proposed merger of KAA and KQ should not be implemented since it is not in the public interest, gives rise to conflict with international obligations, and goes against international best practices.

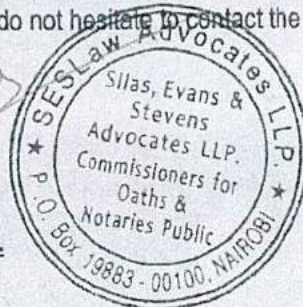
We will be glad to be given an opportunity to appear before the Committee on Transport, Public Works and Housing of the National Assembly to clarify our comments. We are available whenever called upon to make a presentation.

In the meantime we would like to register our gratitude for the opportunity to give our views on the proposed Bill which touches on one of the most important sectors of our economy. Should you require any clarification, please do not hesitate to contact the undersigned on [evans@seslaw.co.ke](mailto:evans@seslaw.co.ke).

Yours faithfully

  
Evans Lagat, FCI Arb.

MANAGING PARTNER.







*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

# **11. Kakai Mugalo Advocates**



The Clerk,  
National Assembly of Kenya  
Parliament Buildings  
PO Box 41842-00100  
NAIROBI, Kenya  
Tel: 254 2 2221291 or 2848000  
Fax: 254 2 2243694  
E-mail: clerk@parliament.go.ke

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①  
Committee relevant  
for attention of members  
22/9/20  
11<sup>th</sup> September 2020



cc: Hon. David Losiakou Pkosing,  
Departmental Committee of Transport, Public Works & Housing  
National Assembly of Kenya  
Parliament Buildings  
PO Box 41842-00100  
NAIROBI, Kenya



Dear Sir,

### PETITION TO THE PARLIAMENT OF KENYA

UNDER ARTICLES 37 AND 119 OF THE CONSTITUTION, PETITION TO PARLIAMENT (PROCEDURE ACT No. 22 of 2012), AND STANDING ORDERS 219, 223 OF THE NATIONAL ASSEMBLY ON THE PROPOSED NATIONAL AVIATION MANAGEMENT BILL, 2020

**WE THE UNDERSIGNED PETITIONERS,**

Citizens of the Republic of Kenya representing dozens of commercial air operators of Kenya, their passengers, their employees, their suppliers, airport service providers other individual stake holders including travel agents, taxi drivers, hotel operators and clearing and forwarding agents;

**DRAW THE ATTENTION OF THE NATIONAL ASSEMBLY TO THE FOLLOWING:**

②  
TUNGO/SALIR  
Please clear  
FAA  
22/9/20



1. **THE NATIONAL AVIATION MANAGEMENT BILL, 2020** (The Bill) which is presently at the Committee stage and due to go under consideration of Kenya's parliament for first and second readings; and whose objective is to formulate a legal framework for the nationalization of Kenya's flag carrier Kenya Airways PLC (KQ) after establishment of the National Civil Aviation Council that is intended to oversee the creation of a new outfit, Kenya Aviation Corporation (KAC).
2. KQ has faced extremely turbulent times including rising debt, annual losses on end and employment disputes, factors which have all limited its capacity to compete internationally. Kenya's Parliament voted to nationalize KQ perhaps looking at the model of Ethiopian Airlines and Emirates which seem to be doing well and hoping that nationalization will prop up the fortunes of the airline.
3. Around the globe, there are discussions by numerous stakeholders for the nationalization of airlines within their jurisdictions, supposedly to help them survive the adverse effects of COVID 19 pandemic. This global discourse appears to have accelerate KQ's nationalization plans and given birth to The Bill.
4. We strongly oppose the enactment of this bill into law because while The Bill purports to seek/restore KQ's profitability and bring growth in aviation sector, that law also unwittingly creates a monopoly that has far reaching implications for the entire aviation industry players totally whom it leaves at the mercy of Kenya Aviation Corporation thus putting to risk the future of thousands of private businesses and hundreds of thousands of jobs.
5. While appreciating parliament's role in law making, the greatest stakeholders in the domestic air travel industry, are greatly concerned that.
  - 5.1 The Transport Committee allegedly held six (6) meetings with stake holders but opted/avoided the primary stakeholders who are representatives of the local air operators and related industry players.
  - 5.2 The Transport Committee rushed through its public participation which was not advertised and conducted in accordance with the lawful provision of the public participation laws and the constitution of Kenya.
  - 5.3 The Transport Committee neglected the need to seek expert opinion in attempting to create laws that would have far reaching impact on the aviation industry not just in Kenya and regionally, but globally too.

5.4 As a result of the omissions of the Transport Committee, we find that several provisions of The Bill are ill-defined while others are openly in conflict with existing laws.

5.5 We will seek to clarify all these issues plus others.

5.6 We pray that the Honourable Members of Parliament throw out this legislation in totality and explore other methods of reforming the Aviation sub-sector.

6. The aviation industry and its related subsectors such as tourism and logistics are characterised by highly competitive environment in which private sector is able to achieve many competitive advantages for benefit of the national economy. The Bill, however, makes public entities to be active participants within the sector and hands them sweeping regulatory powers over the industry. In the absence of effective synergy between the public and private entities in the sector, Kenya's economy is likely to take a beating due to lack of efficiency and sustainability in the areas of tourism and logistics. Additionally, The Bill could significantly decrease foreign investment in Kenya.

6.1 The enactment of the bill as is will result in loss of revenues which will induce mass layoffs due to the collapse of many private operators and related industry players, a development that runs counter to government policy of jobs.

6.2 The resulting deflationary spiral effect of the economic crisis will inevitably affect tourism and other related industries exacerbating an industry struggling to recover from the effects of the COVID-19 crisis.

7. We have noted that in the Bill, a holding company to be known as Kenya Aviation Corporation (KAC). Kenya Aviation Corporation will be at the apex of a group of presumed operating entities (the KAC Group) that will acquire the functions of KQ following nationalization. Kenya Aviation Corporation will hold shares in the operating entities (a) Kenya Airways (KQ); (b) Kenya Airports Authority (KAA); and (c) Aviation Investment Corporation (AIC).

7.1 The relationships between these operating entities; some of which are presently private companies; is not defined with respect to their functions.

7.2 Another question that arises is the recreation of Kenya Airports Authority as a government entity, yet it is already a profitable government entity. What is the rationale?



8. **SECTION 4**, Sub-section (c) KAC is presupposed to oversee increased competitiveness of the industry, and under sub-section (e), to be responsible for efficiency in management and allocation of funds relating to the group.

8.1 For all intents and purposes, this function will not be attained in a market that resembles a monopoly.

8.2 Basic principles of macroeconomics have proven that a monopoly is undesirable and is often responsible for straining competition and worsening resource allocation.

8.3 Members of Parliament need to seek technical advice from macro-economic experts who will shed more light to this reality.

9. **SECTION 5** establishes the National Civil Aviation Council (NCAC) whose role will be to create a link and encourage cooperation between the aviation sector and the other critical sectors of the economy. It will also assess and appraise Kenya's actual and potential civil aviation capabilities. Members of NCAC will be senior government officials, namely: the President, cabinet secretaries responsible for transport, internal security and National Treasury, Attorney General and Kenya Air Force Commander.

9.1 How can NCAC be entirely responsible for "civil aviation" when all its members are government and military, with no representation from Civil Aviation industry players.

9.2 Without the expertise of Kenya Civil Aviation Authority (KCAA), NCAC exposes itself to serious contradiction with international law and particularly the International Civil Aviation Organization (ICAO) which is a specialised agency created under United Nations charter to which Kenya is a signatory.

9.3 Consequently, under sub-section (b), due to a membership dominated by public servants, the NCAC has membership that lacks technical or professional expertise to effectively discharge the full mandate under this sub-section.

9.4 Furthermore, The Bill is totally silent on the future role of KCAA and because it takes over most of the functions of KCAA, there is bound to be conflict of roles resulting to confusion in the aviation industry.

9.5 As stakeholders, we hold the view that KQ, KAA and possibly KCAA being government entities will have no option but to support the enactment of this Bill regardless of its long term adverse effects.



**10. SECTION 6** establishes the holding company to be known as Kenya Aviation Corporation (KAC).

10.1 The powers handed to Kenya Aviation Corporation through The Bill ie subsection (b) to purchase and dispose of assets, some of which are leased in the long term or held in trust on behalf of the public, needs clarity. Will Kenya Aviation Corporation be subject to public procurement and asset disposal laws?

10.2 Sub-section (d) gives Kenya Aviation Corporation powers to borrow and to lend money. Again, under what law will this be regulated to protect public interest? Is Kenya Aviation Corporation a financial institution as defined under the Banking Act

10.3 The entire Section 6 needs independent oversight and cannot be left to the board of the hold company due to conflict of interest created in members of operating entities also serving in the board of the holding company.

**11. SECTION 7** which lists the functions of KAC

11.1 The broad functions of KAC mirror those of KCAA, yet the Bill is silent on the fate of KCAA and its compatibility with the Kenya Civil Aviation (Amendment) Act 2002. KCAA is solely responsible for regulating the aviation industry in Kenya as well as for providing air navigation services in the Kenya flight region. KCAA also offers training in the aviation professions through its affiliated East African School of Aviation. Either the Kenya Civil Aviation (Amendment) Act 2002 be repealed, or the Bill be suspended until the fate of KCAA is clearly clarified.

11.2 The role of KCAA and its technical capacity cannot be replicated by the Kenya Aviation Corporation in the form prescribed in the Bill. There are significant regulatory issues touching on its legal mandate on the global stage as well as its technical role in ensuring aviation safety.

**12. SECTION 8** which outlines the composition of the boards of directors of KAC is replete with a stark case of conflict of interest. The new KQ will be in competition with local and international air operators, yet the new KQ CEO will sit the KAC board which wields immense regulatory powers over the aviation sector. These powers can be used to advance the interest of KQ while also suppressing those of competitors.

**13. SECTION 9** outlines the scope of the functions of the board of KAC.

- 13.1 Sub-section (d) gives the board powers to implement government strategy in relation to the national aviation sector. Our question is; what will be the framework used to develop this government strategy and who will be the players involved?
- 13.2 The interests of private operators are obviously not considered in unilaterally giving this important function solely to the Board of KAC. This oversight exposes the aviation industry to operational problems and puts the entire sub-sector at risk of collapse.
- 13.3 Sub-section (m) further gives the board of KAC powers to determine user charges. The users are not defined. The framework to be used in determining these charges is also not defined. All the other industry stakeholders who will determine the success and/or the failure of the subsector are totally ignored in what is perhaps the most important element that determines profitability in the industry. We find this totally unfair and unacceptable.
- 13.4 In a market that has local and international air operators, KQ can easily exploit this open-ended power to frustrate viability and profitability of its market competitors by imposing unreasonable user charges.
- 13.5 In a free market economy like Kenya, the principle of fair competition demands that all the players operate on a level playing field. In this case, aviation businesses base their competitive practices on price, quality and customer service. It is the only way the Kenyan aviation sector can become globally competitive compared to similar sectors in the region. Our question is, what stops KAC abusing their monopolistic powers to drive off competitors from the market?
- 13.6 Kenya has over 200 Air Operator Certificate holders unlike Ethiopia, Emirates and Qatar.

**14. SECTION 11** provides qualification for appointment as KAC board member.

- 14.1 Sub-section (c) rules out appointment of independent directors to the board if they hold a position of conflict of interest. Why does this discriminative provision not apply to all members of the board and specifically the new KQ CEO who is a competitor in the aviation sector?



14.2 It is also possible that this Board can award itself excessive perks and salaries, engage in insider trading, or misappropriation of assets, and neglect of duties if the structure proposed in the Bill remains as is.

**15. SECTION 12** dwells on the functions of the CEO of Kenya Aviation Corporation.

15.1 Sub-section (b) gives the CEO powers over the management and operations of the Operating Entities. In a classic case of contradictory provisions in the Bill, the CEOs of the Operating Entities also oversight the Kenya Aviation Corporation CEO as members of the Board of Kenya Aviation Corporation. The CEO of the Kenya Aviation Corporation is likely to be a lame duck and a puppet due to overhead board powers in the hands of those he or she is expected to oversight. This goes against the principals of good governance which demands for a separate board of directors for subsidiary companies.

15.2 Further contradiction is found in sub-section (e) which mandates the Kenya Aviation Corporation CEO to ensure the board's policies and guidelines are communicated to the operating entities whose CEOs are members of the Board of Kenya Aviation Corporation.

15.3 Because of the structuring of the board of Kenya Aviation Corporation which has members drawn from operating entities, the oversight function is greatly compromised and shall not be effective in ensuring operating entities conduct themselves in accordance to required standard, or achieve expected results or deliver good value for public money.

**16. SECTION 14** provides for the removal of the CEO of Kenya Aviation Corporation through the consensus of the board. However, within this Bill, nothing stops the CEOs of the operating entities from removing the KAC CEO through conspiracy.

**17. SECTION 18** provides for conflict and disclosure of interest within the board of KAC.

17.1 Sub-section (2) indirectly allows members of the board to trade with the new KAC. For any public entity, this goes against the principles of good governance and does not insulate the public against rogue members who may take advantage of their position on the board to benefit themselves inappropriately or unfairly.



**18. SECTION 26 AND SECTION 27** establishes the new Kenya Airports Authority (the new KAA) whose functions shall be, among others to construct, own, operate and maintain aerodromes and related services. These functions mirror to a large extent the functions of the Kenya Airports Authority established under the Kenya Airports Authority Act (CAP 395 of the Laws of Kenya) (KAA);

18.1 Sub-section (i) allows KAA to borrow and lend money in the ordinary course of its business subject to the limit provided by the National Treasury. What is the legal framework for this arrangement? For instance, who determines where to borrow/lend from/to, at what interest rates, and at what grace periods? This provision is potentially at risk of abuse and a loophole to exploit tax payers money.

18.2 KAA is currently the only profit-making entity of the proposed entities. What is the framework put in place to safeguard KAAs fairly-earned and publicly-owned revenues from being absorbed to pay the new KQs privately-acquired debts that were the result of poor management?

**19. SECTION 30** gives the new Aviation Investment Corporation broad functions including undertaking businesses in relation to aviation activities and any other business related to or ancillary to the aviation sector in Kenya as proposed in detail in the Bill.

19.1 Sub-section (b) introduces the element of unfair competition by allowing the new KAA to engage in commercial activities within the airports while at the same time acting as the overall management authority of the same airports. Monopolistic and anti-competitive practices usually serve to suppress competition and has far reaching effects on the competitiveness of airports in Kenya as compared to regional airports.

**20. SECTION 33** provides that AIC may independently and directly propose legislative amendments to the Cabinet Secretary for the establishment of additional operating entities in the aviation subsector.

20.1 Unfortunately, contrary to established norms, this provision does not mandate AIC to seek public participation or the input of industry stakeholders while making such proposals to the Cabinet Secretary as provided in the constitution.

21. SECTION 38 provides that operating entities shall determine user charges but prior to such determinations, shall publicize the proposed user charges and shall take into consideration the views of the users of its charges.

21.1 The Bill is vague in this provision and open to abuse. Fees and charges constitute a key success factor in the operation of private entities. The Bill should establish a fair frame work for setting user charges with the full participation of all stakeholders.

22. Without a competitive aviation sector in Kenya, mass international travel & tourism and global supply chains will not effectively function. Tourism and horticulture are the two leading foreign exchange earners in Kenya and some of its biggest employers. Saving KQ at the expense of significant sectors of the economy will not augur well for the government of Kenya.

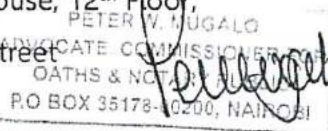
23. Essentially, the scarce resources which could otherwise have been reinvested in improving public services will now be diverted away to pay dividends and boardroom rewards for multiple operating entities. Added to this will be government bureaucracy which will hamper efficiency in a sector that is recovering from a serious economic downturn.

24. Under the second schedule, the definition for state corporation, which also includes the operating entity subsidiaries, is vague and open to abuse as it may create state corporations through the back door.

Kakai Mugalo Advocates

Corner House, 12<sup>th</sup> Floor,

Kimathi Street  
Nairobi



[info@kakaimugaloadvocates.co.ke](mailto:info@kakaimugaloadvocates.co.ke)

21<sup>st</sup> September 2020



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*Written Submissions Received by the Committee*

## **12. The Law Society of Kenya (LSK)**



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③ TUNGIO

Please note CNA remarks and prepare the brief on the Bill FTA 03/09/20



Law Society of Kenya

Hon. Justin E. N Muturi, E.G.H  
Speaker of the National Assembly  
Parliament Buildings  
P.O. Box 41842-00100  
NAIROBI.

① Noted.  
CNA to advise.

Bill SNA  
2/9/2020

Lavington, opp Valley Arcade, Gitanga Road  
P.O Box 72219-00200 Nairobi, Kenya  
Dropping Zone -149 Embassy House Basement  
Tel: +254 709 087000/720 904983  
Website: www.lsk.or.ke  
Email: lsk@lsk.or.ke

Our Ref: 5/20

Your Ref: TBA

Date: 18<sup>th</sup> August, 2020

①  
② Draft  
to final

Dear Sir

**RE: LACK OF ADEQUATE PUBLIC PARTICIPATION OF THE NAIROBI AVIATION MANAGEMENT BILL, 2020**

Reference is made to the above subject matter.

As you are aware, public participation is a core and non-derogable value in the law-making process set out under Articles 10, 118, 124, 201 and 221 of the Constitution of Kenya, 2010 and the National Assembly Standing Orders 120-139. Public participation in the making of law, gives rise to the sovereign will of the people and generates many benefits including more citizen empowerment, enhancing citizen-government relations, generation of diverse and innovative ideas, among others. This duty is more onerous in matters involving public finance and expenditure of taxpayers money. The Courts have also in a number of judicial decisions pronounced and affirmed, the need for public participation to be conducted in the legislative business of Parliament, in the manner conceptualized in the Constitution.

Chronology of public participation undertaken on the Bill. at

We however note with concern that the Nairobi Aviation Management Bill, 2020 which is currently before the Departmental Committee on Transport, Public Works and Housing for consideration, fails to meet the dictates of the Constitution and the thresholds prescribed by Courts, on public participation.

This is demonstrable by the fact that a notice inviting memoranda from the public, was published in respect to the Bill together with another Bill, the Social Assistance (Repeal) Bill, 2020, in the Newspapers, on 2<sup>nd</sup> July 2020, requiring members of the public to submit their representations interestingly within 5 days.

3/9/20

- Nelson Havi (President), Carolyne Kamende (Vice-President)
- George Omwansa, Herine Kabita, Roseline Odede (General Membership Representatives)
- Aluso Ingati, Carolyne Mutheu, Faith Odhiambo (Nairobi Representatives)
- Bernhard Ng'etich, Beth Michoma, Esther Ang'awa, Ndinda Kinjili (Upcountry Representatives)
- Riziki Emukule (Coast Representative)

03 SEP 2020





In this regard, the period for submission of memoranda cannot be said to have been adequate time for the public to analyze the Bill and make any meaningful submissions. Indeed, the Courts have in the past emphasized on the need to have a qualitative public participation process without which public participation cannot be said to have been conducted. It is therefore our submission that the five days' notice cannot be said to be one that amounts to public participation within the meaning of Article 118 of the Constitution.


Further, we note that the Committee is hell bent to consider the Bill in a rushed manner that ignores the public participation process. A number of key stakeholders including ourselves who submitted a Memorandum on the Bill, have not to date been given any chance to prosecute the Memorandum, despite the fact that the Bill raises serious and significant constitutional, legal and public policy issues. We have attached the Memorandum that we submitted to the Committee herein, for your information.

Certainly, a public participation process that meets the requirements of the Constitution should be one that ensures that the public have adequate time to submit their views and have been given an opportunity to be heard. In the current scenario, the Committee on Transport has failed to meet the two. Consequently, if the Bill is considered and passed by Parliament without the stakeholders' views being heard and taken into consideration, the Bill will eventually be subject to legal challenge in the Courts.

To this end, this is to request for your intervention for the Committee on Transport, to give an audience to the members of public, who may have submitted any memoranda in relation to the Bill, to be heard. We are in particular requesting that we be given an opportunity to prosecute our memorandum before the Committee, noting that the Bill in question is one that seeks to introduce significant reforms in the aviation industry, which have huge legal implications.

We await your kind consideration of this matter and look forward to your response.

Yours faithfully,

  
**MERCY K. WAMBUA, OGW**  
**SECRETARY/CEO**

Nelson Havi (President), Carolyne Kamende (Vice-President)  
George Omwansa, Herine Kabita, Roseline Odede (General Membership Representatives)  
Aluso Ingati, Carolyne Mutheu, Faith Odhiambo (Nairobi Representatives)  
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Riziki Emukule (Coast Representative)



LAW SOCIETY OF KENYA  
Lavington, Opposite Valley Arcade  
Gitanga Road  
P.O. Box 72219-00200  
NAIROBI  
Tel. 0709 087 000

MEMORANDUM TO THE NATIONAL ASSEMBLY OF KENYA

ON

THE NATIONAL AVIATION MANAGEMENT BILL, 2020

AUGUST 2020

Nelson Havi, President Law Society of Kenya  
Lavington, opp Valley Arcade.  
Gitanga Road P.O Box 72219 - 00200 Nairobi | Kenya  
Tel: +254 709 087 000  
Email: [nhavi@haviandcompany.co.ke](mailto:nhavi@haviandcompany.co.ke) Website: [www.lsk.or.ke](http://www.lsk.or.ke)

Nelson Havi (President), Carolyn Kamende (Vice-President) Herine Kabita, George Omwansa, Roseline Odede (General Membership Representatives) Caroline Mutheu, Faith Odhiambo, Aluso Ingati (Nairobi Representatives) Ndinda Kinyili, Bernhard Ngetich, Esther Angawa, Beth Michoma (Upcountry Representatives) Linda Emukule (Coast Representative)



## INTRODUCTION

The Law Society of Kenya is 17,000 plus member body corporate established by the Law Society of Kenya Act, 21 of 2014. One of its statutory objects as provided for in section 4 of the Act is to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya.

Pursuant to this mandate, the Law Society among other things circulates Bills to its members for comments, collates those comments and engages with relevant arms of the Government including Ministries and Departmental Committees of Parliament with a view to ensuring that any proposed legislation is drafted to achieve its desired goal of promoting the Rule of Law.

The Council is the governing body of the Law Society of Kenya. It comprises a President, a Vice- President and ten other members, all of whom must be members of the Law Society of Kenya. Council members are elected every two years by the members of the Society by means of a secret ballot conducted in accordance with the Law Society of Kenya Act. Currently the Council comprise of:

1. Havi Nelson Andayi (President),
2. Daudi Carolyne Kamende (Vice-President)
3. Herine Akoth (General Membership Representatives)
4. Okenyo George Omwansa (General Membership Representatives)
5. Roseline Odhiambo (General Membership Representatives- Senior Advocate)
6. Muthiani Carolyne Mutheu (Nairobi Representatives)
7. Odhiambo Faith Mony Aoko (Nairobi Representatives),
8. Ingati Aileen Aluso (Nairobi Representatives)
9. Damaris Ndinda (Upcountry Representatives)
10. Bernhard Kipkoech (Upcountry Representatives)
11. Michoma Beth Kemunto (Upcountry Representatives)
12. Adero Esther Angawa (Upcountry Representatives)
13. Emukule Linda Riziki (Coast Representative)

The Law Society of Kenya collates views from its members and consolidates them to a single whole; we present the following comments on the The National Aviation Management Bill, 2020.



## BACKGROUND

National carrier Kenya Airways is grappling with a Sh220 billion debt and needs a government bailout to compete favourably with foreign airlines flying into Nairobi according to a confidential report tabled in the Cabinet. The report, titled Project Simba Memorandum and dated February 20, 2018, paints a desperate picture of an airline, which has no cash flow buffer and whose level of revenue does not allow it to generate positive cash flow. "Kenya Airways board and management wish to warn that without immediate remedial action, the company may revert to technical insolvency," notes the report.

Sources say the report was first handed to President Kenyatta, who then asked Transport Cabinet Secretary, James Macharia to rework it as a Cabinet paper.

It was this Cabinet paper that proposed the running of Jomo Kenyatta International Airport by Kenya Airways (JKIA), abbreviated as KQ, much to the chagrin of the Kenya Airports Authority (KAA) and the aviation workers' union. "Insolvency of the airline will result in the immediate repossession of aircraft and engines by lessors and trigger the \$750 million (Sh74 billion) government guarantee in place on behalf of Kenya Airways," notes the report.

The government issued a sovereign guarantee to local banks that turned their debt into equity, and in the event of KQ's collapsed, they could cash \$750 million (Sh75 billion). Among the proposals given to save the troubled airline is the government buyout of its foreign partner KLM, banks whose debts were turned into equity and minority shareholders.

The government has also been asked to oversee the delisting of KQ, manage its nationalization, and protect it as a national asset. "Kenya Airways should be treated as a national asset... and not a financial one because it is the only carrier interested in the growth of the Nairobi hub," says the report, which was accepted by the Cabinet.

With 60 per cent of business at JKIA derived from KQ, insiders say the airline's collapse would lead to closure of several terminals and reducing the airport to a white elephant. The government is currently the majority shareholder in KQ, with a 48.9 per cent stake.

KQ Lenders 2017 Limited is the second largest shareholder at 38.1 per cent, and KLM the third with 7.8 per cent. The rest is shared out among minority shareholders (2.8 per cent) and KQ employees (2.4 per cent).

“For 17 years, before competition arrived, KQ was one of the most profitable airlines on earth, but this market has dramatically changed. KQ has made mistakes in the past, but we have to either face the competition or copy their model or they will run us out of town,” said the then airline’s CEO, Mr Sebastian Mikosz. In the report He proceeded to warn: “We either change the mandate of KQ or we sink.”

It was the proposal to form a Kenya Aviation Holding Company to operate all airline businesses that sparked a strike after Kenya Aviation Workers Union members downed their tools in protest, arguing that the new arrangement would lead to job losses.

The proposed Kenya Aviation Holdings Company would also run other aviation-related businesses within the airport with the hope of generating more revenue. The report before the Cabinet argued that allowing KQ to run JKIA would create an opportunity for the national carrier to generate more revenue that will be channelled to upgrading both its own operations and those of the airport. The takeover would see KQ set up a maintenance centre that other airlines would pay to use, and give the airline a monopoly over fuel distribution, catering and ground handling services.

The Project Simba team also argued that if the JKIA takeover deal passed, KQ would only run aviation related assets in the airport (runways, terminals, taxiways and car parks) while the rest of the land will remain in KAA’s control.

But Kenya Aviation Workers Union does not think the plan is well-meaning and has sued to block KQ’s proposal. The union argues that the move could be a back-door attempt to privatize JKIA. The Project Simba team, on the other hand, holds that its turnaround plan, if implemented, will see KQ make at least Sh17 billion in profit by 2022.

The other option, the team warned, was to sit back and watch the airline fall to competition. “Our only desire is to emulate the success of our competitors, Ethiopian Airlines, Emirates and Qatar Airways which are all strongly protected by their



governments,” Mr Mikosz said. “It is important to note that, among its competitors, Kenya Airways is the only one that is privately owned, listed, and that doesn’t benefit from airport revenues.”

While suggesting how to revive what was once a coveted airline, the report also shows how the government’s neglect over the years has contributed to KQ’s current predicament. However, having already gone through restructuring over the last two years, KQ still owes Sh220 billion — and is not making as much as it should. “The growing presence of highly subsidized and protected African and Middle Eastern carriers operating into Nairobi has continued to weaken KQ’s ability to improve its revenue earnings,” the report says.

The emerging picture is of an airline literally spending more than it is making. Currently, KQ makes an average of Sh75.8 per seat per kilometer. It, however, spends an average of Sh77.6 on each seat per kilometre.

The Project Simba report also revealed that KQ has at least Sh2.5 billion trapped in bank accounts held in other African countries, but does not specify why the national carrier is unable to recover the “blocked funds”. More so, being cash strapped, the airline is unable to enter fuel-hedging contracts — deals which cap the cost of fuel to avoid the effect of global fuel price fluctuations — with suppliers. Last year alone, KQ spent an additional Sh6.1 billion due to the rise in global fuel prices.

At home, KQ is on a level playing field with competitors, but abroad it does not enjoy the same neutrality offered other carriers by the Kenyan regulators. Ethiopia, Rwanda, Qatar and the United Arab Emirates, for instance, have given tax breaks to their national carriers and given relief to flight bookings done by local agents, which lowers operation costs and, ultimately, ticket prices.

Ethiopian Airlines, KQ’s biggest threat, has taken advantage of its government’s support and bought into national carriers in other countries through strategic deals that have given it an easy time operating outside its own borders. At the moment, data shows that the Kenyan government gives 90 per cent of its cargo business to foreign freighters since KQ operates only two Boeing 737s.



It is against this background that the government seeks through the enactment of the Bill, to legislate strategies (including merger and acquisition and also privatization) to return KQ to profitability, but all these may just be illusions as it will amount to using the appropriation in aid hitherto made by KAA an KCAA to be ploughed back to the airline, that does not logically turn around the airline to profitability.

Even assuming, for argument's sake, that the nationalization is justified, the proposed merger would be fraught with diverse legal and practical hurdles that may be difficult to rationalize as highlighted below. There appears to be an assumption that the revival or profitability of KQ is synonymous with national or public interest. What is the long-term effect of the nationalization of KQ and its merger with KAA on other enterprises that operate at JKIA and to the economy in general? Has there been a comprehensive cost-benefit analysis undertaken to justify the cost to the taxpayer and use of public funds to finance the restructuring? Moreover, it seems that Government embarked on a nationalization process as an afterthought during the Parliamentary inquiry on the PIIP process.

#### GENERAL COMMENTS

Thus, this Bill is premised on Kenya Airways strategy to take over the JKIA in order to enable it return to profitability which is predicated on the Simba report above, that became the Kenya Airways Privately Initiated Proposal (KAPIIP) presented to a parliamentary committee and eventually adopted as a parliamentary report. One would want to see alternative reports by other stakeholders including unionisable workers of the sector and other airlines that use the facility; perhaps they have divergent and more sustainable strategies. The PIIP made by Kenya Airways sought to cure the underinvestment by KAA in JKIA which made the latter less competitive compared to its peer airport facilities. KQ's argument was that less investment by KAA is as a result of diversion of funds. Kenya Airways proposed a number of investments including rehabilitation of taxiways, upgrading of the runways and remodelling of the Terminals, which would increase the overall capacity of the airport in passenger-handling. The recommendations of the Parliamentary Report being nationalization of Kenya Airways and subsequent merger with KAA do not provide a viable solution to the problem



statement presented in the PIIP. In fact, the proposed merger is only likely to result in lower profits for the Aviation Corporation, leaving even less reserves for infrastructural investments at JKIA. For instance, Kenya Airways reported a Ksh.12.9 billion loss for the financial year ended December 2019. This loss would completely wipe out KAA profits of approximately Ksh. 2.5 Billion resulting to a net loss of over Ksh. 10 Billion. This would contribute to joint collapse of both Kenya Airways and KAA. Additionally, the report that precipitated this Bill in itself was not made in a participatory manner, leaving it subjective and this makes the Bill problematic.

There is need for full disclosure of the business dynamics including current shareholding of Kenya Airways as the Constitution prohibits members of National Assembly, from making laws that gives them direct financial benefit. The recommendations by the National Treasury on the financial implications of the proposed formation of a state entity known as Kenya Airways should be tabled before Parliament for consideration by the Public Investments Committee, prior to debate on the Bill. There is need for an independent audit to determine the true value of KQ and an analysis by financial experts on whether it can feasibly be operated as a going concern. There is an imminent risk that there may be pilferage and loss of public funds- especially given the debt situation of the airline should nationalization and merger proceed unchecked. KQ should make full disclosure of all businesses and operations that it intends to undertake under the new arrangement beforehand. There should be full disclosure and determination of the extent to which contracts, permits, leases, and other legal obligations and operations will be affected; especially those involving third parties.

There should be clear provisions in the Bill on the appropriation and utilization of funds paid into the Aviation Corporation Fund. There is need for clear safeguard measures to address issues of competition and aviation regulation as guided by ICAO. These should be tabled before parliament for scrutiny.

The Bill proposes the repeal of KAA but its unionized workers have been opposed to the privatization of Jomo Kenyatta International Airport, this is also against the background of opposition of such move by IATA. The considered opinion of IATA over the report that precipitated the drafting of this Bill is imperative to enable informed

decision. While Airport and airlines ownership generally rests on the state globally, management tends to be independent of state control. Ethiopian Airlines, which is wholly owned by the Government of Ethiopia, has traditionally been unfettered by government intervention, even during times of significant turmoil and domestic hardship.

Over the last few decades, there has been progressive movement globally towards commercialization and corporatization of airport management and private sector involvement. The Initial PIIP by KQ was premised on this trend and made a proposal for privatization of the operations of KAA through a concessionary agreement. Privatization of Airports through concessionary agreements, based on numerous case studies in Europe, Brazil, Japan and China, has proven to be the most efficient mode of airport management, leading to increased passenger traffic and spurring economic growth in the respective countries. The only downside to the PIIP was that it was made by an airline operator with huge losses resulting from mismanagement and no previous experience in the field of airport management.

According to Airports Council International (ACI), there is a strong case for privatization of airports since it provides higher operational efficiency as well as better service standards for the users and end-users. *Privatization can alleviate the State burden for airports development and transfer risks to the private sector. But most importantly, privatization represents a solution to gain capitals from external sources for infrastructure investments. It is a policy that enables airport development which, in turn, facilitates the economic development of a region.*

There is enough evidence supporting the thesis about private companies being more successful in managing corporate assets and assuring high standards of customer service. Private companies not only seek for the efficient sources of financing investments but are also profit-oriented. The profit motive is a natural incentive for effective costs management and ambitious revenue generation, especially outside the traditional aeronautical domain on the commercial side.



The proposed merger is therefore not only against best management practices based on global studies, it also denies KAA a chance to enter into similar concession agreements with better placed independent international companies, which would inject much needed capital to the Authority without recourse to public funds.

Perhaps the biggest issue here is how to privatize such a vital security installation which is also one of the biggest revenue earners to the Republic and leave it in the hands of private commercial entities. The committee should be alive to this inherent danger to state sovereignty should anything go wrong in the hands of private entrepreneurs.

The other intriguing question is whether the tax payers should bail out a partly government owned Airline through secretive manoeuvres which in addition allow eventual exclusive take over and monopoly of an airport that equally serves its competitors. This will run on the face of competition laws. It not clear that the current proposed Bill promotes the spirit and objectives of the Competition Act, which are set out in Section 3. The aim of the Act is to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya, in order to:

- a) increase efficiency in the production, distribution and supply of goods and services;
- b) promote innovation;
- c) maximize the efficient allocation of resources;
- d) protect consumers;
- e) create an environment conducive for investment, both foreign and local;
- f) capture national obligations in competition matters with respect to regional integration initiatives;
- g) bring national competition law, policy and practice in line with the best international practices; and
- h) promote the competitiveness of national undertakings in world markets.

The proposed re-nationalization and merger do not appear to promote objectives (d), (e), (f), (g), and (h) above.

The Competition Act applies to all persons including the Government, state corporations and local authorities in so far as they engage in trade. The Competition Authority is mandated to “*study government policies, procedures and programmes,*

legislation and proposals for legislation so as to assess their effects on competition and consumer welfare and publicise the results of such studies”

Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya are prohibited by the Act.

It is highly likely that the effect of the KAA and Kenya Airways merger would result in reduction or at least distortion of competition in the aviation sector in Kenya. There should be separation of roles of the KAA as a semi-regulator which controls the aerodrome facilities at the airports with an entity which makes use of the said facilities so as to ensure fairness to other players in the sector. By allowing an airline to operate aerodrome operations, it gives it an unfair advantage over their competitors, a position that is contrary to Competition Policy.

The issue of competition is widely highlighted by IATA. According to IATA strong, robust, independent and effective economic regulation is necessary to protect airlines and their passengers from airports’ and air navigation services providers’ abuse of their dominant position.

Generally, this Bill is problematic as it creates amorphous state corporations not specific in number and without specific roles, christened Operating entities; one would imagine that these are going to be conduits for siphoning money from the public. There is no clear accountability structures ascribed to them and they can do business and borrow money from anywhere, this will prejudice our National Strategic Interest, more so at this time when Zambia has to give up its port to China for loans borrowed in Public Interest, we must be very cautious.

In Its current state the Bill is an open platform for creation of omnibus state corporations against the advice of Hon. Abdi Kadir’s task force that championed mergers of state corporations. There is a very big question mark that these proposed entities under the Bill will defeat the purpose for which the report by Kenya Airways was shared with Parliament.

Lastly and candidly, we do not ascribe to the idea of using tax payers’ money to pay for the losses incurred by Kenya Airways for nonstrategic business decisions, Parliament



will be setting a wrong precedent that will not only haunt it for centuries but will also occasion one of the biggest reaps in the history of the Nation.

Conclusively, the Bill is prematurely before the House and its entire matrix should be rethought as it is withdrawn for further consultations.

## SPECIFIC COMMENTS

### Part Two- Creation of National Aviation Council

Clause 5 of the Bill provides for the establishment of the National Civil Aviation Council. The role of the Council is to integrate policies relating to aviation sector and the other sectors of the economy to enable all the national organs and the sectors of the economy requiring access and support of the civil aviation sector to cooperate and work with the sector to ensure the effective performance of its mandate; and assess and appraise, the objectives, commitment and the risks to the country in respect of actual and potential civil aviation capabilities.

We note that the composition of the Council is structured in a similar manner as the National Security Council with the President as the Chairperson alongside high level representation that includes the Attorney General and the Kenya Air Force Commander.

The creation of this Council materializes to nothing as it replicates functional Cabinet Committees that the president can create without legislation. It is our humble recommendation that this part should be deleted or shelved as it adds no value to the Bill. In legislative drafting purpose such shelving is called de-bulking the law. Otherwise the mischief of this provision may only be read against the history leading to the enactment of this Bill.

Further, presently some of the responsibilities proposed to be performed by Council including giving policy direction in the Aviation sector are performed by the Kenya Civil Aviation Authority pursuant to the Civil Aviation Act, 2013, which Bill has neither proposed to amend or repeal. In this regard, we foresee a conflict in discharge of mandates by the Kenya Civil Aviation Authority in view of the proposed establishment of the National Aviation Council. Consequently, we recommend deletion of this entire part of the Bill completely- Clause 5 of the Bill.



### Part Three- Establishment of Kenya Aviation Corporation (Part V and VI)

It would appear that Establishment of Kenya Aviation Corporation is the primary objective of the Bill according to its Memorandum and Objects, however, a detailed reading reveals that it is the veil for the amorphous operating entities, kind of, general purpose unique investment vehicles that are in themselves corporate entities. Any laws that purports to create so many state corporations albeit against advice by the presidential task force on state corporations is problematic.

The architect and the matrix behind it was poorly thought out, and was prematurely put on paper.

We further note that some of the roles assigned to the Kenya Aviation Corporation are currently performed by the Kenya Civil Aviation Authority this includes the role of advising the Cabinet Secretary on the development of the Kenyan aviation sector. In this regard again foresee a potential conflict in the discharge of roles.

We recommend that the drafting should be guided by principle of the rule of law; the law should be predictable, regular and in harmony with other laws and international standards and norms- creation of amorphous bodies in the name of state corporations is irregular and unconstitutional as it does not conform to the spirit of the rule of law.

Our recommendation is that a standalone law for every state corporation called Operating entities should be enacted, separately. This will be in consonance with the state corporation Act.

#### Formation of Kenya Airways as a subsidiary (entity- under aviation Corporation)

Kenya Airways is among the new entities to be created under this law, however, the law is quiet about private commercial interests under KQ as currently constituted- there is completely nothing on redress issues of assets and liability under this statutory succession scheme.

Who will bear the cost accrued by the successor in title to Kenya Air Corporation? Why the losses incurred by private entities should be borne by tax payers? money in hundreds of billions have been marked to it.

Clause 29 of the Bill provides for establishment of the Aviation Investment Corporation some of the proposed functions of the Aviation Investment Corporation are currently regulated by the Kenya Civil Aviation Authority such the regulation of aviation training institutions. Whereas the Bill proposes for the Aviation Investment Corporation to carry on businesses in relation to aviation training schools without making reference to the Kenya Civil Aviation Authority. These provision need to be harmonized to avoid conflict of roles.

#### Irregular Amendments to Other Laws – Amendment of the Public Procurement and Asset Disposal Act and the Companies Act Constitutional Requirements

Article 227 of the Constitution requires that public entities should conclude contracts for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The Public Procurement and Asset Disposal Act, 2015 operationalizes the Article by providing a framework and policy on procurement and disposal of public assets. In particular, Sections 68(3), 125(5), 138, and 179 of the Act provide for: transparency of the procurement process including requirements for procuring entities to publicly avail procurement records after closure of proceedings, publicise notice of intention to enter into contract on websites and public notice boards, publish, and publicise all contract awards.

According to article 2 of the constitution -Any law that is inconsistent with the constitution is void, to the extent of the inconsistency.

The amendment to section 4 of the Public Procurement and Asset Disposal Act 2015 to provide room for exemption of a state organ or public entity from the application of the Act by a Cabinet Secretary opens room for abuse and disposal of public assets cheaply and in an opaque manner as they will not be bound by principles of value for money and open tendering that are stipulated under the Act. There are wider public interest concerns that are protected by the Constitution and thus a public entity cannot opt to procure out of the legal requirements.

It is concerning that the Bill purports or attempts to amend other enacted statutes that are not necessarily related to it in a manner that unduly and unreasonably expands the



subject of the Bill and in a manner that is not appropriate or in logical sequence to the subject matter of the Bill. In this case the subject matter of the Bill is nationalisation of the airline and the establishment of an institutional framework to realise this. Yet, other amendments such as the one highlighted above of the Public Procurement and Asset Disposal Act are sneaked in contrary to the law. This amendment would have far reaching implications on other unrelated entities. In our view, this attempt is contrary to Standing Order 133(5) of the National Assembly Standing Orders which read: *'No amendment shall be permitted to be moved if the amendment deals with a different subject or proposes to unreasonably or unduly expand the subject of the Bill, or is not appropriate or is not in logical sequence to the subject matter of the Bill'*.

The Bill also rather surreptitiously exempts the three operating entities (KA, KAA and Aviation Investment Corporation) as well as other state-owned entities or parastatals from complying or being bound by the Companies Act 2015 which is the main framework relating to corporations thereby presenting a danger of a breach of corporate governance procedures and violating transparency requirements. We recommend the deletion of Schedule 2 for being an affront to the constitution.

#### Statement on delegated powers and limitation of fundamental rights -The fate of unionisable workers under the aviation workers union

There are court matters that are on-going by members of trade union who were either laid off illegally or retrenched, declared redundant- that are still active in court. In many occasions Kenya Airways and other entities in the same genus have gotten unfavourable outcomes from the court and it is our hope that this Bill's sponsor is not making an attempt to settle a judicial score with trade unions.

The Bill is quiet about matters liability as they may accrue from court pronouncements and appropriate transitional provisions should be incorporated to deal with these matters. We note clause 52 purports to deal with matters incidental to transition however this provision to be redrafted in clearer terms.

We recommend that this constitutional right of the aviation workers should be fortified in the Bill after pragmatic consultation with the aviation stakeholders.



### Statement on how the Bill concerns County government

The county government is a big stakeholder in the management of the local aerodromes as they are transport leeway into the county and their positioning directly affects the county development plan.

We recommend that this section should be amended to reflect the above reality.

Lastly and on the way forward there is need for –

- Feasibility study to confirm viability and sustainability of the option proposed in the Bill.
- There is need for an independent valuation of KQ and KAA Assets and liabilities before Nationalization.
- Comprehensive and systematic public participation

### **CONCLUSION**

In light of the foregoing, the Law Society of Kenya notes that the issues arising from the Bill are very pertinent and need to be carefully considered as they may lead to the complete death of our aviation industry. To this end, we submit that the Bill be withdrawn.

However, should the House be inclined to proceed with the Bill, it's provisions ought to be amended in line with our proposals above. In particular the Bill ought to be harmonized with the provisions of the Civil Aviation Act, 2013 particularly as regards the functions of the Kenya Civil Aviation Authority to avoid duplication of functions and subsequent conflict in discharge of mandates of the proposed new entities in the Bill such as the National Aviation Council, Kenya Aviation Corporation, Aviation Investment Corporation and Operating Entities as against the current mandate of the Kenya Civil Aviation Authority.



*Written Submissions Received by the Committee*

# **13. Mwangi, Mwangi & Associates**





# MWANGI, MWANGI & ASSOCIATES

Advocates and Commissioners for Oaths

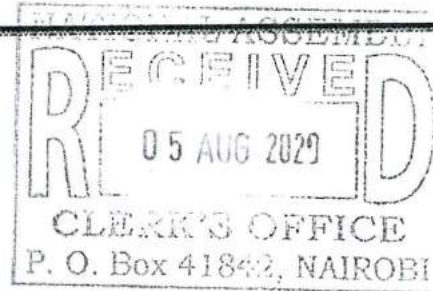
Ambassador Court,  
Jakaya Kiwete road  
(Formerly Milimani Road) off Valley Road  
P.O. Box 18050-00100  
NAIROBI

Tel: +254-20-2359201  
+254-20-3502162  
+254-722-616098

Email: info@mwangimwangiadvocates.com  
mmwangi@mwangimwangiadvocates.com

② TUNGO  
please doaf  
AAA  
06/8/20

Date: 7<sup>th</sup> July 2020  
Our ref: M&M/08g/Op/01/020  
Your ref: TBA



The Clerk of the National Assembly  
Parliament Buildings  
NAIROBI

advance by email

Dear Sir,

*Handwritten signature*  
5/8/20

RE: MEMORANDUM ON THE NATIONAL AVIATION MANAGEMENT BILL

In response to advertisement for public participation on the above Bill, I draw the attention of the Transport Committee to a conflict between the Bill and the prevailing practice in civil aviation practice. Civil aviation covers private and commercial aviation which is non-military in nature. Majority of the countries in the world are members of the International Civil Aviation Organization (ICAO) where they work together to establish common standards and recommended practices for civil aviation for safety, efficiency and regularity of air transport. All the signatories to the Chicago Convention which established ICAO have established a civilian aviation authority to:

- regulate the training and issuance of licenses and certificates to air personnel;
- carry out safety oversight of commercial air operators;
- issue certificates of registration and certificates of airworthiness to civil aircraft, and oversee the safety of aircraft maintenance organizations;
- regulate the design and construction of aerodrome facilities;
- manage the traffic within national airspace; and
- provide security and facilitations within national airspace.

As a signatory to the Chicago Convention, Kenya established the Kenya Civil Aviation Authority and granted it the above functions, among others, under the Civil Aviation Act, 2013.

Reading through the National Aviation Management Bill, 2020, there is no mention of the interface of the entities it creates with the civil aviation authority. This may have

far-reaching consequences on the safety and security of the Kenyan airspace as it may create confusion on the entity responsible for particular functions.

For example, Clause 5 of the Bill creates what it refers to as the National Civil Aviation Council ("Council") comprising the President as Chairperson; the Cabinet Secretary for Transport, the Cabinet Secretary responsible for matters relating to internal security, the Cabinet Secretary for the National Treasury, the Attorney-General, and the Kenya Air force Commander. The Council is mandated to:

- a) integrate policies relating to aviation sector and the other sectors of the economy to enable all the national organs and the sectors of the economy requiring access and support of the civil aviation sector to cooperate and work with the sector to ensure the effective performance of its mandate; and
- b) assess and appraise the objectives, commitment and the risks to the country in respect of actual and potential civil aviation capabilities.

The mandate given to the Council is rather sensitive yet there is no representative of the Civil Aviation Authority in the Council. This may lead to an overlap.

Second, Clause 7 of the Bill establishes a Kenya Aviation Corporation which is mandated under subclause (1) (d) to advise the Government on matters relating to the development of the Kenyan aviation sector. This particular mandate fails to take into account the role of the Civil Aviation Authority under the Act to advise the Cabinet Secretary for Transport on the development and maintenance of civil aviation policy framework.

Third, Clause 27 of the Bill outlines the functions of the Kenya Airports Authority to include the regulation of regulate the use by any person of the services performed or the facilities provided by the Kenya Airports Authority; and the presence of any person, aircraft or goods within the facilities provided by the Kenya Airports Authority. The Clause further mandates KAA to control the construction of aerodromes. The function of regulating the airspace, and the operation of aerodromes is the sole mandate of the Civil Aviation Authority. The grant of any part of this function to KAA may lead to serious lapses in the security of the airspace and aerodromes.

I propose the following amendments to the Bill:

- a) A general amendment to subject the entities created under the Bill to the provisions of the Civil Aviation Act, 2013 and the supervision of the Civil Aviation Authority in regulatory and policy matters. This may be done through the insertion of an Application clause subjecting the provisions of the Bill to the Civil Aviation Act and providing for the provisions of the Civil Aviation Act to prevail in the event of any conflict between the two laws;



- b) Amendment of Clause 5 of the Bill to include a representative from the Civil Aviation Authority in the Council to reduce any potential conflicts arising in the operations of the Council and Civil Aviation Authority;
- c) Amendment of Clause 27 of the Bill to remove any reference to the grant of regulatory powers to the Kenya Airports Authority with regard to access to, operation and construction aerodromes.

Yours faithfully



NEWTON M. MWANGI

FOR: MWANGI, MWANGI AND ASSOCIATES



*Written Submissions Received by the Committee*

# **14. R. Mobisa & Associates Advocates**







**R. MOBISA & ASSOCIATES ADVOCATES**

Notary Public, Commissioners for Oaths and Certified Public Secretaries

② Tunao  
Please deal  
FAA  
14/8/20

OUR REF: RM/GEN/2020

YOUR REF: TBA

DATE: 13/07/2020

THE CLERK OF THE NATIONAL ASSEMBLY,  
CLERK'S CHAMBERS,  
PARLIAMENT BUILDING  
P.O BOX 41842-00100  
NAIROBI

Advance Copy via "clerk@parliament.go.ke"

① Dancy

**MEMORANDUM OPPOSING THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

14/8/20

We refer to the above Bill.

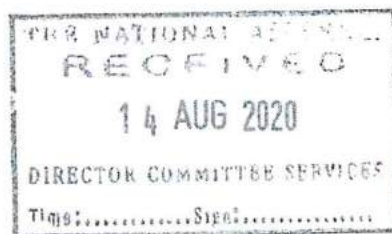
We appreciate that the Bill seeks to establish a consolidated and vibrant aviation industry in Kenya. We however note that the Bill is **ill-timed and not properly conceived for the following reasons:**

**Feasibility study**

(1) No feasibility study has ever been conducted to ascertain the appropriate and viable model for the revival of Kenya's aviation industry. The inquiry by the Committee on Transport was majorly motivated by the impending collapse of Kenya Airways and the debt of Kenya Shillings Seventy Five Billion (Kshs 75,000,000,000-) guaranteed by the Government. That is not a proper basis for coming up with this Bill.

**Commencement**

(2) Article 116 of the Constitution governs the commencement of all laws passed by Parliament. It requires the coming into force of all laws within fourteen (14) days of their publication, after being assented to. If it is the intention of Parliament for the coming into force of a law to be deferred, the date and/or time to which the commencement is deferred must be stated on the law. Clause 1 of the Bill seems to postpone the coming into force of the Bill until such a time as the Cabinet Secretary for Transport decides for it to commence. This is an uncertain provision since the Cabinet Secretary may fail to decide. If the government is unsure of when the provisions of the Bill should come into force, it may well be that consideration of the Bill is premature.



### Ambiguity provisions on the charges that may be levied under the Act

- (3) Clause 2 of the Bill defines “user charges” to mean *fees, rates, levies and other charges as specified by the Cabinet Secretary and levied under the Act*. Clause 9(m) outlines part of the mandate of the Board of the Corporation as approving “the user charges”. Thereafter, clause 38 requires the “*relevant Group Entity*” to publicise “*the proposed user charges and take into consideration the views of the users of its services or facilities and other relevant stakeholders prior to publication by the Cabinet Secretary*”.

These provisions are unclear on the charges that may be levied under the Act. They postpone the determination of the user charges to the discretion of the Cabinet Secretary for Transport. In formulating the Bill, stakeholder consultations ought to have been exhaustively undertaken to identify what to include under the charges instead of leaving this determination to the whims of the Cabinet Secretary.

### Conflicting entities

- (4) The Bill gives the entities it creates undefined and very general functions as follows:

- Clause 7(1)(e) of the Bill mandates the Kenya Aviation Corporation to “perform such other functions or duties as may from time to time be conferred on it by the Cabinet Secretary or by any other written law”.

Though a law may rightly grant functions to a statutory body, allowing the Cabinet Secretary for Transport to prescribe other functions not contemplated by law to a statutory body in the manner proposed is imprudent. The power may be used in an arbitrary manner.

- Clause 24(1) (f) of the Bill mandates Kenya Airways to carry out “such other functions as may be necessary for the performance of its functions under this Act or as may be assigned by the Board”.

Allowing the Board to prescribe other functions not contemplated by law to a statutory body in the manner proposed is imprudent. The power may be used in an arbitrary manner.



- Clause 26 (1) (b) of the Bill mandates Kenya Airways “to provide other transport related services and to undertake other businesses related to air transport and ancillary businesses”. **Noting the rationale given for consolidating aviation assets and focusing the energies of Kenya Airways as an airline, it beats logic to then generally mandate it to carry out any other business related to air transport. This may lead to a shift of focus from its core business.**
- Clause 30 (d) of the Bill mandates Kenya Aviation Corporation to engage “in any other activities that may be necessary for the performance of its functions under this Act and as may be assigned by the Board from time to time”.

Allowing the Board to prescribe other functions not contemplated by law to a statutory body in the manner proposed is imprudent. The power may be used in an arbitrary manner.

**A law should clearly and exhaustively outline the functions it intends by the entities it creates to undertake, and leave any additional tasking to any other law made by Parliament.**

#### **Ambiguity in the entities created**

- (5) The Bill also establishes a Kenya Aviation Corporation to be run by a Board comprising of a Chairperson appointed by the President, the Attorney-General, the Cabinet Secretary for the National Treasury, the Principal Secretary in the Ministry of Transport, the Chief Executive Officer, the Managing Directors of Kenya Airways and the Kenya Airports Authority, and four (4) independent non-executive Board members appointed by the Cabinet Secretary for Transport.

Cabinet Secretaries do not sit on Boards. They are usually represented by their Principal Secretaries. There is no need for the Cabinet Secretary for the National Treasury to sit in the same Board with a Principal Secretary and other members appointed by a fellow Cabinet Secretary. ***Additionally, the Clause does not specify the capacity in which the Chief Executive Officer and the Managing Directors of Kenya Airways and KAA are sitting in the Board. Are they ex-officio or can they vote?***

Under the Bill, the Managing Directors for Kenya Airways and Kenya Airports Authority are required to report to the Chief Executive Officer. The three of them all sit in the Board of the Corporation in an unspecified capacity. ***Who gives policy guidance and who runs the day-to-day operations of the Corporation, Kenya Airways and KAA? The structure is unworkable.***

The Bill creates Kenya Airways, Kenya Airports Authority and an Aviation Investment Corporation as operating companies. However, for some reason, the Managing Director of the Aviation Investment Company does not sit on the Board of the Corporation. Further, the Cabinet Secretary for Transport appoints four "Independent" non-executive directors to the Board. Though the Bill does not define what the role of these directors is, their direct appointment by the Cabinet Secretary kills their "independence". Independent directors directly oversee the audit function of a corporation and their independence should be real. **The proposal in the Bill makes the Board a purely government-dominated affair lacking any divergence of opinion.**

- (6) The terms of office of the various officers is convoluted. The Chairperson and the "Independent" Board Members hold office for a renewable three (3) year term. The Chief Executive Officer is to hold office of a renewable four (4) year term, whereas the Managing Directors of Kenya Airways, Kenya Airports Authority and the Investment Company are to hold office for a renewable five (5) year term. **The continuity of the affairs of the Board is heavily compromised by these overlapping tenures.**

#### **Additional and unnecessary layer of bureaucracy**

- (7) The Bill establishes a National Aviation Council whose membership only creates an additional and unnecessary layer of bureaucracy. The inclusion of the President in the Council is unnecessary since the Transport docket is already delegated to the responsible Cabinet Secretary who is a technocrat. Further, inclusion of the other Cabinet Secretaries serves no particular purpose. Any work coming from the Council will still need Cabinet approval. Why would they do the work twice?

The Kenya Air force Commander is a military officer. His inclusion in a body related to civil aviation does not make sense. Kenya is a signatory to the Chicago Convention on International Civil Aviation, and has formed the Kenya Civil Aviation Authority (KCAA) to regulate non-military aviation. If the Council is to be retained, a representative from Kenya Civil Aviation Authority (KCAA) would be better suited in the position than a military officer.



## Arbitrary Valuation of Kenya Airways, Kenya Airports Authority and the Investment Company

- (8) Clauses 25, 28 and 31 value Kenya Airways, Kenya Airports Authority and the Investment Company at Kenya Shillings Seven Billion Four Hundred and Eighty Million (Kshs 7,480,000,000/-), Kenya Shillings Sixty Six Billion (Kshs 66,000,000,000) and Kenya Shillings One Million (Kshs 1,000,000/-) respectively. What is the justification for this valuation?

Parliament should not be hoodwinked into accepting an arbitrary valuation in this manner. The Clauses should be amended to reflect the true value of the companies.

### Other provisions

- (9) Part XI of the Bill provides for offences. I have noted that the penalties stipulated for the offences do not correspond to the gravity of the offences. For a major offence, a person is fined Two Million Shillings (Kshs 2,000,000/-) or to imprisoned for five (5) years.

For a minor offence, the penalty is a fine of five hundred thousand shillings (Kshs 500,000/-) or imprisonment for two (2) years. Oddly, an employee who endangers the safety of aircraft or charges more or less for a service is fined Five Hundred Thousand Shillings (Kshs 500,000/-) or imprisoned for six (6) months. The punishments do not make sense, they should be harmonized.

- (10) Clause 62 of the Bill allows the Cabinet Secretary for Transport to prescribe a period longer than six (6) months after the end of a financial year for the Auditor-General to finish the audit of the Corporation, Kenya Airways, Kenya Airports Authority and Investment Company.

Article 229(4) of the Constitution requires the Auditor-General to audit all public bodies within six (6) months after the end of each financial year. **The Public Audit Act also has comprehensive provisions on the audit of all public bodies. The Clause contravenes the Constitution and the Act.**

- (11) Clause 50 of the Bill empowers the Cabinet Secretary for Transport to issue a Vesting Order transferring either all the assets and liabilities or specific assets and liabilities of Kenya Airways and Kenya Airports Authority to the New Kenya Airways and the New Kenya Airports Authority on the date or dates specified in the Order. This means that the Cabinet Secretary may choose which assets and liabilities to transfer from Kenya Airways and KAA to the new entities. **This is a wide power and care must be taken to prevent its misuse for other purposes including the exclusion of particular assets from the transfer without proper justification.**



- (12) Clause 72 of the Bill generally empowers the Cabinet Secretary to make regulations. Contrary to Article 94(6) of the Constitution, **the Clause does not provide for the objects and purpose for and limitations on the power granted to the Cabinet Secretary for Transport.**

**A pointer to a Hurried and poorly thought out Bill**

- (13) These shortcomings are a pointer to the hurried manner in which this Bill has been introduced for discussion in Parliament. We believe that further thinking, stakeholder participation and consultations would greatly benefit the development of a proper framework for reviving Kenya's aviation industry. This Bill fails miserably.

**We therefore propose that the Bill be shelved and only be reintroduced once a feasibility study has been conducted. Proceeding with this Bill shall only compound the problems that are currently being experienced at KENYA AIRWAYS. The virus will spread further. In the context of the current pandemic, adopting the proposal will be fatal for the aviation industry.**

**In the event the Bill is to be considered:**

- (a) Clause 1 of the Bill should be amended to provide for a definite date and/or time on which the Bill will come into force once passed;
- (b) Clause 2 of the Bill should be amended to exhaustively define what constitutes "user charges" and to delete the general power given to the Cabinet Secretary to define what the charges are;
- (c) Clause 5 of the Bill be amended to:
  - (i) delete the Council; OR
  - (ii) include a representative from the Kenya Civil Aviation Authority in the Council to reduce any potential conflicts arising in the operations of the Council and KCAA; and
  - (iii) remove the President, the Cabinet Secretaries for the National Treasury and Interior and the Kenya Air force Commander from the Council;
- (d) Clause 7(1)(e) of the Bill should be amended to delete the general power given to the Cabinet Secretary to confer undefined functions and duties to the Corporation;
- (e) Clause 8 of the Bill should be amended to:
  - (i) clarify the capacity in which the Chief Executive Officer and the Managing Directors of Kenya Airways and Kenya Airports Authority sit on the Board;

- (ii) clarify the reporting relationship between the Chief Executive Officer and the two Managing Directors;
  - (iii) clarify whether the Managing Director of the Aviation Investment Company also sits on the Board;
  - (iv) replace the Cabinet Secretary for the National Treasury with the Principal Secretary; and
  - (v) require the Cabinet secretary to appoint the four (4) independent directors subject to their nomination by entities not related to the government;
- (f) Clause 8(2) of the Bill should be amended to harmonise the term of office of the Board to the term of the Chief Executive Officer and Managing Directors;
- (g) Clause 14 of the Bill should be amended to harmonise the term of office of the Chief Executive Officer to the term of the Managing Directors and Board;
- (h) Clause 24(1) (f) of the Bill should be amended to delete the general power given to the Board to assign undefined functions to Kenya Airways.
- (i) Clauses 25 and 28 of the Bill should be amended to reflect the true valuation of Kenya Airways and Kenya Airports Authority;
- (j) Clause 27 of the Bill should be amended to remove any reference to the grant of regulatory powers to the Kenya Airports Authority with regard to access to, operation and construction aerodromes.
- (k) Clause 26 (1) (b) of the Bill should be amended to delete the general function of providing other transport related services and undertaking other businesses related to air transport and ancillary businesses;
- (l) Clause 30(d) of the Bill should be amended to delete the general power given to the Board to assign the Aviation Investment Corporation undefined functions.
- (m) Clause 43 of the Bill should be amended to harmonise the term of office of the Managing Directors to the term of the Chief Executive Officer and Board;
- (n) Clause 50 of the Bill should be amended to require the Cabinet Secretary to seek the approval of Parliament before excluding any asset or liability of Kenya Airways and Kenya Airports Authority from any Vesting Order;
-

- (o) Clause 62 of the Bill should be amended to subject the audit of the Corporation, Kenya Airways and Kenya Airports Authority to the provisions of Article 229 of the Constitution and the Public Audit Act, 2015;
- (p) Part XI of the Bill should be amended to harmonise the penalties prescribed with the gravity of the various offences; and
- (q) Clause 72 of the Bill should be amended to provide for the objects and purpose for and limitations on the power granted to the Cabinet Secretary for Transport to make Regulations.

Yours faithfully,



**R. MOBISA & ASSOCIATES  
ADVOCATES**

Wanandegge Flats , Suite D1 , Kirichwa Road. off Argwings Kodhek Road ,Opposite Kilimani Primary School , P.O Box 51355-00100, NAIROBI. Tel: 0721-681740,  
Email:mknadvocates@gmail.com

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Advocates: R. Mobisa LLB (Hons) Nag. Dip KSL, CS(K), T. Khaduli LLB (Hons) Moi, Dip KSL, B. Nzioki LLB (Hons) KU, Dip KSL.

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*Written Submissions Received by the Committee*

# **15. OKAO & Company Advocates**



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FAA  
06/8/20

**OKAO & COMPANY  
ADVOCATES**

**COMMISSIONER FOR OATHS & NOTARY PUBLIC**

Town House, 6<sup>th</sup> Floor  
Kaunda Street  
P.O. Box 61622-00200  
Nairobi – Kenya

Tel: 2248593  
Mobile: 0722-822-420

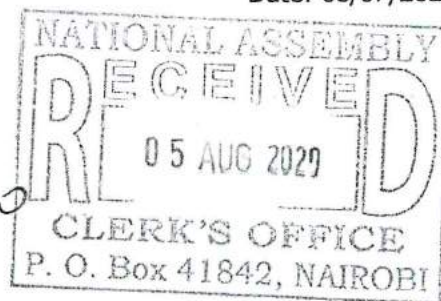
Email: [okaoj@yahoo.com](mailto:okaoj@yahoo.com)

Our Ref: JO/022/NAM/4/20  
Your Ref: 12765/001

Date: 08/07/2020

The Clerk  
The National Assembly  
Parliament Building  
**NAIROBI**

① D/cmts.  
5/8/2020



Dear Sir/Madam,

**RE: OPPOSITION TO THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

I write to oppose the consolidation of Kenya Airways [hereinafter KQ] and the Kenya Airports Authority into one entity under the National Aviation Management Bill, 2020 that is currently before Parliament. Though the Bill claims to implement a report made by a Committee of Parliament, I believe that both the report and the Bill do not adequately safeguard the interests of Kenyans who will suffer the ultimate cost of trying to salvage KQ. KQ is an unprofitable loss-making entity and nowhere has it been shown that consolidating it with another healthy and profit-making entity will work.

I oppose the Bill because:

- a. The assets of KAA should be protected from the losses and debts of KQ;
- b. No feasibility study has been done to show that the creation of a Kenya Aviation Corporation to consolidate aviation assets is viable, sustainable and will result in value for taxpayers' money;
- c. The airline business is a historically unprofitable undertaking. It is a business that the government should not gamble taxpayers' money in, especially in the current circumstances of the COVID-19 pandemic; and
- d. The Government engaging in business has previously gone very badly leading to additional and unnecessary burdens on taxpayer. Examples include National Bank, the Kenya Co-operative Creameries, all the Sugar companies and Pan-Paper Mills;

When the matter of KQ came before Parliament last year, no feasibility study was ever produced or even done afterwards to show that the arrangement proposed in the report of the Committee on Transport or the Bill that has been made from it will work.



In its submissions before the Committee on Transport, the Kenya Airports Authority (KAA) submitted that its assets are worth more than Kshs. 80 Billion. KAA has also over the years steadily increased its revenues and taken up very little debt. On the other hand, Kenya Airways has been on a loss-making spree leading to various bailouts by the taxpayers. Its assets are a paltry 135Billion and it is swamped by enormous debt due to a lack of proper strategy. Currently, apart from owning more than 45% of KQ, the Kenyan taxpayer has also guaranteed KQ debt of Kshs. 75Billion. In its last year, KQ made a loss of 8 Billion. Pairing these two entities together simply does not make any business sense unless the purpose is for KQ to cannibalize the assets of KAA to repay its debts. As recently as last year, KQ owed KAA Kshs. 5.54 billion in statutory charges! Will KQ miraculously be able to pay its debts once it is nationalized and paired with the entity it owes?

Clause 58 of the Bill lays out the intention of the consolidation quite clearly. All the monies to be generated by KQ, KAA and the Aviation Investment Company are to be lumped together in a "Fund" that will be used communally. Of the three entities, one is loss-making, one is profitable, and the other has not begun any operations. Clearly, it is the intention of this Bill to burden KAA and its assets with the problems of KQ and the dreams of the Investment Company. This will not end well.

The Committee on Transport and the Government has to be clear on the reason for nationalizing KQ. If the reason is that KQ has cornered the taxpayer by burdening the government with a large shareholding and a Kshs. 75Billion sovereign guarantee, that is not a proper reason to betray the taxpayer by continuing an unprofitable business and risk further losses. A huge amount of money will be required to buy off the other shareholders of KQ in order to nationalize it. That money will ultimately come from taxing the people. Even if the government negotiates with the other shareholders to take up some sort of bond or guarantee for giving up their shares, the taxpayer will still be called upon the maturity of the bonds or guarantees. This is not a good deal and will never be a good deal.

The report of the Committee on Transport made reference to the need for JKIA to be an international hub and the consolidation of the country's aviation assets for strategic, security and geopolitical reasons. These reasons were not fully explained. The reason for Kenya requiring a National Carrier was also not explained. I do not think Kenyans would take pride in a loss-making airline that endlessly contributes to their increased taxation. The logic is also faulty. Bundling all aviation assets together does not guarantee success, profitability, or the development of an international hub. The United States of America does not have a national airline yet it has several hubs. Singapore has separated the ownership of airports from the ownership of its national carrier. Its Changi International Airport has consistently been ranked first in the world.

The bundling of KQ and KAA also poses challenges to the obligations of KAA to the other airline operators in Kenyan airports and airstrips. The arrangement proposed in the Bill creates an incestuous relationship between KAA and one of its customers. Will KAA demand the payment of statutory charges from a government-owned KQ with the same vigour that it previously did? I doubt so. The potential of the government leaning on KAA to give favourable terms to KQ is very likely. The pairing of the two entities runs contrary to the principles of our

liberalized free market economy and does not bode well for other airline operators. It may end up killing the very business it seeks to generate.

It is my honest belief that if KQ is a profitable business, then it does not require a forced marriage with any other entity. If nationalization of KQ is the cure of turning it around, then it should be nationalized and left to battle it out on its own. If it cannot survive on its own, it is not a business worth saving or sacrificing other profitable entities for.

I therefore propose that the Bill be rejected by Parliament. If Parliament is keen on nationalizing KQ, the Bill should be amended to remove all references to the Kenya Airports Authority and its assets to protect them from guaranteed loss.

Yours faithfully,

  
OKAO & CO. ADVOCATES





*Written Submissions Received by the Committee,  
vide the second advert dated 14.9.2020*

**16. Mr. David Njuguna  
Njathi**  
*Aviation Consultant*





*Mr. Salim Abdalla*  
*pre doc*  
*copy*

**THE NATIONAL AVIATION MANAGEMENT BILL, 2020**

**Preamble:**

The Aviation transport sector plays an important role in the economy of our country, by employing thousands of people directly and facilitating the movement of goods and persons safely and efficiently locally and beyond the borders of Kenya.

*30/9/20*

As aviation professionals we are encouraged that the Government acknowledges this aspect and in an endeavour to boost the industry came up with the National Aviation Bill 2020 which among other objectives; "improving the competitiveness of the Kenyan aviation sector" and "promotion of increased employment opportunities in the Kenyan aviation sector" These goals are indeed commendable.

The country needs to develop a National Policy Paper on Aviation which would encourage the organic growth of the industry in the Kenyan situation.

The aviation activities carried out by Kenya registered entities whether public or private, operating Kenya registered aircraft are classified into the following categories for analysis:

**1. Large Airlines:**

Large airlines are based and operate from the larger international airports like Jomo Kenyatta International Airport (JKIA), Moi International Airport, Kisumu International Airport and Eldoret International Airport. They operate large aircraft and for passengers and cargo to international destinations facilitating trade, leisure travel and export of perishable commodities to international destinations. An important point to note is that some airlines are based in Somalia but choose to operate out of JKIA

**2. Commuter / Charter Airlines:**

Commuter airlines operate medium sized turboprop aircraft regionally, most of them are based at Wilson Airport. Some are involved in the transport of miraa to a neighboring country. However the majority fly tourist circuits locally and regionally, providing an efficient means of reaching varying destinations from bush to beach. Some operators also offer hot air balloon safaris for sightseeing in the tourist destinations.

The commuter airlines have also covered locations hitherto considered remote as well as major towns and cities in the country.

**3. Humanitarian and Peacekeeping Operations:**

The Kenya Aviation sector has not only aggressively pursued contract flying for humanitarian agencies such as World Food Programme (WFP), UN Department of Peacekeeping Organization (DPKO), European Union (ECHO), ICRC and Red Cross in volatile regions like DR Congo and Southern Sudan, West and Central



Africa as well as hot spots in Somalia, Pakistan and as far afield as Afghanistan. These Operators are based mainly at Wilson Airport and compete internationally for these contracts which support hundreds of staff directly and bringing considerable foreign exchange in excess of \$ 200 million annually and transfer of new technology.

4. Medical Evacuation (MedEvac) Operations

This sector has developed a niche in this region based at Wilson Airport. The operators have acquired high speed turboprop and light jets configured with Life Support Systems for evacuation of patients injured in war zones, road accidents or emergency illness from the greater East, West and South African region for hospitalization in Nairobi or onward transmission to Europe or the USA.

5. Aviation Training Organizations:

Kenya is an attractive country for flight training and there are vibrant flying schools based at various airports and private airstrips. In the past a tourism package was offered with flying lessons included. The country also has private Aircraft Maintenance Engineering Colleges to support the needs of the region.

6. Miscellaneous Operations:

Aviation plays a significant role in agriculture with operators providing farmers with services of crop dusting, fertilizer dispersion and control of pests such as the desert locust and army worm. Some operators have specialized aircraft which carry out photogrammetry mapping, survey and estimating crop harvest yields and forest cover. Aircraft are also used for animal conservation activities such as anti-poaching, game spotting and animal census.

7. Maintenance Repair Organizations (MRO):

Kenya has several major Maintenance and Repair Organizations based at Wilson Airport and JKIA. The companies not only support aircraft based in Kenya, but from the region including Tanzania, Ethiopia, Uganda, Somalia and DR Congo. A few years many aviation manufacturers had distributorships and after sales support for their equipment based in Nairobi for the above mentioned countries. There are many underutilized human resources and facilities in Kenya.

All the mentioned aviation activities are commercially driven enterprises, managed by professionals who make prudent business decisions. The enterprises are sustainable and do make a profit despite a hostile business environment.

### **Recommendations on the National Aviation Management Bill, 2020:**

This Bill should be set aside to enable a more thorough review to be made aimed at improving the competitiveness of the Kenyan aviation and promoting increased employment opportunities in the Kenyan aviation sector.

1. Adopting a model used in a different operating environment like Ethiopia may not work in our free enterprise culture where the keyword is efficiency as opposed to the Marxist approach of no private enterprise and control from the state and allowing no competition. The return on investment from pooling so many diverse state resources may turn out to be poor.
2. This model may work in other jurisdictions where the industry is not comprised of many vibrant players as the case is uniquely so in Kenya.
3. The formation of this Corporation and singling it out to receive preferential tax breaks not enjoyed by its competitors locally will go against the spirit of the Kenyan Competition Rules.
4. We should not shackle the Kenya Airports Authority (KAA) to a financially struggling airline. The KAA which runs all airports for the benefit of all operators will end up bleeding its resources (obtained from all operators) in its effort to shore up the fortunes of the airline. This will be at the expense of competitors and cannot at all be fair.
5. JKIA can expand to be an attractive hub if managed efficiently. An upgraded JKIA, (which is the heart of Africa) can become the hub of choice in the region which will attract many airlines, foreign and local to make it a port of call. That is the strategy most countries are working on to grow their business.
6. The nationalization of Kenya Airways is a hasty move which takes us back before carefully considering the reasons for the recent bad financial performance. Many countries especially in the West long divested from their former "flag carriers" which had proved to be a mere drain on their Exchequers. A flag carrier does not necessarily need to be owned by the state. Moreover, a review of the performance of Kenya Airways as a state owned airline prior to 1996 should jolt us into not making a wrong decision we are about to make.
7. If we are intent on improving the competitiveness of the Kenyan aviation and promoting increased employment opportunities in the Kenyan aviation sector support should be given to the entire industry by reviewing the heavy taxation regime and waiver of the Railway Development Levy (RDL) to encourage introduction of newer equipment for safety of operation while giving the Kenyan operators a fair and competitive edge within the region. This will make the Kenyan product and destination favourable.

8. Waiver of duty and VAT on aircraft and aircraft parts would make JKIA and Wilson Airport affordable hubs for aircraft maintenance (MROs) which would employ many professionals.
9. Finally, the formation of the Aviation Council seems to be a 'cut and paste' exercise from jurisdictions such as Ethiopia. There is no reason for forming it, and furthermore it will create an unnecessary conflict within a well thought out and managed civil aviation system.



Signed: David Njuguna Njathi. Member AeSK.  
Aviation Consultant.



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*THE END*

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