

THE CONSTITUTION OF KENYA

**REFUSAL TO ASSENT TO THE LAW OF CONTRACT
(AMENDMENT) BILL, 2019**

MEMORANDUM

By His Excellency the Honourable Uhuru Kenyatta, President and Commander-in-Chief of the Kenya Defence Forces.

Submitted to the Speaker of the National Assembly.

WHEREAS a Bill entitled “A Bill for An Act of Parliament to amend the Law of Contract Act”, the short title of which is “The Law of Contract (Amendment) Bill, 2019” was passed by the National Assembly on the 18th September, 2019;

AND WHEREAS the Law of Contract (Amendment) Bill, 2019, was presented to me for assent in accordance with the provisions of the Constitution, on the 23rd December, 2019;

NOW THEREFORE, in exercise of the powers conferred on me by Article 115 (1) (b) of the Constitution, I refuse to assent to the Law of Contract (Amendment) Bill, 2019, for the reasons set out hereunder:

CLAUSE 2

Clause 2 of the Bill seeks to amend section 3 of the Act by inserting the following new subsections—

(1A) Notwithstanding subsection (1), before a suit is brought against a defendant under subsection (1), the plaintiff shall first realise the assets of the principal.

(1B) For the avoidance of doubt, subsection (1A) shall not be applied retroactively.

(a) The proposed amendments were re-introduced prematurely:

The provisions contained in the Bill were originally contained in the Statute Law (Miscellaneous Amendments) Bill, 2019. They were severed from that Bill in order to allow for more comprehensive consultations with all stakeholders to ensure that they equitably met the needs of all parties. Their re-introduction in Parliament in the current form was therefore, premature as consultations were ongoing especially with key policy and regulatory stakeholders such as the National Treasury and Capital Markets Authority.

(b) The proposals will negate a long-standing principle of contract law:

The proposed new provisions to section 3 of the Law of Contract Act will negate a long-standing principle of contract law that is relied on by lenders, borrowers, guarantors, investors and other stakeholders in the Kenyan economy, especially in the capital markets. An obvious effect will be to prolong the process of settling debts in the case of a default through protracted asset-tracing and litigation without the assurance that the outcome will be positive. The current system is prompt and predictable and enjoys the confidence of the majority of stakeholders. It

is a key element in Kenya's ease of doing business profile, which has improved significantly in recent years.

(c) The proposals will prejudice the financial sector:

The proposed amendments are likely to prejudice the financial sector if they are enacted in their current form. They are likely to adversely affect creditors by making the debt-recovery process longer and more expensive, as well as by affording guarantors the opportunity to conceal or dispose of assets in order to avoid the realization of security when debts are unpaid.

(d) The propose will adversely affect credit advanced to MSMEs:

The proposed provisions are also likely to adversely affect credit advanced to micro, small and medium enterprises due to lenders' reluctance to rely on third-party collateral, and may provide a statutory loophole that enables guarantors who provide third-party security to divert assets that have been pledged as security during the period when lenders are pursuing the principals' assets through the courts.

(e) The proposals will interfere with the operations of capital markets:

The proposed provisions will also interfere with the operations of the capital markets. Because of the guarantee, a guarantor ranks equally with the principal and, in case of default, can be pursued without recourse to the principal. The proposed amendment, by placing the principal above the guarantor with respect to the loan advanced and the requirement that the principal's assets be realized before the guarantee is called in, shall hamper the ease of doing business and capital raising. The effect of this

change will be to diminish the role of guarantors in the capital markets, lowering the confidence of investors and thereby, reducing capital inflows and adversely affecting capital raising activities. This, in turn, shall adversely affect the national economy and deal a blow to the ease of doing business in Kenya.

RECOMMENDATION:

For the foregoing reasons, I recommend that the Bill be amended by deleting clause 2.

Dated the ^{3rd} of January....., 2020.

A handwritten signature in black ink, appearing to be 'Uhuru Kenyatta', written in a cursive style.

**UHURU KENYATTA,
President.**