

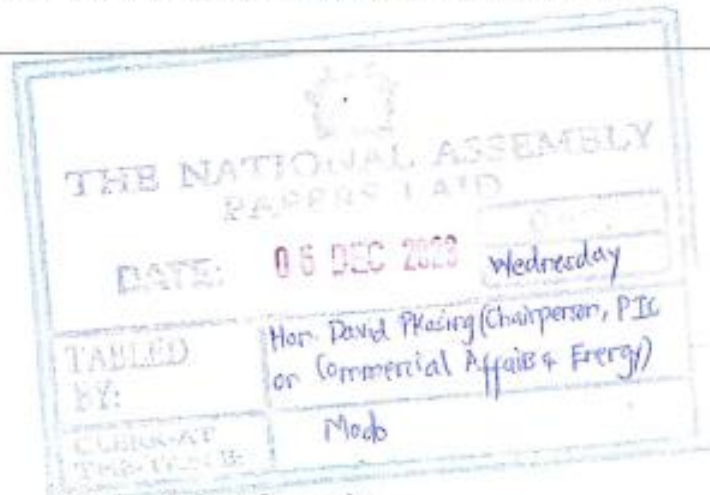


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REPUBLIC OF KENYA
THIRTEENTH PARLIAMENT- SECOND SESSION

THE NATIONAL ASSEMBLY

**THE FIRST REPORT OF THE
PUBLIC INVESTMENTS COMMITTEE ON COMMERCIAL AFFAIRS & ENERGY
ON EXAMINATION OF THE REPORTS OF THE AUDITOR GENERAL ON THE
FINANCIAL STATEMENTS OF SELECTED STATE CORPORATIONS**



Directorate of Audit, Appropriations & Other Select Committees

The National Assembly

Parliament Buildings

NAIROBI

DECEMBER 2023

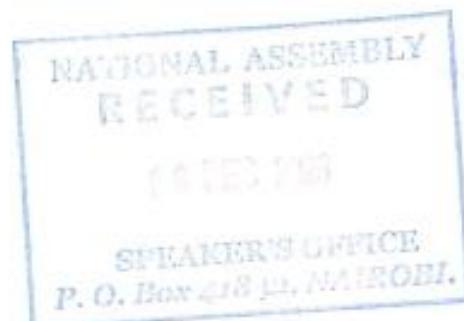


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LIST OF ABBREVIATIONS /ACRONYMS

Ag.	-	Acting
AIE	-	Authority to Incur Expenditure
AGPO	-	Access to Government Procurement Opportunities
CBK	-	Central Bank of Kenya
CCP	-	County Connectivity Project
CEO	-	Chief Executive Officer
CRB	-	Credit Reference Bureau
DCI	-	Directorate of Criminal Investigations
DG	-	Director General
DLP	-	Digital Literacy Programme
EACC	-	Ethics and Anti-Corruption Commission
EAPCC	-	East African Portland Cement Company
EBK	-	Engineers Board of Kenya
ECP	-	Enforcement and Consumer Protection
Eng.	-	Engineer
EPRA	-	Energy & Petroleum Regulatory Authority
ERP	-	Enterprise Resource Planning
IAS	-	International Accounting Standards
ICT	-	Information and Communication Technology
ICTA	-	Information and Communication Technology Authority
IFMIS	-	Integrated Financial Management Information System
IFRS	-	International Financial Reporting Standards
IPSAS	-	International Public Sector Accounting Standards
KBA	-	Kenya Bankers Association

KDIC	-	Kenya Deposit Insurance Corporation
KMA	-	Kenya Maritime Authority
KPA	-	Kenya Ports Authority
KPLC	-	Kenya Power and Lightning Company
KR	-	Kenya Railways
KRA	-	Kenya Revenue Authority
KRC	-	Kenya Railways Corporation
KSMS	-	Kenya School of Monetary Studies
KWS	-	Kenya Wildlife Service
LPG	-	Liquefied Petroleum Gas
MGR	-	Meter Gauge Railway
MOICT	-	Ministry of ICT
NLC	-	National Lands Commission
OAG	-	Office of the Auditor General
OMC	-	Oil Marketing Company
PFM Act	-	Public Finance Management Act
PIC-C&E	-	Public Investments Committee on Commercial Affairs and Energy
PLC	-	Public Limited Company
PS	-	Principal Secretary
RDLF	-	Railway Development Levy Fund
RVR	-	Rift Valley Railways
S.O	-	Standing Orders
SCAC	-	State Corporations Advisory Committee
SCM	-	Supply Chain Management

SGR	- Standard Gauge Railway
SHKL	-Superior Homes (Kenya) Limited
TNT	-The National Treasury
UNEP	-United Nations Environment Programme
USD	-United States Dollar
WIBA	-Work Injury Benefits Act

CHAIRPERSON'S FOREWORD

The Public Investments Committee on Commercial Affairs & Energy (hereinafter referred to as "the Committee" is one of the six 'Watchdog Committees' in the thirteenth Parliament that examine reports of the Auditor-General laid before the National Assembly to ensure probity, efficiency and effectiveness in the use of public funds. The Committee is established pursuant to National Assembly Standing Order 206A to examine the working of public investments based on their audited reports and accounts. This ensures implementation of *Article 229(8)* of the Constitution of Kenya, 2010 on reports laid before the House by the Auditor- General. The Committee was hived off the hitherto singular Public Investments Committee, alongside two others, for efficiency of examination of audit reports.

In examining the accounts of the Auditor General, the Committee invited accounting officers in each of the state corporations under review to adduce evidence before it.

This report contains observations, findings and recommendations arising from examination of reports of the Auditor-General for *five (5)* state corporations for several financial years running up to the latest, 2020/21 FY. The report is structured as follows:

- i) general observations arising from recurring and cross-cutting audit queries;
- ii) recommendations to each of the above;
- iii) audit queries identified by the Auditor General in the audit reports of each state corporation;
- iv) management responses to each of the queries;
- v) Committee observations/ findings on each query; and
- vi) recommendations of the Committee to each query raised.

In this report, the Committee makes policy recommendations that it deems will cure financial and audit challenges and at the same time recommends specific actions against specific officers who may have acted contrary to the law. It further recommends further investigations of certain matters by the relevant investigative agencies such as the EACC and the DCI. All this is geared towards ensuring prudent use of public resources and holding all persons that have misappropriated public funds accountable, in accordance with *Article 226 (5)* of the Constitution.

The Committee appreciates the Offices of the Speaker and the Clerk of the National Assembly for the support accorded to it to enable it to perform its mandate. The Committee further extends its appreciation to the Office of the Auditor-General, the National Treasury and Economic Planning and the Inspectorate of State Corporations for the services it offered to the Committee during the entire period, as well as those Accounting Officers who complied with audit timelines, and provided satisfactory responses to queries raised.

I also extend my appreciation to my fellow Members of the Committee and the Secretariat whose immense contributions and dedication to duty has enabled the Committee to examine the audit queries and produce this report.

On behalf of the Public Investments Committee on Commercial Affairs & Energy, and pursuant to National Assembly Standing Order 199(6), it is my pleasant duty and honour to present to the House the 1st Report of the Public Investments Committee on Commercial Affairs & Energy on the audited Financial Statements for *five* (5) State Corporations.

A handwritten signature in black ink, appearing to read 'DAP/Kou', is written above the printed name.

HON. DAVID LOSIAKOU PKOSING, CBS, MP

**CHAIRPERSON, PUBLIC INVESTMENTS COMMITTEE ON COMMERCIAL
AFFAIRS & ENERGY**

EXECUTIVE SUMMARY

The first report of the Public Investments Committee on Commercial Affairs & Energy (PIC-C&E) contains the Committee's examination of audited financial statements of *five* (5) State Corporations.

In its examination and scrutiny of the audited financial statements of the various State Corporations, the Committee's primary approach was to elicit background information as to why particular course of financial and/or management actions were or were not taken. This was done with the relevant public financial management principles in mind, including, the Public Audit Act, 2015, the Public Finance Management Act, 2012, Public Finance Management Regulations, Public Procurement & Asset Disposal Regulations, International Public Sector Accounting Standards (IPSAS) and International Financial Reporting Standards (IFRS) relevant for commercial state corporations.

The preface of the report contains preliminaries on the establishment of the Committee; its membership and secretariat; mandate; and the guiding principles governing the Committee while undertaking its mandate.

Part two of this report contains the Committee's general observations / findings on cross cutting issues, and their recommendations.

Part three of this report contains reports of the specific state corporations whose financial statements were examined; the financial years considered in each state corporation; the specific audit reservations raised by the Auditor General in each financial year; management response to each audit reservation raised by the Auditor General; Committee observations/ findings after considering each audit reservation; and finally, Committee recommendations on each audit query.

1.0 PREFACE

1.1 ESTABLISHMENT AND MANDATE OF THE COMMITTEE

1. The Public Investments Committee on Commercial Affairs & Energy is established under the National Assembly Standing Order (S.O.) 206A and is responsible for the examination of the working of public investments based on their audited reports and accounts in the sectors of energy, environment, general economic and commercial affairs. It is mandated to-
 - i. examine the reports and accounts of the public investments.
 - ii. examine the reports, if any, of the Auditor General on the public investments; and
 - iii. examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices.

2. The Committee in considering the Audited accounts of state corporations is guided by the Constitution of Kenya and the following statutes and codes/regulations in carrying out its mandate: -

Chapter Twelve of the Constitution on Public Finance

Part I-Principles of Public Finance

Article 201 sets out the principles of public finance which includes: -

- (i) openness and accountability, including public participation in financial matters (**Article 201(a)**); use of public money in a prudent and responsible way (**Article 201(d)**); and
- (ii) responsible financial management and clear fiscal reporting (**Article 201(e)**).

Part 6-Control of Public Money

Article 226 deals with the accounts and audit of public entities and provides that:

- (i) the accounting officer of a national public entity is accountable to the National Assembly for its financial management (**Article 226(2)**); and
- (ii) the holder of a public office, including a political office, who directs or approves the use of public funds contrary to law or instructions, is personally liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not (**Article 226(5)**).

Article 227 deals with the procurement of public goods and services. **Article 227 (1)** in particular, provides that “when a State organ or any other public entity contracts for goods

or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective”.

the Public Finance Management Act, No. 18 of 2012

Section 68 sets out the responsibilities of accounting officers for national government entities, Parliament and the Judiciary. This includes accountability to the National Assembly for ensuring that the resources of the respective entity for which he or she is the accounting officer are used a lawful, authorized, effective, efficient, economical and transparent manner (section 68(1)).

Section 72 focuses on the accounting officers’ responsibility to manage the assets and liabilities of national government entities.

3. Apart from the above-named laws, the Committee was further guided by the following: -
- (i) the Parliamentary Powers and Privileges Act, No. 29 of 2017;
 - (ii) the Public Finance Management (National Government) Regulations, 2015;
 - (iii) the Public Procurement and Asset Disposal Act, No. 33 of 2015;
 - (iv) the Public Procurement and Asset Disposal Regulations, 2020;
 - (v) the State Corporations Act, No. 11 of 1986;
 - (vi) the Public Audit Act, No. 34 of 2015;
 - (vii) The Fair Administrative Action Act, No. 4 of 2015;
 - (viii) the Accountants Act, No. 15 of 2008; and
 - (ix) the National Assembly Standing Orders.

1.2 COMMITTEE MEMBERSHIP

4. The Committee comprises of the following fifteen (15) Members;

Name of Member	Constituency	Party
Hon. David Pkosing, CBS, MP. Chairperson	Pokot South	KUP
Hon. Dr. Lilian Achieng Gogo, MP Vice-Chairperson	Rangwe	ODM
Hon. James Opiyo Wandayi, CBS, MP	Ugunja	ODM
Hon. Dr. Adan Keynan Wehliye, CBS, MP	Eldas	JP
Hon. Festus Mwangi Kiunjuri, EGH, MP	Laikipia East	TSP
Hon. Sarah Paulata Korere, MP.	Laikipia North	JP
Hon. Dr. Babu Owino Paul Ongili, MP	Embakasi East	ODM
Hon. Dr. Beatrice Kahai Adagala, MP.	Vihiga County	ANC
Hon. Paul Kahindi Katana, MP.	Kaloleni	ODM
Hon. Charo Kazungu Tungule, MP.	Ganze	PAA
Hon. John Machua Waithaka, MP	Kiambu	UDA
Hon. Marianne Jebet Kitany, MP.	Aldai	UDA
Hon. Peter Irungu Kihungi, MP.	Kangema	UDA
Hon. Ronald Kamwiko Karauri, MP.	Kasarani	Independent
Hon. Yussuf Mohamed Bulle Farah, MP	Wajir West	ODM

1.3 COMMITTEE SECRETARIAT

5. The Secretariat facilitating the Committee comprises the following technical staff: -
1. **Ms. Wanjiru Mwaura** - **Principal Clerk Assistant/ Team Leader**
 2. Mr. Ahmad Guliye - Clerk Assistant II
 3. Mr. Letaya Morintat - Clerk Assistant III
 4. Mr. Andrew Kipchumba - Clerk Assistant III
 5. Ms. Sheila Chebotibin - Sergeant at Arms I
 6. Ms. Angela Musau - Legal Counsel II
 7. Ms. Judith Kiprop - Fiscal Analyst III
 8. Ms. Gladwel Amimo - Research Officer III
 9. Mr. Eric Ogolla - Public Communication Officer
 10. Mr. Amos Tindi - Hansard Reporter III
 11. Mr. Mwangi Murimi - Media Relations Officer III
 12. Ms. Mercy Kerubo - Audio Officer

1.3 COMMITTEE PROCEEDINGS

6. To produce this report, the Committee held thirty-eight (38) sittings in which it comprehensively examined the reports of the Auditor General on the financial statements of five (5) State Corporations for various financial years.
7. In its inquiry into whether the affairs of the public investments are managed in accordance with sound business principles and prudent commercial practices, the Committee heard and received both oral and written evidence from Chief Executive Officers, Managing Directors and Director Generals (Accounting Officers) of various State Corporations and other relevant witnesses.
8. The Committee observations and recommendations on the issues raised by the Auditor General for the various State Corporations are found under appropriate sections of the report for each of the State Corporations covered.
9. These observations and recommendations, if considered and implemented, will enhance accountability, effectiveness, transparency, efficiency, prudent management, commercial viability and value for money in State Corporations and the public investments in the sectors of energy, environment, general economic and commercial affairs.

2.0 GENERAL OBSERVATIONS AND RECOMMENDATIONS

10. In consideration of reports of various state agencies, the Committee encountered cross-cutting and at times recurring matters that make general observations and recommendations. Specific observations and recommendations are however made under each specific agency:

a. Poor accounting standards and general incapacity of some accounting officers

11. The Committee found that due to a previous lack of exposure to the audit process culminating in parliamentary review, some accounting officers were ignorant of/ or non-compliant to various provisions of the PFM Act and Public Audit Act. Audit queries spanning as far back as FY 2017/18 remained unresponded to by some agencies who were only triggered to action once invited by the Committee.

The Committee recommends that the National Treasury, Inspectorate of State Corporations and the Office of the Auditor General conduct annual sensitization and capacity building exercises to all accounting officers and finance staff in state corporations. This includes their responsibilities during the audit cycle and adherence to IPSAS.

b. Late submission of supporting documentation

12. The Committee observed that some accounting officers failed to submit supporting documentation to the Auditor General on time as per section 68 of the PFM Act 2012. This invariably led to the Committee discussing matters that should ordinarily not feature in the final report, some as mundane as accounts not balancing.

The Committee recommends that Accounting Officers henceforth comply with section 68(2)(k) of the PFM Act 2012, by providing supportive documentation on time. The Committee in subsequent audits will prescribe punitive measures to those accounting officers that fail to adhere to the requirements of the law in this regard.

c. Unsecured/ untitled land holdings

13. The Committee also observed cases where land held by various institutions were not secured and titled accordingly. This led to encroachment in some cases, with the potential of eventual forfeiture or loss.

The Committee recommends that the National Land Commission and the relevant ministries immediately ensure that all State Corporations secure titles to all their parcels of land. These institutions and the National Treasury must also prioritize fencing off all

land holdings to forestall further encroachment. The Committee recommends that encroachers face full extent of the law, and are evicted and charged in court.

3.0. EXAMINATION OF THE REPORTS OF THE AUDITOR GENERAL ON THE AUDITED FINANCIAL STATEMENTS OF STATE CORPORATIONS

3.1. ENGINEERS BOARD OF KENYA (F/Y 2017/18 -2020/2021)

EXAMINATION OF THE AUDITED ACCOUNTS OF THE ENGINEERS BOARD OF KENYA FOR THE FY 2017/18 TO 2020/21

270. Eng. Margaret Ogai the CEO/Registrar of Engineers Board of Kenya, accompanied by Eng. Benjamin Mwangi (Board Member), Mr. Elijah Ngochi Muriuki (Manager Finance and Accounts), Mr. Dennis Karanja (Manager Internal Audit), Ms. Fridah N. Ng'alu (Director, Corporate and Legal Services) and Mr. Tony Kibet Lang'at Principal Capacity Building Officer appeared before the Committee to adduce evidence of the audited accounts of Engineers Board of Kenya for the financial years 2017/2018 to 2020/2021.

REPORT OF THE AUDITOR GENERAL ON THE FINANCIAL STATEMENTS OF THE BOARD FOR THE FY 2017/18, 2018/19, 2019/20 AND 2020/21.

FINANCIAL YEARS 2017/2018, 2018/2019 AND 2019/2020

271. The Committee was informed that in the three financial years under review, the Board received unqualified opinions and there were no audit issues raised by the Auditor General.

FINANCIAL YEAR 2020/2021

1.0. Unsupported Cash & Cash Equivalents

272. The Committee heard that the reported balance of Kshs.132,695,916 in Cash and cash equivalents include two Mpesa balances held in two accounts totaling to Kshs.33,284,213. Although the Mpesa balances were supported by a board of Survey as at 30th June 2021, the Mpesa statements reflect a total balance of Kshs.33,543,213 which results in a variance of Kshs.159,000. The Management did not provide the Mpesa confirmation certificates to the Auditor for review.

Managements Response

273. The Board informed the Committee that the Board of Survey Report was reviewed further, and it was discovered that the incorrect amounts were erroneously captured and recorded as the closing balances in both Mpesa Accounts. The correct balances ought to have been captured as follows: **Kshs.27,511,590** for the Mpesa Pay bill account No.

- 839300 and **Kshs.6,031,623** for the Mpesa pay bill No. 260560, both giving a combined total of **Kshs.33,545,213**.
274. In light of the above information, the Board had sought concurrence from the OAG to amend the financial statements by passing the applicable journal/ledger entries in order to correct the resultant variance of **Kshs. 159,000**.
275. The Board had opted to prepare an addendum to the Board of Survey report capturing the correct and accurate Mpesa balances for the two pay bill accounts.
276. The management explained to the committee that unlike banks which do provide certificates of balances, Safaricom only provides monthly accounts statements showing the closing balances for each month. These were provided to the audit team during the audit exercise.
277. The Board requested the Office of the Auditor General for an opportunity to pass necessary journals to correct the reconciliation error in the Financial Statements and Board of Survey Report.

Committee Observations

278. The Committee noted at the time of examination that the Board had sought concurrence from the OAG to amend the financial statements by passing the applicable journal/ledger entries in order to correct the resultant variance of **Kshs. 159,000**.

Committee Recommendations

279. The matter should be restated in the financial statements of the subsequent year.
280. The Public Sector Accounting Standards Board to incorporate new technologies /trends in accounting reporting.
281. The matter remains unresolved.

2.0. Outstanding Receivables from Non - Exchange Transactions

282. The statement of financial position reflects receivables from non-exchange transactions balance of Kshs.128,539,177 after net-off provision of Kshs.14,282,131. The receivables

increased by Kshs.46,179,227, from Kshs.82,359,950 as at 30/06/2020 to Kshs.128,539,177 as at 30/06/2021. Further, it was noted that the Board did not have a Debt Management Policy to guide the management of accounts receivable and it was also not possible to ascertain how the 10% provision for doubtful debt was arrived at in the absence of a debt management policy. In addition, the Board did not provide a receivables' ageing analysis to analyze the status of receivables.

Management's Response

283. The Board was in the process of developing a Debt Management Policy where this matter would be fully addressed. Management requested the Auditor General to keep the matter in view' as a draft Debt Management Policy had already been developed at the time of the audit, awaiting approval.
284. The debt management policy was approved by the Board in the 2021/2022 financial year and was now at implementation phase.
285. The Board was also rolling out the ERP system that would be fully configured and integrated to produce the debtors aging analysis basis reports on a periodical basis among other analytical reports.
286. The Board has also in the interim put mechanisms in place to ensure that the outstanding receivables are recovered either partially or in full. These include sending of regular payments reminders to the registered engineers via bulk SMS & bulk emails platforms, making individual phone calls to the registered engineers, and holding CPD clinics & sensitization forums with the engineering fraternity in a bid to enhance their compliance with the Engineers Rules of 2019.

Committee Observations

287. The Committee noted at the time of examination that the debt management policy was approved by the Board in the 2021/2022 financial year and was now at implementation phase.
288. The Committee noted at the time of examination that the Board was also rolling out the ERP system that would be fully configured and integrated to produce the debtors aging analysis basis reports on a periodical basis among other analytical reports.

Committee Recommendation

289. The matter stands resolved

3.0. Maintenance of a Fixed Assets Register

290. The fixed assets register availed did not include the asset code column for the individual assets. It was therefore not possible to identify the various assets held by the Board in the assets register maintained. This may have been an indication of inadequate controls over fixed assets. This is contrary to Section 139(1) of the Public Finance Management (National Government) Regulations, 2015 which provides that the Accounting Officer of a national government entity shall take full responsibility and ensure that proper control systems exist for assets.

Management Response

291. The management reported that it maintains a fixed asset register which shows the assets category, assets code column, name of the asset, purchase cost, accumulated depreciation and net book value of the various physical assets that are in the custody of its officers. The management has since implemented the following measures to address the audit query, namely—

- i. The management prepared an updated fixed asset register as per the recommendations of the office of the auditor general.
- ii. The management had submitted the updated fixed assets register to the office of the auditor general in compliance with the guidance of the committee.

Committee Observation

292. The Committee noted at the time of examination that the management had submitted an updated fixed asset register with the asset code column for individual assets.

Committee Recommendation

293. The matter stands resolved.

3.2. ENERGY AND PETROLEUM REGULATORY AUTHORITY (F/Y 2016/17-2020/21)

EXAMINATION OF THE AUDITED ACCOUNTS OF ENERGY AND PETROLEUM REGULATORY AUTHORITY FOR FY 2016/17 TO 2020/21

The management of Energy and Petroleum Authority (EPRA) led by the Director General, Mr. Daniel Kiptoo Bargoria appeared before the Committee to present the evidence on the audited accounts of the Authority the FY 2017/2018 to FY 2020/2021.

REPORT OF THE AUDITOR GENERAL ON THE FINANCIAL STATEMENTS OF THE ENERGY & PETROLEUM REGULATORY AUTHORITY (EPRA) FOR THE FINANCIAL YEARS 2016/17, 2017/18, 2018/19, 2019/20 & 2020/21

F/Y 2016/2017, 2017/2018 ,2018/2019

294. In the opinion of the Auditor General, the financial statements of the years under review presented fairly, in all material respects, the financial position of Energy Regulatory Commission and of its financial performance and cash flows for the years ended, in accordance with the International Public Sector Accounting Reporting Standards (Accrual Basis) and comply with the Energy Act, 2006.

Committee Resolution

295. The Committee adopted the opinion of the Auditor General which found that the reports of the Auditor General on the audited accounts of the Energy and Petroleum Regulatory Authority for the financial years 2016/2017, 2017/18, 2018/19, were unqualified as there were no audit issues raised by the Auditor General.

FINANCIAL YEAR 2019/2020

296. The Auditor General gave a qualified opinion for the year under review and raised the following concerns: -

REPORT ON LAWFULNESS AND EFFECTIVENESS IN THE USE OF PUBLIC RESOURCES

1.0. Compliance with Executive Order on Procurement

297. Executive Order No.2 of 2018 requires all public entities to publish all tenders processed by the respective entities through the Public Procurement Regulatory Authority website, and the Public Procurement Regulatory platforms. Further, Executive Order No.6 of 2016 requires all public entities to migrate their procurement processes to E-Procurement. However, the Committee was informed that the Authority did not publish tenders processed during the year under review in the Public Procurement Information Portal. In

addition, the Authority had not migrated its procurement processes to the E-procurement platform and all procurements were processed manually during the year under review. This is contrary to the provisions of the Executive Orders issued by the Government on public procurement.

Management Response

298. The management reported that they had started online registration of suppliers. They were able to publish the tenders online and suppliers were able to submit their electronic bids on the portal. Further EPRA has already rolled out an ERP system through which they are able to plan, purchase, monitor inventory, processing of LPO's, GRN's invoices. Notably, the management reported that they are also able to carry out supplier appraisal online. The SCM department is currently working with ICT to extend the other features to ensure that the Authority has full integration the E-Procurement System.

Committee Observation

299. The Committee noted at the time of examination that EPRA was able to register suppliers online, publish the tenders online and suppliers are also able to submit their electronic bids online and therefore, EPRA has complied with Executive Orders No.6 of 2016 and No.2 of 2018.

Committee Resolution

300. The matter stands resolved.

2.0. Withholding of Rental Income Tax

301. It was reported that the Authority paid gross rent to its landlord without withholding tax at the rate of 10% of gross rent paid, as provided for under Section 35(3)(a) of the Income Tax Act. Further, the deductible taxes were not remitted to the Kenya Revenue Authority (KRA) by the twentieth day of the month following the month in which the deduction was made as provided for under Section 35(5) of the Income Tax Act. During the year under review, the taxes not withheld for remission to KRA, in relation to two (2) payments, amounted to Kshs.1,068,160, indicating that the Authority was in breach of the law.

Management Response

302. At the time, the Authority had not received correspondence from KRA on this appointment as a withholding Rental Income Tax agent. The Authority wrote to KRA initially on 20th March 2019 seeking to know its withholding tax agency status. Confirmation of withholding tax agency for rental income was received on 3rd October 2019 from KRA whereby the Authority went ahead to set up the system to accommodate withholding of tax was not withheld in that particular month due to system challenges that resulted in omission of this particular transactions. Subsequent rental withholding tax have been consistently withheld and remitted to KRA within the prescribed deadline to date. There are no Rental Income Tax due to KRA currently (See attached correspondences with KRA-Annex I).

Committee Observation

303. The Committee noted at the time of examination that rental withholding tax had been submitted to KRA within the prescribed deadline date and that there was no Rental Income Tax due to KRA from EPRA.

Committee Recommendation

304. The matter stands resolved.

3.0. Overpayment on account of rent review

305. The Authority paid an amount of Kshs.2,159,522 to a valuer appointed to review the current rent being paid by the Authority to its landlord, by making reference to the Fourth Schedule to the Lease Agreement between the Authority and its Landlord. According to the apportionment set out in the agreement, the Authority was to pay Kshs.1,079,761 and the landlord was to pay an equivalent amount, to the valuer. However, the Committee was informed that the Authority paid the total valuation fees of Kshs.2,159,522, contrary to provisions of Section 1.10 of the Fourth Schedule to the Lease Agreement which provided that the fees of the valuer should be shared equally between the landlord and the tenant. In the circumstances, the propriety of the expenditure amounting to Kshs.2,159,522 could not be ascertained.

Management Response

306. The Authority paid the total valuation cost but subsequently recovered the portion of the landlord totaling Kshs.1,079,761 from the rent. The matter has since been closed (Attached confirmation of recovery of valuation fees from rent-Annex 2).

Committee Observation

307. The Committee noted at the time of examination that the Authority had paid the total valuation cost but subsequently recovered the portion of the landlord totaling Kshs.1,079,761 from the rent.

Committee Recommendation

308. The matter stands resolved.

4.0. Budget for UNEP Donor Funds

309. The Authority received donor funds from United Nations Environmental Programme (UNEP) amounting to Kshs.3,695,798, for Development of Electric Mobility Policies in Kenya. However, these funds were not included in the final approved budget of the Authority, and there was no evidence that the Cabinet Secretary, The National Treasury was informed of such budgetary changes. In the absence of inclusion of the above funds in the Authority's final approved budget, it was not possible to confirm that the funds were utilized for approved and authorized purposes. This is contrary to Section 47(1) of the Public Finance Management Regulations, 2015, which requires the Accounting Officer of a state entity to immediately inform the responsible Cabinet Secretary of any circumstances which may materially affect budgetary results of the entity, either through revenue and expenditure or other receipts and payments of the entity. In the circumstances, the Authority was in breach of the Regulations.

Management response

310. EPRA reported that the auditor's recommendations had been adopted. The UNEP will subsequently be treated as deferred income.

Committee Observation

311. The Committee observed that at the recommendation of the Auditor General to treat UNEP Funds as deferred income had been adopted and is reported accordingly in the financial statements

Committee Recommendation

312. The matter should be restated in the financial statements of the subsequent year.

313. The matter stands resolved.

5.0. Provision of Liquefied Petroleum Gas Compliance Inspection Services

314. The Auditor General reported that the Authority signed a contract with a service provider on 28 March, 2019 for provision of Liquefied Petroleum Gas Compliance inspection services, at a contract price of Kshs.35,809,200 inclusive of taxes, for a contract period of 2 years. During the year under review, the service provider was paid an amount of Kshs.43,165,903, resulting in an overpayment of Kshs.7,356,703 above the contract price. The overpayment is expected to rise considering the nine (9) months remaining to the end of the two-year contract period. Consequently, the Authority did not abide to the contract as per the terms set therein.

Management response

315. Contract Amounts for the LPG contract

Year	Kshs
Year 1	35,809,200
Year 2	40,470,570
Total Contract Amount	76,279,770

Amount Paid

Year 1	33,121,561.20
Year 2	37,519,434.00
Total Paid	70,640,995.20

Committee Observations

316. The Committee observed that at the time of auditing the first year, the contract was still running which led the auditors to believe that there was an overpayment which has been clarified by the Authority not to be the case.
317. The Committee also noted that there was need for the Authority to disclose all the material facts to the OAG during audits to minimize accounting reconciliation challenges.
318. The Committee noted that EPRA provided a list of service providers that came on board during the contract period which necessitated a variation of the original contract.

Committee Recommendation

319. The matter stands resolved.

6.0. Human Resources- Unapproved Recruitments

320. During the year under review, the Authority recruited four (4) Petroleum Gas Officers, Senior Petroleum Officer, Security Officer, two (2) Renewable Energy Officers, Hotline Operator, two (2) Digital Communication Assistants and a Senior Finance Officer, without seeking and obtaining the requisite approval. This was contrary to Cabinet Memo OP/CAB.39/4A of 28 July 2017, in relation to control of expenditure, through which the Government imposed a freeze on new recruitment, unless approval was sought and obtained from The National Treasury. Consequently, the Authority was in breach of Government directive.

Management response

321. Cabinet Memo OP/CAB.39/4A of 28 July 2017 **states that approval should be sought from the Head of Public Service (Circular OP/CAB.39/4A of 28 July 2017).**
 322. Recruitment was majorly for the Regional Office. Approval was granted by the Head of Public Service vide letter OP/CAB9/207/A dated 14th February, 2019 to recruit staff for Enforcement and Consumer Protection (ECP) Directorate. However, the regional offices (under ECP) were operational from August 2018, with staff picked from various directorates and departments and re-designated to ensure operations did not stall. The staff were replaced through external competitive recruitments, at entry levels except for two senior officers' positions S. Nos. 2&3 as tabulated below:
-

S. No.	Employer No.	Previous Position	Deployment title/Designation	Replacement
1	071	Senior Energy Efficiency Officer	Senior Surveillance & Enforcement Officer (Renewable Energy)	171
2	094	Senior Petroleum Officer	Senior Surveillance & Enforcement Officer (PET & GAS)	152
3	102	Senior Finance Officer	Senior Surveillance & Enforcement Officer (ER)	176
4	093	Senior Renewable Energy Officer	Senior Surveillance & Enforcement Officer (RE)	172
5	Jemimah Vivi Muli	Officer (Gas)	Surveillance & Enforcement Officer (PET&GAS)	177
6	099	Security Officer	Left EPRA in 2017. This was a replacement that did not need approval	170

(Circular OP/CAB.39/4A of 28 July 2017 and letter OP/CAB9/207/A dated 14th February, 2019 approving recruitments are annexed- 3).

Committee Observations

323. The Committee noted at the time of examination that the management had received approval from the Head of Public Service vide letter OP/CAB9/207/A dated 14th February, 2019 to recruit staff for Enforcement and Consumer Protection (ECP) Directorate.

Committee Recommendation

324. The matter stands resolved.

REPORT ON EFFECTIVENESS OF INTERNAL CONTROLS, RISK MANAGEMENT AND GOVERNANCE

7.0. Secondment of staff

325. It was reported that an employee of Kenya Power and Lighting Company (KPLC) whose designation was Debt Controller (III), was seconded to the Authority. According to management, the employee was seconded to the Authority to eliminate possibility of conflict of interest at KPLC. However, according to Section 10 of the Energy Act, 2019, the Authority's mandate is the Economic and Technical Regulation of Electric Power. Therefore, there was a conflict of interest for the seconded employee as the Authority is the Regulator of KPLC. Further, the employee's duties at KPLC were different from the duties assigned at the Authority. In addition, the employee was to be retained in the payroll of KPLC during the period of secondment and the Authority was to pay KPLC the remunerations made to the employee on a quarterly basis. However, the Authority did not make any refunds to KPLC and there were no provisions for same making it difficult to confirm how the amount was being accounted for. In the circumstances, there was no clear justification for the above employee secondment to the Authority.

Management Response

326. KPLC delayed in submitting the invoices for EPRA's settlement. EPRA reminded KPLC of the same. The amount was subsequently accrued and when the invoice was received, KPLC was paid all the funds due on the secondment. The matter has since been closed.

Committee Observation

327. The Committee at the time of examination noted that KPLC was paid all the funds due on secondment.

Committee Recommendation

328. The matter stands resolved.

FINANCIAL YEAR 2020/2021

1.0. Inaccuracies in Property, Plant and Equipment

329. The statement of financial position reflected property, plant and equipment amount of Kshs.211,238,288 as was disclosed in the financial statements. Included in the balance was an amount of Kshs.79,067,020 in respect of partitions works in four (4) regional offices whose contract value totaled to Kshs.69,343,570 resulting to unreconciled variance of Kshs.9,723,450. Further, the final accounts by the supervising consultant in respect of the works above indicated the work done to be valued at Kshs.58,130,808

resulting in an unexplained and unaccounted for variance of Kshs.11,212,762 compared to the contract sum of Kshs.69,343,570. In addition, examination of the final certificate of completion indicates that the works were certified as complete on 27 August, 2021, but the partitions were capitalized in the year under review. Management has not explained the reasons for capitalizing the works yet the final certificate of completion had not been issued. In the circumstances, the accuracy, completeness and regularity of the property, plant and equipment balance of Kshs.211,238,288 could not be confirmed.

Management Response

330. PPEs were corrected and the ledgers updated. The comparative for 2021/2022 were restated.

Committee Observation

331. The Committee noted at the time of examination that the financial statements were restated to reflect the correct financial position on PPEs.

Committee Recommendation

332. The matter stands resolved.

2.0. Inaccuracies in Employee Costs

333. The statement financial performance reflected employee cost of Kshs.630,822,709 as disclosed in the financial statements. However, review of the payroll details indicated total employee cost of Kshs.516,536,406 resulting in a variance of Kshs.114,286,303. In the circumstances, the accuracy and completeness of employee costs of Kshs.630,822,709 could not be confirmed.

Management Response

334. The management reported that the Auditor considered employee costs as the only costs reflected on the payroll. Employee costs included gratuity, pension, medical, WIBA and other non-payroll costs that were not reflected in the payroll.

Committee Observation

335. The Committee noted at the time of examination that employee costs included gratuity, pension, medical, WIBA and other non-payroll costs that were not reflected in the payroll.

Committee Recommendation

336. The matter stands resolved.

3.0. Unsupported expenditure on Consultancy

337. The statement of financial performance reflected contracted services balance of Kshs.120,872,750 as disclosed in the financial statements. Included in this balance was an amount of Kshs.10,245,718 incurred on Consultancy for Development of Environmental Health Safety (EHS) guidelines for Petroleum Upstream Sector. The contract was awarded to a company on 11 June, 2019 at a contract sum of Kshs.17,076,196. However, Management did not provide documents to support payment of Kshs.10,245,718 for audit. In the circumstances, the accuracy, completeness and regularity of the consultancy expenditure of Kshs.10,245,718 could not be confirmed.

Management Response

338. The expenditure of consultancy for the Development of Environmental Health and Safety (EHS) Guidelines for Petroleum Upstream Sector disclosed under consultancy services was supported by a contract and the final report for Environment, Health and Safety availed for audit both in hard and soft copy. *(Contract and final report for the consultancy are annexed-4).*

Committee Observation

339. The Committee noted at the time of examination that the management had submitted the contract Environmental Health and Safety (EHS) Guidelines for Petroleum Upstream Sector for audit verification.

Committee Recommendations

340. The matter stands resolved.

4.0. Budgetary Control and Performance

341. It was reported that the statement of comparison of budget and actual amounts reflected budgeted total revenue of Kshs.1,887,092,149 and actual revenue of Kshs.1,510,183,486 resulting to under receipts by Kshs.376,908,663 or 20% of the budget. Similarly, the Authority projected to spend Kshs.1,388,936,050 but incurred Kshs.1,354,664,883 resulting to under expenditure of Kshs.34,271,167 or 2% of the budget. The underfunding affected the planned activities and may have impacted negatively on service deliver to the public.

Management Response

342. Operations of the Authority were greatly hampered by the Covid-19 Pandemic in the FY 2020/2021, which affected both the Authorities revenue streams and ability to undertake

various scheduled activities, which were either downscaled, delayed or suspended both within the Authority and on the part of service providers and other stakeholders.

Committee Observation

343. The Committee noted at the time of examination that Operations of the Authority were greatly hampered by the Covid-19 Pandemic in the FY 2020/2021, which affected both the Authorities revenue streams and ability to undertake various scheduled activities, which were either downscaled, delayed or suspended both within the Authority and on the part of service providers and other stakeholders.

Committee Recommendation

344. The matter stands resolved.

REPORT ON THE LAWFULNESS AND EFFECTIVENESS IN THE USE OF PUBLIC RESOURCES

5.0. Irregular expenditure on the contract for monitoring domestic Kerosene

345. The statement of financial performance reflects contracted services balance of Kshs.120,872,750. Included in this balance is an amount of Kshs.77,812,262 incurred on provision of petroleum fuels marking and monitoring services. An amount of Kshs.56,041,963 was paid in the financial year 2019/2020 resulting in total payments of Kshs.133,854,225. According to the tender documents, the contract was awarded to a company on 28 March, 2019 at a contract sum of Kshs.68,512,520 in the two years resulting to an unexplained over expenditure of Kshs. 65,341,705. Further, according to Part I section 8 of the contract agreement, the Authority had committed to bear the cost of services offered to independent and unbranded retail stations. The Authority was exposed to the risks of additional costs in respect to independent and unbranded stations. In the circumstances, value for money for the contract could not be confirmed.

Management Response

346. The Energy & Petroleum Regulatory Authority (the Authority) has been empowered under Section 10 (a) (ii) of Energy Act 2019 to regulate importation, exportation, transportation, refining, storage and sale of petroleum and petroleum products in the country. Additionally, Section 10 (a) (h) mandates the Authority to protect the interests of consumer, investor and other stakeholder interests.

347. To ensure fair competition in the Petroleum business and ensure that only quality petroleum products are offered for sale in the local market, the Authority undertakes a Fuel Marking and Monitoring program. The program is meant to curb Fuel adulteration and dumping of Export Bound products. Fuel adulteration involves the introduction of Kerosene into Premium Motor Spirit (PMS) or Automotive Gas Oil (AGO) with the resultant mixtures being sold to consumers as pure PMS or AGO respectively. On the other hand, dumping involves the diversion of duty-exempt export fuel for illegal sale in the local market.
348. The Authority undertakes the Fuel Monitoring program for two weeks in each month by taking product samples from selected petrol stations across the country, the samples are tested to check the presence adulteration or dumping. Due to budget constraints, only 18,000 samples were contracted in year 1 with a possibility of review in year 2 subject to availability of funds.

Year 2 Variation

349. According to the provisions of the Public Procurement and Asset Disposal Act 2015 Section 139(4), it provides that;
- a) the quantity variation for goods and services should not exceed fifteen per cent of the original contract quantity;
 - b) the price or quantity variation is to be executed within the period of the contract; and
 - c) the cumulative value of all contract variations do not result in an increment of the total contract price by more than twenty-five per cent of the original contract price.
350. Computation below are therefore derived from the provisions of the Act as above.

Table 1: Variation Option 1 (by 15% of Contract Samples)

	Total No. of samples (Annual)	Proposed Variation (15% of Annual)	Cost per sample (USD)	Quantum of variation (USD) Annual

		Sample s)		
Kerosene	9,000	1,350.0 0	63.075	85,151.25
Export	9,000	1,350.0 0	63.075	85,151.25
Annual Total	18,000	2,700.0 0	63.075	170,302.50
Total 3 year Contract	54,000	8,100	63.075	510,907.50

351. The Act restricts the number of variation samples to 15% of the total contract samples subject to the cost of those samples not exceeding 25% of the full contract value. The cost of the 15% of the varied contract samples (8,100*63.075) amounts to USD 510,907.50 which is within the maximum variation limit of 25% of the full contract value.
352. The contract variation amount of USD 510,907.50 (KES 53,645,287.50) was to be executed within the contract period which ideally means - the remainder of the contract period. The remaining period was two years, each of the two remaining years was allocated KES 26,822,643 (KES 31, 114, 266.75 inclusive of 16% VAT). These amounts were all allocated to the unbranded stations that were paid by the Client (EPRA)
353. Initial annual contract price is given as USD 326,250 (KES **34,256,260** excluding VAT) in Year 1. (The contract price inclusive of 16% VAT is therefore be KES **39,737,250**) From the above computations, the new full contract amount inclusive of 16% VAT for EPRA is estimated as follows:

Year 1 : 39,737,250 + 0	= 39,737,250
Year 2 : 39,737,250 + 31,114,266	= 70,851,516
Year 3 : 39,737,250 + 31,114,266	= 70,851,516
Total Ksh	= 181,440,282

354. Total estimated full contract amount for the three years inclusive of 16% VAT will amount to approximately KES 181, 440, 282 (KES 156,414,036 exclusive of 16% VAT). Please

note that there is a period VAT was 14% therefore 16% is used in all years for illustration purposes. Additionally, when payments are made to Intertek, some 2% tax is withheld, that has to be considered when comparing the full contract sum versus payments made)

355. As at 23rd February 2021, it is indicated that EPRA had paid KES 113,257,626 to Intertek which is within the estimated full contract amount of KES 181, 440, 282 inclusive of VAT. We still had over 9 months remaining to the end of the contract. We have an exchange rate of KES 105/USD for consistency in all computations but actual rates varied month to month.

Auditors Comments

356. The issue at hand was to ascertain whether there was an over expenditure under the contract. To establish this, a review of the provisions of the contract was done against the total payments made under the contract.
357. A contract for provision of petroleum fuel marking and monitoring services was entered into on 2 January, 2019 between the Authority (Then Energy Regulatory Commission) and Intertek testing services (East Africa) PTY Limited and Authentix Inc at an annual total contract sum of USD 3,633,908.23, exclusive of taxes. According to the contract, out of the annual contract sum, USD.3,307,658.28 was chargeable to oil importing companies and USD.326,250 to the authority. This means that the maximum chargeable amount to the authority under the contract from 2 January 2019 to 1 January 2020 was USD.326,250 (or Kshs.34,256,260) exclusive of taxes and USD 378,450 (or Kshs.39,737,250) inclusive of taxes. It has also been noted that the amount billed by Intertek testing services depends on the samples tested in each month and cannot therefore be distributed equally throughout the contract period. Additionally, the contract ran from January to December for the three years (2019, 2020 and 2021) while the financial year runs from 1 July to 30 June.
358. A contract variation was done in March 2020 which increased the whole contract by USD.510,907.50 from the initial USD.3,633,908.23 to USD4,144,815.78 exclusive of taxes which is approximately 14% of the original contract. The variation was therefore within the provisions of Public Procurement and Asset Disposal Act 2015. According to the variation, the amount chargeable to oil importing companies was set at a maximum of USD3,307,658.28 per year, while the Authority was to be billed a maximum of USD837,157.50 per year. The amount chargeable to the authority after variation was an equivalent of Kshs.70,851,516 inclusive of taxes.

359. To ascertain whether there was over expenditure under the contract, the whole contract duration was considered because of the lack of homogeneity of samples tested and overlap between the contract period and financial year (please note that the contract was running from January to December whereas the financial year runs from July to June.
360. Records provided for audit verification show that a total of USD.1,705,459.18 was paid against a contract sum of USD 1,728,002.70 (all figures are inclusive of VAT) for the three years the contract was in place (from January 2019 to December, 2021). It can therefore be confirmed that no amount was paid in excess of the contract sum during the contract period of the three years. Therefore, it is my proposal that the issue be considered as satisfactorily addressed.

Committee Observation

361. The Committee observed at the time of examination that the full contract amount for the three years inclusive of 16% VAT was Kshs.181,440,282. As at 23rd February,2021, EPRA had paid Kshs.113,257,626 which was within the estimated contract sum. There was still 9 months remaining to the end of the contract period and therefore no overpayment.

Committee Recommendation

397. The matter stands resolved.

6.0. Irregular extension of inspection of Liquefied Petroleum Gas Storage and Cylinder Contract

362. The statement of financial performance reflects contracted services balance of Kshs.120,872,750. Included in this balance is an amount of Kshs.45,529,384 incurred on inspection of Liquefied Petroleum Gas (LPG) storage facilities and LPG cylinders. According to the tender documents, the contract was awarded to a company on 28 March, 2019 at a contract sum of Kshs.35,809,200. The contract duration was for two (2) years commencing 28 March, 2019 to 28 March, 2021. The contract was extended for a period of one (1) year on 25 March, 2021 for a contract sum of Kshs.35,809,200. This was contrary to Section 139, 2 (a) of the Public Procurement and Asset Disposal Act, 2015 which provides that an accounting officer of a procuring entity, on the recommendation of an evaluation committee, may approve the request for the following, which request shall be accompanied by a certificate from the tenderer making a justification for such cost. Review of the financial records revealed the firm has been paid a total of

Kshs.85,515,453 since inception of the contract resulting in an unexplained overpayment of Kshs.13,897,053. In the circumstances, the Authority was in breach of law.

Management Response

363. Contract Amounts for the LPG contract

Year	Kshs
Year 1	35,809,200
Year 2	40,470,570
Total Contract Amount	76,279,770

Amount Paid

Year 1	33,121,561.20
Year 2	37,519,434.00
Total Paid	70,640,995.20

Committee Observations

364. The Committee observed that at the time of auditing the first year, the contract was still running which led the auditors to believe that there was an overpayment which has been clarified by the Authority not to be the case.
365. The Committee also noted that there was need for the Authority to disclose all the material facts to the OAG during audits to minimize accounting reconciliation challenges.
366. The Committee noted that EPRA provided a list of service providers that came on board during the contract period which necessitated a variation of the original contract.

Committee Recommendation

367. The matter stands resolved

7.0. Unutilized office space

368. The Authority entered into a lease agreement with a landlord for office rent fifth (5th) floor at an amount of Kshs.2,785,050 per month payable quarterly in advance. However, a physical verification of the premises confirmed that the Authority had not occupied the office as from 1 July, 2020 until the time of the audit in March, 2022 despite paying rent of Kshs.6,684,120. According to the Management, the non-occupancy was as a result of long period of partitioning, fittings and remodeling of the office to conform to the Authority's needs and brand. In the circumstances, the Authority did not obtain value for money on the expenditure.

Management Response

369. The office space required remodeling that involved procurement of a consultant for interior design which would result in floating of another tender for the contractor. Both tendering processes and design of the floor would require time after which the winning contractor required time to mobilize resources. **Covid-19** impacted the speed of the contract due to restricted movement and disruption of supply chain for materials used in the construction, some of which were sourced from outside the country. The office floor is currently fully operational.

Committee Observations

370. The Committee noted at the time of examination Covid -19 impacted the speed of the contract due to the restricted movement and disruption of supply chain for materials used in the construction, some of which were sourced from outside the country. The office floor is currently fully operational.

Committee Recommendation

371. The matter stands resolved.

8.0. Failure to remit surplus funds to Kenya Revenue Authority

372. Examination of expenditure records revealed that the Kenya Revenue Authority through a notice dated 25 August, 2020 demanded remittance of surplus funds amounting to Kshs.240,041,236. The Authority failed to remit the funds contrary to Section 219(2) of Public Finance Management Act, 2012 on dividend policy and surplus funds. Further, in a letter dated 6 November, 2020 Kenya Revenue Authority (KRA) required the Authority to pay tax owed of Kshs. 276,731,953. The Management has explained they had communicated with The National Treasury indicating that they cleared the issue. However, no official communication from KRA confirming the clearance of the issue was provided for audit. In the circumstances, Management was in breach of law.

Management Response

373. Following National Treasury letter ref DGIPE/P/7/100 "B", the Authority remitted all invested funds to the National Treasury, in form of surplus funds. The Authority remitted a total of Ksh.460M in 2019/2020 which is more than the amount demanded by KRA at the time. The Authority had utilized all remaining funds demanded by KRA in the purchase of furniture, fittings and equipment and wrote to the National Treasury on the same matter. The National Treasury through a letter dated 13th March 2023 approved utilization of the funds for capital expenditure. (Confirmation payment of Kshs.460M and National Treasury Letter on Surplus Funds annexed-5).

Committee Observation

374. The Committee noted at the time of examination that the Authority had utilized the funds demanded by KRA in the purchase of furniture, fittings and equipment and wrote to the National Treasury on the same matter. The National Treasury through a letter dated 13th March 2023 approved utilization of the funds for capital expenditure.

Committee Recommendation

375. The matter stands resolved.

9.0. Irregular appointment of Director General

376. Review of human resource records and minutes of the Board of Directors meetings revealed irregularities in the appointment of the Director General of the Authority. The details were provided below:

- a) ~~The Board held 79th special Board meeting on the 14 of December, 2020 and confirmed the interdiction of the former Director General. Upon further~~

deliberations, the members unanimously resolved that a recommendation be made to the Cabinet Secretary in Charge of the Ministry of Energy, for appointment of one of their own who was representing the Cabinet Secretary in the Board as the Acting Director General. The appointment was to take effect as from 9 December, 2020. It was however noted that the Board Members did not declare a conflict of interest in the matter since the person to be appointed Acting Director General was a member of the Board and was in the meeting. This was contrary to Section 1.16(1b) of the Code of Governance for State Corporations (Mwongozo) which requires that a Board Member disclose all real or perceived conflict of interest and manage these within an agreed framework.

- b) Further review indicated that the special Board meeting held on 14 December, 2020 ended at 8p.m, while the letter from the Board seeking approval for appointment of Acting Director General was done and sent to the Cabinet Secretary on the same day. The Board issued an appointment letter on 14 December, 2020 to one of their own to act as Managing Director on 14 December, 2020 before the approval was granted. The Acting Managing Director who was a member of the Board and was present in the meeting accepted the appointment the same day. However, the letter from the Ministry on the appointment was issued on the 15 of December, 2020. This implies that the Board appointed him before getting the Ministry's approval. This was contrary, to Part 13(1) of the Energy Act 2019, that stipulates that the Board shall subject to the approval of the Cabinet Secretary, appoint a Director General who shall be the Chief Executive Officer of the Authority.
- c) The position of the Director General was declared vacant by the Board during its 109th regular meeting held on 31 March, 2021 and subsequently the position was advertised on 27 April, 2021. The 83rd special meeting of the Board held on 20 May, 2021 delegated the task of shortlisting the applicants to the Finance and Administration Committee (FAC) which in turn formed a team consisting of Management to open and compile the applications. The team prepared the report dated 28 May, 2021 which indicated there were 23 applicants.
- d) The Board sought approval of the Cabinet Secretary on 28 June, 2021 to appoint the Director General. However, the Cabinet Secretary appointed the Director General on 28 June, 2021 whose terms of offer were accepted and signed by the nominee on the same day instead of the Board of Directors as required by Section 13 (1) of the Energy Act, 2019.
- e) According to Section 13 (3)(c) (d) of the Energy Act, a person shall be qualified for appointment as a Director-General if such person has at least seven (7) years management experience at a senior level and at least two (2) years of experience

in petroleum and energy. However, review of the applicant's documents confirmed that the person lacked the requisite management experience at senior level for appointment as a Director General.

In view of the foregoing, the regularity and suitability in the appointment of the Director General could not be confirmed and Management was in breach of law.

Management Response

377. The Chairperson, Board of Directors of EPRA, Hon. Justice (Rtd) Jackton Ojwang' responded to this query as follows; —

- i. The Board at its 121st meeting held on 25th January 2023, discussed the aforementioned report and resolved that a brief and supporting documentation for the appointment of the Director-General (DG) be submitted to the OAG, under the Board Chairman's signature, as EPRA's response to the audit issue. We therefore state as follows:
- ii. The task falls to me to fully explain the context and circumstances in which the EPRA Board, under my Chairmanship, made the appointment of the current Director-General, Mr. Daniel Kiptoo Bargoria.
- iii. An appropriate starting-point is: "Minutes of the 79th Special Board Meeting of the Energy and Petroleum Regulatory Authority (EPRA) held on Monday 14th December, 2020 at 9.00a.m. at the EPRA Boardroom and via Video Conference."
- iv. It is evident from those minutes that the EPRA Board was on that occasion acting (as it had a legal duty to do) on "Letters from the Ethics and Anti-Corruption Commission (EACC) dated 11th December, 2020 (Ref. No. EACC1 Vol. III (60) (61)) on the arrest of Mr. Robert Pavel Oimeke, Director General of EPRA, for demanding and receiving a bribe....."
- v. The EPRA Board, on that occasion, took two decisions (see the last page of the Minutes), as follows:

"1. Mr. Robert Pavel Oimeke be interdicted with immediate effect in accordance with the law and EPRA's prevailing Human Resource Policy and Procedure Manual; The recommendation be made to the Cabinet Secretary for the Ministry of Energy, Hon. Charles Keter, that Mr. Daniel Kiptoo Bargoria be appointed as the Director-General in an acting capacity, with effect from 9th December, 2021."
- vi. The EPRA Board bore responsibility for assuring that EPRA consistently had continuous leadership in an executive capacity. This is the reason for the proposal made for the appointment of an interim Director-General. The Board exercised its discretion in proposing an interim Director-General, and the Board sought the approval of the Cabinet Secretary for such an interim appointment. There was no

- substantive appointment then, and the purpose was simply to enable EPRA to continue with its operations, in the absence of a substantive Director-General.
- vii. This was a responsible decision taken by the EPRA Board, in the short term. Therefore, there was no advertisement then. The Board only required a suitable suggestion in terms of a proper understanding of energy law and management. And the Board was clear that, one of the most knowledgeable persons in that regard was Mr. Daniel Kiptoo Bargoria, who was also familiar with EPRA's operations, as he was already a Board Member. There was no advertisement at that stage, and there would strictly have been no need for anyone proposed, to disqualify himself or herself from the conduct of proceedings. Disqualification should only have come later, when a substantive appointment, based on applications, would be considered.
- There was no irregularity regarding the interim appointment.
- viii. This takes us to the later procedure of formal applications for the position of Director-General of EPRA. Attached are the many documents describing the procedures of advertisement, applications and interviews, which culminated in Mr. Daniel Kiptoo Bargoria being duly appointed, on merit and on high scores, as the Director-General of EPRA. It is not true, in these circumstances, that the appointment as substantive Director-General, of Mr. Daniel Kiptoo Bargoria, in any way stood in conflict with Section 1.16 (1b) of the Code of Governance for State Corporations (Mwongozo).
- ix. As Chair of the interviewing Board of EPRA, I should like to state that all appropriate short-listing procedures had been followed; and I would emphasize that the candidate appointed by the Board had distinctly high scores, above the others; and so the right decision for the Board was to approve this particular candidate for the position of Director-General of EPRA. There was no alternative.

Acting Appointment of the Director-General

378. On the matter of the Board meeting that was held on the 14th of December 2020, I wish to clarify as follows, since the same was not captured in the Board minutes (Board Minutes Annexed-6):
- a) The Board did consult with the Ministry of Energy, on the appointment of Director-General in an acting capacity.

- b) It was after consultations between the Chairman and the Ministry leadership, that the Ministry recommended that a person familiar with the energy sector should act, noting the internal challenges which the Authority had experienced for some time. This was, in our view, a pragmatic and sensible standpoint, in all respects.
- c) It is upon the advice of the Ministry, that the matter was tabled for discussion before the 79th Special Board meeting held on the 14th of December 2020.
- d) In the Chairman's opening address to the Board, it was communicated that the Ministry had recommended the appointment of Mr. Daniel Kiptoo Bargaroria, in an acting capacity. Following those opening remarks, Mr. Bargaroria was declared at the meeting as the subject matter of discussion. He requested quite properly, to step out of the meeting to facilitate deliberations. Consequently, he did not participate in the deliberations of the Board that culminated in his appointment in an acting capacity.

379. On the matter of the offer of appointment by the Board to Mr. Bargaroria being issued and accepted on the 14th of December 2020, and as to the concurrence for the appointment being received by the Ministry the following day, on the 15th of December 2020, the rationale (which was not captured in the Board minutes), is as indicated below:

- a) The Board was cognizant of the fact that following the concurrence of the Ministry, and the fact that the meeting was being held on the 14th of December 2020, there was need to have an acting Director-General on the same date, in order to ensure regular conduct of business.
- b) The Authority reviews maximum wholesale and retail prices of petroleum products across the Country every 14th day of the month, and the absence of a holder (acting or substantive) in the office of the DG had the implication that the country would not have prices applicable on the 15th of December, if the Board failed to conclude the appointment. Time was therefore of essence.

380. **Advertisement of the Position of DG**

- i. The position of Director-General was declared vacant by the Board during its 109th regular meeting, held on 31st March, 2021.
- ii. The position was advertised on 27th April, 2021 in various dailies, and on the EPRA website. The adverts specified the academic and professional qualifications required for the position.

381. **Long-listing for the Position of the DG**

- i. A team consisting of Senior Management was directed to open the applications and prepare a long list. The team consisted of the Corporation Secretary & Director of Legal Services (CS&DLS), Manager HR; Principal Officer HR; and the Senior Office Administrator in the CS&DLS Office who was to provide secretarial support.
- ii. The team undertook the long-listing exercise from 26th to 28th May, 2021. Twenty-three (23) individuals were long-listed out of the eighty-five (85) applications received.
- iii. A Finance & Administration Committee Paper on the long-listing exercise referenced: EPRA/ FAC/Paper No. 211/2021 dated 28th May 2021, was prepared. This was for purposes of recommending to the Board for approval, the qualified candidates to be interviewed for the position of DG. See attached FAC Paper on the **long-listing exercise Annexed 7.**

382. **Short-listing for the Position of the DG**

- i. The 83rd Special Board meeting held on 20th May, 2021 delegated the task of short-listing the applicants to the Finance and Administration Committee of the Board (FAC).
- ii. Short-listing for the position of Director-General was done during the special Finance and Administration Committee meeting held on 2nd June 2021.
- iii. On the issue of seven (7) years management experience, Mr. Bargoria had eight (8) years five (5) months management experience by the time of closing of the advert in May 2021. This experience was drawn from the time he started working at Salama Fikira International Limited, from January 2013, as Oil & Gas Legal Affairs Director. He continued to gain experience in various management positions up to the date of the closing of the advert in May 2021. The management experience was drawn from his CV. See summary below on management experience for ease of reference:

S/N	Position held	Period
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1.	Ag. DG, EPRA	15 December 2020 to 12 May 2021
2.	Board member of EPRA	June 2019 to 14 th December 2020
3.	Legal Advisor and Chairman First Oil committee, Ministry of Petroleum & Mining	March 2018 to February 2021
4.	Legal Advisor to the Cabinet Secretary, Ministry of Energy/Ministry of Petroleum Mining	July 2013 to 12 May 2021
5.	Oil& Gas Legal Affairs Director for Salama Fikira International Ltd (Risk Management Consultancy)	January 2013 -June 2013
	Total Experience	8 years and 5 months

- iv. A Board paper on the short-listing exercise referenced: EPRA/ Board/Paper No. 768/2021 was forwarded to the Board for approval.

383. Interviews for the Position of the DG

- i. During the eighty fifth (85th) Special Board meeting held on 25th June 2021, three (3) shortlisted candidates were interviewed for the position of Director-General.
- ii. The Board deliberated and reviewed the scores for each candidate, and on the basis of objective criteria, appointed Mr. Bargoria to the position of the Director-General, subject to the approval of the Cabinet Secretary, Ministry of Energy, pursuant to Section 13 (1) of the Energy Act 2019.

384. **EACC Clearance**

- i. The clearance of EACC was one of the prerequisites during the recruitment process, as captured in the advertisement, and Mr. Kiptoo did attach his application for clearance.
- ii. The EACC did communicate that due to the prevailing pandemic at the time, applicants were required to submit their clearances and await guidance from EACC.
- iii. The Authority did write to EACC for clearance, following the recruitment process, and the clearance came after the appointment was made. **See attached letter Annexed 8.**
- iv. However, it is noted that at the time of appointment, Mr. Kiptoo was already a serving public officer.

385. **Appointment of the DG**

- i. On the issue of the Board of EPRA being the appointing authority and not the Cabinet Secretary (CS) for Energy, the Board Chairman in his letter to the CS dated 28th June 2021, communicated the results of the interview and sought approval for appointment of Mr. Bargarora to the position of the DG, as required by Section 13 (1) of the Energy Act 2019. **See attached letter Annexed 9.**
- ii. The Cabinet Secretary concurred with the Board's Decision, vide the appointment letter dated 28th June, 2021. The letter was forwarded to Mr. Bargarora through the Board Chair (**See attached letter Annexed 10**).

386. **Guidance from the Attorney-General (AG), on Appointment of the DG**

- i. A legal opinion on the appointment of the DG was sought by the Board Chairman, from the Hon. The Attorney-General on 13th August 2021. Guidance from the AG was offered in a letter dated 13th September 2021 (**AG's opinion annexed 11**).
- ii. Below is a highlight of the Hon. The Attorney-General's guidance, for ease of reference:
 - a. Whether the Board Members were conflicted in the Recruitment
Clause 16 – In AG's view, the mere fact that Mr. Bargarora previously sat on the Board as an alternate representing the Principal Secretary, Ministry of Energy, would not by itself create conflict of interest on the part of the Board.
 - b. Whether Mr. Bargarora was disqualified from Being Interviewed and appointed as DG in view of Mwongozo's provisions as stated by SCAC.

-Clause 8 - No provision was found in the applicable statute and Mwongozo that bars the interview and appointment of a person as a Director-General on the basis that such a person has served on the Board of the Authority.

c. The Legal Status of Mwongozo Provisions vis-a vis the Provisions of the Energy Act with Respect to the appointment of EPRA's DG

-Clause 12 - Mwongozo is subordinate to any contrary provisions of statute law, including the Energy Act. Section 31(b) of the Interpretation and General Provisions Act stipulates that no subsidiary legislation shall be inconsistent with the provisions of an Act.

Committee Observations and Findings

387. The Committee noted at the time of examination that on the issue relating to conflict of interest, evidence was tabled by way of a legal opinion from the Office of the Attorney General that, the mere fact that Mr. Bargoria previously sat on the Board as an alternate representing the Principal Secretary, Ministry of Energy, would not by itself create a conflict of interest on the part of members of the Board interviewing him.
388. The Committee also observed that on the matter of seven years' experience, evidence was tabled to the satisfaction of the Committee demonstrating that Mr. Bargoria had eight (8) years five months management experience by the time of closing of the advertisement in May 2021. The experience was drawn from time he started working at Salama Fikira International Limited from January 2013 as Oil and Gas Legal Affairs Director.
389. The Committee noted at the time of examination that on the matter relating to appointment of the Director General, there was no evidence tabled to satisfy the Committee that the process of appointing Mr. Bargoria, as the Director General, was irregular.

Committee recommendations

390. The matter stands resolved.

10.0. Irregular payment of retention money

391. Review of financial records confirmed that the works for partitioning the regional offices in Nyeri, Mombasa, Kisumu and Eldoret had accrued bills amounting to Kshs.21,207,345 out of which an amount of Kshs.5,077,257 was paid to the contractor as retention monies leaving a closing balance of Kshs.16,130,088. However, payment of retention monies was done before issuance of the final certificate of completion contrary to Section 151, (2), (h) of the Public Procurement and Asset Disposal Act, 2015. In the circumstances, Management was in breach of law.

Management Response

392. The retention money was withheld for every invoice presented to EPRA as indicated in the attachment. It emerged that EPRA withholding amount of Kshs.5,077,257 was double retention which was released to the contractor following consultation with the Project Manager as evidenced by the statement in the valuation certificate. The completion certificate was issued on 27th August 2021, the final invoice dated 28th August 2021 submitted on 9th September 2021 and the final payment of Kshs.7,358,177.25 made on 10th September 2021 (*Final accounts, valuation certificate and, contractor's final invoice and payment voucher for settlement of final payment are annexed-12*).

Committee Observation

393. The Committee noted at the time of examination that the completion certificate was issued on 27th August 2021, the final invoice dated 28th August 2021 submitted on 9th September 2021 and the final payment of Kshs.7,358,177.25 made on 10th September 2021.

Committee Recommendation

394. The matter stands resolved.

3.3. COMPETITION AUTHORITY OF KENYA (F/Y2017/2018 - 2020/2021)

EXAMINATION OF THE REPORTS OF THE AUDITOR GENERAL ON THE AUDITED ACCOUNTS OF COMPETITION AUTHORITY OF KENYA FOR THE FINANCIAL YEARS 2017/2018 TO 2020/2021

395. Dr Adano Wario Roba, the Managing Director of Competition Authority of Kenya accompanied by Mr. Eric Mwangi the Director, Corporate Services of the Authority, appeared before the Committee to give evidence on the audited accounts of Competition Authority of Kenya for the years 2017/2018 to 2020/2021.

REPORT OF THE AUDITOR GENERAL ON THE FINANCIAL STATEMENTS OF THE AUTHORITY FOR THE FY 2017/18, 2018/19, 2019/20 AND 2020/21.

396. The Financial Statements for the four (4) years under review were audited by the Auditor General as per the Public Audit Act 2015 and section 81(3) of the Competition Act No.12 of 2010. The Committee was informed that the Authority's Financial Statements were found to comply with all the statutory requirements, International Public Sector Accounting Standards (IPSAS) and that the financial resources received were managed in accordance with sound financial/business or commercial principles.
397. It was reported that the Authority has consistently won the prestigious financial reporting (FiRe) awards under the IPSAS accrual category for the four years under review.
398. The Auditor General consistently issued an unqualified audit opinion on the Financial Statements of the Authority for the four (4) Financial Years under review. Accordingly, there were no outstanding audit issues contained in the reports as submitted to the Public Investment Committee on Commercial Affairs and Energy.

Management Response;

A) Background

399. The Competition Authority of Kenya (the Authority) is established under the Competition Act, No. 12 of 2010 (the Act). The Authority's mandate is generally to promote and protect effective competition in markets and preventing misleading market conduct in the country.
400. The Authority endeavors to achieve its mandate through control of mergers; prohibition of Abuse of Dominance; regulation of concerted practices and prohibition of unfair and misleading market conduct. The Authority also advises the Government on competition and consumer protection issues.

B) Functions

401. To actualize its mandate, the Authority focuses on:

- i. Promotion and enforcement of compliance with the Competition Act;
- ii. Receipt and investigation of complaints from legal, natural persons and consumer bodies;
- iii. Promotion of public knowledge and awareness;
- iv. Promotion of creation of consumer bodies and establishment of proper rules and standards to be followed by such bodies;
- v. Provision of consumer's information and guidelines relating to the Act and the rights and remedies available under the Act;
- vi. Conduct of inquiries and sector studies on competition matters and protection of consumer interests;
- vii. Study of government policies, procedures and programmes to assess the effects on competition;
- viii. Investigation of impediments to competition including entry and exit from markets;
- ix. Investigation and increasing deterrence of abuse of buyer power and late payments in order to strengthen SMEs;
- x. Investigation of policies, procedures and programmes of regulatory authorities to assess their effect on competition and consumer welfare and publicity of the results.

C) Strategic Focus

402. During the four-year period 2017/18 to 2020/21, the Authority focused on the following main strategic areas:

- i. Regulation of anti-competitive practices and mergers, unwarranted concentration of economic power, and practices that affect consumer Welfare;
- ii. Conducting market inquiries, promotion of public awareness and understanding of the competition policy and law;
- iii. Mobilization of adequate financial resources and enforcement of optimal utilization to ensure financial sustainability of the Authority;
- iv. Building of adequate infrastructure and human capital capacity to enable the Authority efficiently and effectively execute its mandate;
- v. Increasing deterrence of abuse of buyer power through late payments and unfavorable contractual terms;
- vi. Enhancing corporate image and visibility of the Authority.

D) Major achievements

403. During the review period;

- i. **Facilitated investment of over Kshs. 140 billion into the national economy** through the reduction in the number of days taken to analyse mergers from thirty-five (35) days in FY2020/21 to thirty-two (32) days in 2021/22 against a statutory timeline of sixty (60) days. Additionally, mergers in the hospitality sector which was greatly affected by the COVID-19 pandemic and under the Big 4 Agenda have been fast-tracked and therefore, determined within ten (10) days after complete filing, resulting in creating/salvaging of over five thousand (5,000) jobs;
- ii. **Facilitated implementation of Article 46 of the Constitution on Consumer welfare by expediting an estimated Kshs. 12.4 million in consumer savings** through investigation of eight hundred and ninety-two (892) consumer cases over the period and finalizing 94% of these cases investigated. Further, the Authority has in collaboration with the KICD integrated and mainstreamed consumer protection literacy in the Competency Based Curriculum for Junior and Senior Secondary Schools;
- iii. **Enhanced competition in the market leading to, among others, lower consumer prices, increased consumer choice and high-quality goods in key sectors** – Paints, alcoholic beverages and energy, through investigating and sanctioning ninety-one (91) abuse of dominance, business cartels and bid rigging schemes. The Authority's intervention resulted in sanctioning to remedy the conduct, resulting in imposition of penalties amounting to Ksh.67.8 million;
- iv. **Facilitated recovery of delayed payment totaling over Kshs. 2.3 billion in the retail and Kshs. 43.3 million in the Insurance sectors thereby supporting the sustainability of suppliers, most of whom are SMEs.** This was achieved through: investigating one hundred and thirty-one (131) abuse of buyer power cases; publishing a code of practice for the retail sector in order to facilitate self-regulation and pre-empt incidences of abuse of buyer power; developing template contracts for the insurance retail sectors to encourage fair competition; and sensitizing nine hundred and sixty-two (962) stakeholders on the provisions of buyer power in order increase compliance;
- v. **Policy development** - The Authority conducted and concluded four market inquiries during the period under review. As highlighted in the MTP III consolidation of players in the banking sector through mergers has been adopted; policy proposals emanating from the Digital Credit Market have been adopted,

resulting in the Central Bank of Kenya (Digital Credit Providers) Regulations 2022;

- vi. **Creating predictability to minimize conflicting decisions and create regulatory certainty** through operationalization of co-operation frameworks with Sector Regulators such as the Kenya Civil Aviation Authority, the Energy and Petroleum Regulatory Authority and the Public Procurement Regulatory Authority; and
- vii. **Deepened research to support decision making in order to bring up policies supporting emerging issues that facilitate economic growth by** conducting three (3) Annual capacity building workshops and symposiums in collaboration with the University of Nairobi and the University of Johannesburg. Over six hundred (600) practitioners have been trained in competition law and policy in the region through these forums.

A detailed account of the Authority's achievements is contained in the Annual Reports for each of the financial years annexed to this report.

E) Financial Resources

404. During the period 2017/18-2020/21, the Authority continued to rely heavily on the Exchequer for most of its funding requirements with limited scope for internal revenue generating opportunities constituting only 30% of the budget.
405. During the FY 2017/18, 2018/19, 2019/20 and 2020/21, the Authority mobilized and received **Kshs.563M, Kshs.553M, Kshs.505M and Kshs.430M** which formed the total resources received for implementation of its programmes during the period.
406. Total exchequer releases from the National Treasury as part of transfers to SAGAs and which form part of the above revenues were, **Kshs.381M, Kshs.387M, Kshs.312M and Kshs.253M** for FY 2017/18, 2018/19, 2019/20 and 2020/21, respectively.
407. Total Appropriations in Aid amounted to **Kshs.162M, Kshs.159M, Kshs.183M and Kshs. 169M** raised internally mainly through merger filing application fees as well as fines & penalties from the Authority's enforcement actions.

408. Another **Kshs.45M** was received through Direct support from the COMESA RIIP fund for implementation of the Regional Integration Implementation Programs (RIIP) during the four-year period.

F)) REPORT OF THE AUDITOR GENERAL ON THE FINANCIAL STATEMENTS OF THE AUTHORITY FOR THE FY 2017/18, 2018/19, 2019/20 AND 2020/21.

409. All the four Financial Statements were audited by the Auditor General as per the Public Audit Act 2015 and section 81(3) of the Competition Act No.12 of 2010. The Authority's Financial Statements were found to comply with all the statutory requirements, International Public Sector Accounting Standards and that the financial resources received were managed in accordance with sound financial/business or commercial principles.
410. The Auditor General issued an unqualified Audit opinion on the Financial Statements of the Authority for all the Financial Years. Accordingly, therefore, there were no outstanding issues contained in the Reports as submitted to the Committee.

Committee Observations and Findings

411. The Committee observed at the time of audit that for the financial years 2017/18, 2018/19, 2019/20 and 2020/21, the Authority had received an unqualified audit opinion.
412. The Committee noted that the report on the financial statements did not disclose any key audit matters on the financial position of Competition Authority of Kenya as at 30 June, 2019, in accordance with International Public Sector Accounting Standards (Accrual Basis) and complied with the Public Finance Management Act, 2012 and Competition Act, 2010.
413. The Committee further observed that the report on lawfulness and effectiveness in use of public resources disclosed that nothing has come to the attention of the Auditor General to conclude that public resources have not been applied lawfully and in an effective way in accordance with Article 229(6) of the Constitution.
414. The Committee observed that the report on effectiveness of internal controls, risk management and governance disclosed that nothing has come to the attention of the

Auditor General to conclude that internal controls, risk management and overall governance were not effective in accordance with Article 229(6) of the Constitution.

415. The Committee observed that the Authority has consistently won the prestigious financial reporting (FiRe) awards under the IPSAS accrual category for the four years under review.

Committee recommendation

416. The Committee recommends Competition Authority of Kenya to continue upholding financial prudence and adhering to the principles of Public Finance.

3.4. CENTRAL BANK OF KENYA (2018/19 - 2020/2021)

EXAMINATION OF THE AUDITED ACCOUNTS OF CENTRAL BANK OF KENYA FOR FY 2018/2019 TO 2020/21

417. The management of Central Bank of Kenya, led by the Governor Dr. Patrick Njoroge appeared before the Committee to adduce evidence on the audit queries that had been raised by the Auditor General for FY 2018/19 to FY 2020/21.

REPORT OF THE AUDITOR GENERAL ON THE FINANCIAL STATEMENTS OF THE BOARD FOR THE FYs 2018/19, 2019/20 AND 2020/21.

F/Y 2018/2019

418. The Auditor General gave an unqualified opinion and raised the following concerns.

OTHER MATTER

1. Failure to Maintain the Required Number of Non-Executive Directors.

419. The Central Bank Act Cap 491 of 2014, Part IV - Management, Section 11(1) (d) provides that there shall be eight (8) other non-executive directors of the Board. During Report of the Auditor-General on the Financial Statements of Central Bank of Kenya for the year ended 30 June 2019 2 the year under review, the Bank had in place five (5) non-executive directors transacting business on its behalf.

Management Response

420. This matter lies with the Appointing Authority. However, the operations and governance of the bank had not been adversely affected.

Committee Observations

421. The Committee observed that no evidence had been provided by the Management of CBK showing communication to the appointing authority, regarding the appointment of the non-executive directors.
422. The Committee noted that the operational effectiveness of the institution would be affected given that non-executive directors would have formed part of membership of the different committees of the Bank.

Committee Recommendation

423. The Committee recommends that the Appointing Authority should at any given time appoint the requisite number of non-executive directors to the Central Bank of Kenya Board as per section 11 (2) of the Central Bank of Kenya Act, Cap 491.

2. Lack of the Second Deputy Governor

424. In addition, the Central bank of Kenya Act Cap 491 Section 13B (1) states, “There shall be two Deputy Governors who shall be appointed by the President through a transparent and competitive process and with the approval of Parliament”. During the year under review, only one Deputy Governor was in office.

Management Response

425. This matter lies with the Appointing Authority. However, the operations and governance of the bank have not been adversely affected. This matter has now been resolved with the appointment of a second Deputy Governor on March 10,2023.

Committee Observations

426. The Committee noted that at the time of meeting the management, a deputy governor had been appointed via Kenya Gazette Notice Vol.CXXV-No.61 dated 10 March, 2023 and therefore elected to treat the matter as resolved.

Committee Recommendation

427. The matter stands resolved.

F/Y 2019/2020

428. The Auditor General gave an unqualified opinion and raised the following concerns.

OTHER MATTER

1. Failure to Maintain the Required Number of Non-Executive Directors

429. The Central Bank Act, Cap 491 of 2014, Part IV - Management, Section 11(1)(d) provides that there shall be eight (8) other Non-Executive Directors of the Board. During the year under review, the Bank had in place five (5) Non-Executive Directors transacting business on its behalf.

Management Response

430. This matter lies with the Appointing Authority. However, the operations and governance of the bank had not been adversely affected.

Committee observations

431. The Committee observed that no evidence had been provided by the Management of CBK showing communication to the appointing authority, regarding the appointment of the non-executive directors.

432. The Committee noted that the operational effectiveness of the institution would be affected given that non-executive directors would have formed part of membership of the different committees of the Bank.

Committee Recommendation

433. The Committee recommends that the Appointing Authority should at any given time appoint the requisite number of non-executive directors to the Central Bank of Kenya Board as per section 11 (2) of the Central Bank of Kenya Act, Cap 491.

2. Lack of the Second Deputy Governor

434. In addition, the Central Bank of Kenya Act, Cap 491 Section 13B(1) states, “There shall be two Deputy Governors who shall be appointed by the President through a transparent and competitive process and with the approval of Parliament”. During the year under review, only one Deputy Governor was in office.

Management Response

435. This matter lies with the Appointing Authority. However, the operations and governance of the bank have not been adversely affected. This matter has now been resolved with the appointment of a second Deputy Governor on March 10,2023.

Committee Observation

436. The Committee noted that at the time of meeting the management, a deputy governor had been appointed via Kenya Gazette Notice Vol.CXXV-No.61 dated 10 March, 2023 and therefore elected to treat the matter as resolved.

Committee Recommendation

437. The matter stands resolved.

FY 2020/2021

438. The Auditor General gave a qualified opinion and raised the following concerns.

OTHER MATTER

1. Failure to Maintain the Required Number of Non-Executive Directors

439. As was reported in the previous year, the Central Bank Act, Cap 491 of 2014, Part IV – Management, Section 11(1) (d) provides that there shall be eight (8) other Non-Executive Directors of the Board. During the year under review, the Bank had in place four (4) Executive Directors transacting business on its behalf. There was no amendment to the Central Bank Act to provide for reduction in the number of Directors.

Management Response

440. This matter lies with the Appointing Authority. However, the operations and governance of the bank had not been adversely affected.
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Committee observations

441. The Committee observed that no evidence had been provided by the Management of CBK showing communication to the appointing authority, regarding the appointment of the non-executive directors.
442. The Committee noted that the operational effectiveness of the institution would be affected given that non-executive directors would have formed part of membership of the different committees of the Bank.

Committee Recommendation

443. The Committee recommends that the Appointing Authority should at any given time appoint the requisite number of non-executive directors to the Central Bank of Kenya Board as per section 11 (2) of the Central Bank of Kenya Act, Cap 491.

2. Lack of the Second Deputy Governor

444. In addition, the Central Bank of Kenya Act, Cap 491 Section 13B (1) states that, "There shall be two Deputy Governors who shall be appointed by the President through a transparent and competitive process and with the approval of Parliament." During the year under review only one Deputy Governor was in office. There was no amendment to the Central Bank Act to provide for reduction in the number of Deputy Governors.

Management Response

445. This matter lies with the Appointing Authority. However, the operations and governance of the bank have not been adversely affected. This matter has now been resolved with the appointment of a second Deputy Governor on March 10, 2023.

Committee Observations

446. The Committee noted that at the time of meeting the management, a deputy governor had been appointed via Kenya Gazette Notice Vol.CXXV-No.61 dated 10 March, 2023 and therefore elected to treat the matter resolved.

Committee Recommendation

447. The matter stands resolved.

3. Delayed Winding up of the Kenya School of Monetary Studies (KSMS).

448. The Auditor General drew attention to Note 29(vi) of the financial statements which stated that the Kenya School of Monetary Studies (KSMS) is a subsidiary of the Bank, owned and managed by the Bank in accordance with Article 29 of the Memorandum and

Articles of Association, the number of Directors should not be less than three (3) or more than ten (10) and should be appointed by the school in a General Meeting. For the last six (6) years, the school has existed without a functional Board of Directors and has been proposed for winding up. The dissolution of the school as a legal entity was Gazetted on 24th April, 2020. This was in an effort to address concerns regarding governance and internal controls at KSMS, and to align its objectives and financial reporting framework with that of CBK. However, as at the date of this report, KSMS had not been dissolved. Consequently, it was critical that CBK Management follows up and expedites the conclusion of the dissolution process.

Management Response

449. The dissolution of KSMS as a legal entity was gazetted on April 24, 2020. However, the bank received communication from the Solicitor General to stay the winding up process to allow for further consultation within Government.

STAKEHOLDERS SUBMISSIONS ON DISSOLUTION OF KSMS

SUBMISSION FROM THE CENTRAL BANK GOVERNOR

450. The Governor maintains the opinion that the KSMS be dissolved and made a directorate under the Central Bank of Kenya (CBK) given that all the assets and liabilities are currently owned and borne by CBK.
451. It is the intention of CBK to make KSMS an independent Council within it to address the curriculum matters suitable to the market and all other stakeholders.
452. To promote prudent management and consolidation of resources the Governor is convinced that the dissolution of KSMS is the right way to go.
453. As far as the matters raised by the National Treasury are concerned the CBK acknowledges all of them apart from their view on the dissolution question and promises to implement its strategy and assure full accountability.
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454. The Governor further implored the Committee to facilitate a quick resolution of the matter given that it has now taken more than three years since the National Treasury halted the

dissolution process.

SUBMISSION BY THE STATE LAW OFFICE AND OFFICE OF THE ATTORNEY GENERAL

455. The Kenya School of Monetary Studies (KSMS) was incorporated as a company limited by guarantee on 15th April, 1997. It has since incorporation had only two members; the Central Bank of Kenya (CBK) and the Permanent Secretary (now Principal Secretary) to the National Treasury.
456. The AG noted that a general meeting was convened by the members and held on 1st November, 2019 where they resolved to dissolve the company and transfer all its assets and liabilities to CBK. The resolution was duly signed on behalf of the members by the Governor of the Central Bank of Kenya, Dr, Patrick Njoroge and the Principal Secretary to the National Treasury, Dr. Julius Muia and dated 1st November, 2019.
457. Thereafter, there was a request made by the Cabinet Secretary, National Treasury and Planning dated 27th May, 2020 that KSMS should not be dissolved pending broad consultations within the Government.
458. The Registrar of Companies then wrote to the National Treasury on 22nd June, 2020 on account of the objection. The Registrar suspended the process of dissolution of KSMS as guided by the Companies Act, 2015 under Section 897.
459. Through the letter dated 7th April 2022, the Governor of the Central Bank of Kenya advised the Attorney General that the transformation of KSMS as approved by the CBK Board should proceed and be concluded, with KSMS being transformed into a department of CBK.
460. In light of CBK's letter, the Attorney General wrote to the Cabinet Secretary, the National Treasury and Planning through letter dated 11th April 2022, advising that he should withdraw the objection filed with the Registrar of Companies to enable the finalisation of the dissolution process. In the alternative, the Cabinet Secretary was to provide reasons for any continued objection to the said process. We wrote a reminder to this letter on 5th May 2022.
461. Through a letter dated 13th June, 2022, the National Treasury and Planning informed the Hon. Attorney General that given the enormous public investment and infrastructure

development at the school, there is need for broader consultations within Government in order to determine the best way forward in relation to the future of the school. Thus, the National Treasury and Planning, reiterated their objection to the dissolution of the School as a public entity.

462. In view of the above, the Hon. Attorney General made a request to the Head of the Public Service in a letter dated 24th June, 2022, to intervene in the matter by convening all the relevant stakeholders in order to determine the way forward in relation to the subject matter in issue.
463. Through the letter dated 2nd March 2023, the Attorney General informed the Governor Central Bank of Kenya that since on their part they have always had no objection to the proposed transformation process, the only issue pending was withdrawal of the objection expressed by the National Treasury and filed with the Registrar of Companies, to allow completion of the proposed transformation of KSMS.
464. The Hon. Attorney General in briefing the Cabinet Secretary, National Treasury and Planning in a letter dated 13th March, 2023 on the matter, further sought his guidance on the matter of the dissolution of KSMS.
465. In light of the above, the Registrar of Companies is awaiting policy directions from the National Treasury and Planning in order to proceed with the winding up of KSMS, should that be the case.

SUBMISSION BY THE NATIONAL TREASURY

466. The Kenya School of Monetary Studies (KSMS) began as a property of the School of Banking & Finance, owned by Commercial banks under the umbrella of Kenya Bankers Association (KBA) with the mandate of building capacity for the banking industry. This was in response to bank failures in the 1980s/1990s occasioned by lack of requisite skills of staff in the banking and financial management sector. Later, due to financial and governance issues, the Central Bank of Kenya (CBK) took over the institution and incorporated it to operate as one of its departments until 1997.
467. On April 15th, 1997 KSMS was registered as a body corporate limited by guarantee; under the Companies Act (CAP 486 of the Laws of Kenya) with the CBK and the National Treasury as the Members/Subscribers. This gave KSMS the status of a subsidiary of the CBK. The registration of the School as a legal entity at that time was necessary to facilitate its autonomy in marketing and contracting for its programs. KSMS was limited

by guarantee and not shares, and hence no shareholding.

468. The primary mandate of KSMS was to build capacity for the domestic and regional financial sector and support CBK to deliver on its core mandate of fostering a stable and well-functioning financial system in Kenya. This is an important institutional mandate of the government.
469. CBK owns all the assets and liabilities of the school and manages its operations. In addition, the permanent staff at KSMS are employees of CBK.
470. The proposal to dissolve KSMS was initiated by the Central Bank of Kenya in 2018. CBK Board of Directors, in its 385th meeting held on 5th June 2018, considered, and approved a proposal by the CBK management on the future of KSMS. The Board resolved that:
- i. KSMS be dissolved as a legal entity and continue to operate as a department of CBK as it used to be before April, 1997;
 - ii. Creation of an advisory council for academic matters with a responsibility to advise, evaluate the content and review the academic aspects of the Institution; and
 - iii. Exploration of options for Hospitality Services for the Board's consideration.
471. Pursuant to Article 68 of the Articles and Memorandum of the School, the subscribers of the School i.e. the CBK Governor and the Principal Secretary, National Treasury held a Special Annual General Meeting on November 1st, 2019, and resolved to dissolve KSMS as a legal entity and transfer all its functions, assets, and liabilities to CBK.
472. Subsequently, CBK engaged the Director General/Business Registration Services and after providing all the necessary information and supporting documents, the intended dissolution of KSMS was gazetted on 24th April, 2020.
473. The Cabinet Secretary, National Treasury learnt of the intended dissolution of KSMS through the gazette and immediately wrote to the CBK Governor, Vide Letter Ref. CONF/36/02/E/15 dated 27th May 2022 indicating that the matter required broad consultations within the Government given the enormous public investments and infrastructure developments at KSMS. He also directed the Registrar of Companies, vide a Letter Ref. CONF/36/2/E/15 dated 27th May 2020, to put on hold the dissolution pending further consultations.

474. In response to the letter from the CS/TNT, the Director General/Business Registration Service, wrote to the Principal Secretary/National Treasury and CBK vide Letter BRS/STKH/5 VOL.1 dated 23rd June 2020 indicating that the Registrar of Companies had suspended the process of dissolution of KSMS as guided by the Companies Act, 2015 under section 897.
475. In pursuit of conclusion of KSMS dissolution issue, CBK wrote to the Attorney General vide a letter dated 7th April 2022 and clarified the history, purpose, motive, direction, and content of the ongoing transformation of KSMS. In the letter, CBK highlighted the challenges being faced by KSMS that led to the resolution to have the school dissolved as a legal entity. The challenges include:
- i. That the School was unviable as a subsidiary and requires a guarantee from CBK each year to obtain a clean audit report;
 - ii. CBK owns all the assets and liabilities of the school, manages its operations and all permanent staff of the school are employees of CBK;
 - iii. The school relies heavily on CBK to finance all its operations which are also oversighted by CBK Management and Board. Operating as an independent entity, therefore, adds an unnecessary layer to CBK with inherent risks and without any real advantages;
 - iv. The school was offering training in support of CBK and also collaborating with other institutions on long-term academic programs. It also conducts research, offers conference facilities, and hosts a variety of Institutions. These activities required to be streamlined and aligned to the objectives of the CBK and support its vision of becoming a world-class institution. The current structure of KSMS is not aligned with the CBK vision; and
 - v. CBK indicated that there was lack of clarity with respect to the responsibilities of the CBK Board & Management and the KSMS Board which resulted in weakness of internal controls in the management of assets, compliance with the Companies Act, and general financial responsibility.
476. The Attorney General, thereafter, wrote to the CS /National Treasury & Economic Planning vide letter dated 11th April 2022 seeking withdrawal of the objection that had been filed with the Registrar of Companies if in concurrence with CBK's clarifications and if otherwise, give reasons to enable the Attorney General advise on the way forward.
477. The CS/National Treasury & Economic Planning vide letter TNT/CONF.36/02/AA (107) dated 13th June 2022, held his stand that there was a need to give broader Government

consultations a chance in order to get the best way forward in relation to the future of KSMS.

478. The National Treasury and Economic Planning recommends as follows:
- i. KSMS to retain its corporate status as it is. However, KSMS should be converted to a corporate body limited by shareholding and not guarantee;
 - ii. The school to be revitalized to a special domestic and regional training Center in Banking and Financial management;
 - iii. The Government to pursue the possibility of convincing banks through their umbrella body (Kenya Bankers Association-KBA) to take up some shares so that KSMS will be co-owned by both KBA, CBK and NT & EP;
 - iv. The Government explores the possibility of raising revenue in addition to KSMS current sources like registered Banks and related Financial Institutions to pay a levy for training and capacity building of banks' employees; and
 - v. KSMS to be capacitated and managed by staff with relevant skills in training & capacity building.
479. KSMS is and remains an important institution for the region. For over (ten)10years, the KSMS was hosting The Joint Facility for Electives – graduate training for the African Economic Research Consortium. This was interrupted by COVID 19. It will still be back. In addition, KSMS is hosting the COMESA Monetary Institute, and African Union Remittances Institute.
480. KSMS has therefore carved its niche and should be provided with more autonomy and resources.
481. In addition, KSMS will be in the frontline as Kenya Competes with other EAC members to host East African Monetary Institute. Using KSMS, it will provide Kenya with a competitive edge on this important Institution that will also oversee the East African Central Bank formation in Kenya.
482. In view of the above, The National Treasury still objects the dissolution of Kenya School of Monetary Studies as a legal entity and is therefore, pursuing options as indicated above to revitalize the school.

Committee Observations

483. The Committee observed that KSMS is a body corporate limited by guarantee under the Companies Act, with CBK as its principal shareholder (99%) and the National Treasury as minority shareholder (1%).
484. The Committee further observed that KSMS is a subsidiary of CBK and all the assets and liabilities are owned and borne by The Bank.
485. The Committee noted that the National Treasury still objects the dissolution of KSMS as a legal entity and was pursuing options to revitalize the school.
486. The Committee further noted that despite KSMS being a separate legal entity, it fully depends on CBK for its operations.
487. The Committee further noted that the request by CBK to dissolve KSMS will make the institution fully a department of CBK hence certainty in its going concern.
488. The Committee further observed from the Solicitor General's submission that, the dissolution of KSMS was objected by the CS National Treasury. The Registrar of Companies was awaiting "a no-objection" from the same office to proceed with the winding up of KSMS.

Committee Recommendations

489. The Committee recommends that, there being no justifiable reason as to why the National Treasury objected the dissolution of KSMS, the Registrar of Companies to proceed with the winding up process of KSMS, within sixty days of tabling of this report.
490. The Committee recommends that within sixty days of tabling this report, the dissolved KSMS be made a directorate under the CBK given that all the assets and liabilities are currently owned and born by CBK.

3.5. EAST AFRICAN PORTLAND CEMENT COMPANY(EAPCC) (F/Y2018/2019 - 2020/2021)

EXAMINATION OF THE REPORTS OF THE AUDITOR GENERAL ON THE AUDITED ACCOUNTS OF EAST AFRICAN PORTLAND CEMENT COMPANY FOR THE FINANCIAL YEARS 2018/2019 TO 2020/2021

491. The management of East African Portland Cement led by Managing Director Mr. Oliver Kirubai appeared before the Committee to present evidence on the audited accounts of the Company for the FY 2018/2019 to FY 2020/2021.

FINANCIAL YEAR 2018/2019

The Auditor General gave an unqualified opinion and raised the following concerns

1.0.MATERIAL UNCERTAINTY RELATED TO GOING CONCERN

492. The Auditor General reported that Note 2(a) in the financial statements indicated that the Group and Company incurred a net loss from operations of KES 2,062,381,000 (2018: KES 3,479,298,000) and KES 2,028,098,000 (2018: KES 3,804,171,000) respectively during the year ended 30 June, 2019. Further, the Group and Company's current liabilities exceeded the current assets by KES 10,170,657,000 (2018: KES 6,136,393,000) and KES 10,189,500,000 (2018: KES 6,208,657,000) respectively.
493. This movement was largely due to transfer of long-term loans to current liabilities on account of default on existing loan covenants. The Company defaulted on a loan from one of the key lenders, and subsequent to year end, obtained approval from shareholders to dispose some of the idle land to retire the debt.
494. Other factors that have affected performance have been explained in the Director's Report and Managing Director's Report. In particular, the plant continues to operate significantly below capacity due to working capital constraints, lack of essential spare parts and loss of market share to competitors. Due to the cash flow constraints, the Company has been unable to settle the amounts due to its key suppliers and regulatory authorities including Kenya Revenue Authority and pension liabilities.
495. In addition, the Company has significant litigations and claims against it which, if successful, may result in claims that are unlikely to be settled, given the entity's current financial position. Details of the significant claims include employee related claims

arising from unpaid salaries based on the Collective Bargaining Agreement (CBA) terms with an estimated total exposure of KES 1.7 billion, debt claims by suppliers for unpaid bills for services rendered and /or goods delivered totaling KES 411 million and claims arising from disputed deliveries, breach of distribution contracts and termination of supplier contracts totaling to KES 173 million.

496. These events or conditions, indicate that a material uncertainty exists that may cast significant doubt on the Group's and Company's ability to continue as a going concern.

Management Response

497. The Directors were optimistic that the Group and Company will remain a going concern over the next 12 months. In making this assessment the Directors had considered in detail all pertinent facts as outlined below:
- a. A thorough review of the budgetary and forecasting process to ensure that appropriate assumptions have been considered in developing the Group's forecast.
 - b. Consideration of the timing and uncertainty of the cash flows to reflect the underlying maturity of the liabilities and assets.
 - c. Consideration of the Group's financial adaptability.
 - d. Review of possible exposures to contingent liabilities
 - e. Review of the Group's risk mitigation practices and their adequacy for business related risks such as interest rates, currency exchange rate risk and credit risk.
 - f. Review of other considerations relevant to business continuity such as maintenance of key suppliers and customers; maintenance of stable labour work force and key staff.
 - g. Review of the stability of the Group's cost structure.
 - h. Key areas of focus include:
 - i. Review of the entire mine to market process with a view to enhance efficiency, minimize wastage and capitalize on opportunities to contain costs.
 - ii. Plant refurbishment with a view to lower production costs whilst maintaining quality standards.
 - iii. Increase revenue through new product development.
 - iv. Retire corporate loan through balance restructuring and improve working capital.
-

- v. Continuous engagement with creditors to agree on payment plans based on the paying ability of the company and in line with projected cash flows.

498. For the year ended 30 June 2022 the Board of Directors and Management took the following measures to address and mitigate the above conditions:

- a. Conducted a thorough assessment and review of the market, competition and competition trends and strengths and the potential impact. The Company is convinced that both the domestic Kenyan market and the regional market present vast business opportunities that it can tap into by improving its production capacity and product offering.
- b. Developed its 5-year strategic plan which will be implemented on short term, medium term and long-term business focus through phased execution approach as detailed below:
 - Rapid Results Initiative (RRI) for the first 100 days whose objective will be to kick off the new strategy cycle named 'New Dawn'. A phased approach for plant refurbishment has embarked in earnest, with the kiln shell replacement underway with target completion in September 2022. The Kiln shell is now replaced.
 - The second phase shall run for 15 months as a Transformation phase, whose objective will be to fix and stabilize business operations. Other plant refurbishment activities are planned to coincide with receipt of land sale proceeds which will restore the Company to its rightful position as the low-cost producer of choice in the region.
 - The third phase will be the rest of the strategy period and shall be used to grow and sustain the Company.
- c. Closure and settlement of some of the old debts through workable payment plans and negotiations.
- d. Pursue waiver of penalties and interest from lenders and other creditors.
- e. Recapitalize the business through sale of land. The Company has embarked on a regularization plan of LR 8784/144, 8784/145 & 8784/653 totaling 907 acres which had been heavily populated with squatters. This plan ensures that the local community has first right of purchase with expected proceeds of KES 5 billion. Furthermore, the Company has also subdivided 1000 acres of the adjacent property LR 10424 into 50-acre plots which are on sale with expected proceeds totaling to approximately KES 5 billion. These measures, in addition to the retirement of KCB debt (which is currently concluded) and reclassification of National

Government debt (Subsidiary agreement) will significantly impact working capital, from a deficit of KES 12 billion to a surplus of KES 1.5 billion.

STAKEHOLDERS SUBMISSIONS

SUBMISSION FROM THE STATE DEPARTMENT FOR INDUSTRY AND EAPC PLC PROPOSED TURNAROUND PLAN

499. The Going Concern emphasis of matter raised by the Auditor General was picked by the Parliamentary Public Investment Committee on Commercial Affairs and Energy. The Committee directed that the shareholders must address the conditions that are casting material uncertainty on the going concern status of the business.
500. Pursuant to the meeting before the Public Investment Committee on 13th July 2023, the Committee directed the Principal Secretary for Industry to lead a roundtable meeting with all stakeholders of East African Portland Cement PLC with a view to developing a comprehensive strategy for the revival of the Company.
501. The Board and Management held a two-day roundtable meeting with the Company's Shareholder representatives in August 2023. During the roundtable meeting, the shareholders and stakeholders identified working capital deficit and poor plant status as the key bottlenecks bedeviling the Company in actualizing its turnaround plan targets.

SHORT TERM PLAN

502. The Committee was informed that the shareholders and stakeholders agreed on a three-pronged initiative to inject cash in to the business and finalize the turnaround plan. These are as follows:
- i. Release of outstanding compensations from the Government for land acquired to dual Mombasa Road and for the SGR corridor. The National Land Commission gazetted the acquisition on 17th November 2023 with expectation of award, valuation, settlement in the current Financial Year.
 - ii. Regularization of the Land densely occupied by squatters. The process commenced and is projected to generate KES 5B in the current financial year.
 - iii. Compulsory acquisition of LR10424 and LR7815 (3,563.64 acres) by Kenya Wildlife Service for wildlife Migratory Corridor.

503. Actualization of these initiatives was expected to generate KES 15.6B in the short term and the total realization from the initiatives was expected to be KES 40B.
504. The required support was in terms of clearance of squatters and easement of bureaucratic approvals to avert the daily deterioration that was happening at the Company. It was estimated that the Company was accruing losses of KES 5M per day and the delayed realization of the proposed initiative will further derail the recovery process.
505. On realization of the above initiatives, the Company will be able to grow utilization of the installed capacity from 50% in the current year to 83% by FY 2026. The growth is projected to accrue from the proposed plant refurbishment program, availing of the requisite raw materials through injection of working capital and elimination of business disruptions through settlement of the legacy indebtedness. The increased business level (83% capacity utilization by FY 2026) was projected to generate an annual revenue of KES 10B and profit from operations of KES 400M by FY 2026.

LONG TERM PLAN

506. To address fundamental problems of the business, the three main shareholders agreed during the roundtable meeting held in August 2023 to fund the business through sale of land to facilitate settlement of the existing indebtedness that continues to cast material uncertainty on the going concern of the business.
507. For sustainability, there was need for a structural adjustment of the ownership. This will enable the Company to resolve its Governance structure and the State Corporation Compliance requirements in the face of a competitive operating environment in the cement industry.
508. This proposal was subject to relevant legal and regulatory approvals noting that the Company was listed in the Nairobi Securities Exchange.

SUBMISSION FROM THE NATIONAL TREASURY

509. Public Investment Committee on Commercial Affairs and Energy in a meeting held on 13th July 2023 directed EAPC PLC, State Department of Industry and main shareholders to hold a round-table meeting to address the material uncertainty related to going concern of Company.

510. The parties as indicated above held a two-day round table meeting in August 2023, where the following observations were made:
- i. EAPC PLC is a manufacturer of cement in East Africa (Kenya), listed at Nairobi Securities Exchange (NSE) and is deemed a state corporation by virtue of a majority shareholding (52%), owned by the National Treasury (25%) and NSSF (27%);
 - ii. Other shareholders are Cemential Holdings (14.6%); Associated International (14.6%); Bamburi Cement (12.5%) and other shareholders (6%). EAPC PLC began experiencing financial problems in 2012;
 - iii. Turnover of EAPC PLC declined from Kshs.10.17 billion in 2011 to Kshs.2.8billion in 2019. The accruing losses from operations led to successive negative cash from operations that generated negative working capital. This led to the Company solely depending on KCB Bank Loan facility to bridge the negative working capital. In 2019, KCB recalled its entire loan facility, when the liquidity position of EAPC PLC further deteriorated and the company was unable to settle salaries and wages (which stood at 60% of the revenue) as well as loan repayments and interests;
 - iv. The Cabinet on 1st August 2019 approved Balance Sheet Restructuring (sale of idle land), the company managed to retire the KCB Loan (Kshs.6.8 billion) through debt property Swap, implemented a redundancy program that reduced staff cost from Kshs.245million per month to Kshs.75million per month and undertook partial plant refurbishment that was to enable the company to increase plant reliability; and
 - v. Current challenges facing EAPC PLC are:
 - a) delays in finalization of plant refurbishment to remain competitive;
 - b) inadequate cash flow for working capital;
 - c) modalities of retiring legacy debts; and
 - d) removal of illegal settlers from its parcels of land in Athi River.
511. Arising from the above observations and in compliance with the direction of the Committee, Shareholders and EAPC PLC Board and Management under the leadership of Principal Secretary State Department of Industry discussed and among others agreed on:

Short-term revival plan premised on:

- a) regularization of the land densely occupied by squatters;
- b) sale of 18 parcels of land measuring 50 acres;
- c) release of compensation for land compulsorily acquired by the Government for SGR and Mombasa Road Dualling; and

- d) actualization of the Deed of Settlement entered between the Company and Government for surrender of LR.NO.10425.
512. Revival of EAPC PLC and to address the above and going concern, the following immediate actions were agreed upon to be undertaken:
- a) The company in the immediate term requires Kshs.895million for the next phase of the plant refurbishment program and Kshs.1.1 billion for optimization in order to achieve operational excellence and cost leadership;
 - b) For optimization and proper production scheduling, the Company needs injection of working capital of Kshs.2.5billion to operationalize its quarries. To allow proper production scheduling, there is need for sufficient stock covers for coal and other raw materials. Much of the current inefficiencies are hinged on sub-optimal sourcing due to inability to offer settlement guarantees;
 - c) Retirement of legacy debts; the company has a huge creditor balance of Kshs.12.8billion that arose from successive years of operational losses. Currently, there is court order granted to Employees for a court award of Kshs.1.4billion arising from a case filed in 2016. Unmitigated, the legacy debts problem has the potential of degenerating into receivership demands; and
 - d) Eviction of squatters and illegal settlers on the Company land. The squatters and illegal settlers have settled in the company's investment properties (8784/144/145 And 653). The vastness of the land is 8,300 acres. This has been achieved.
513. Based on the above explanation it was the National Treasury's considered opinion that the Company be placed under the Privatization program to allow private sector participation and full commercialization of the company. Further, the National Treasury was optimistic that Privatization will improve the efficiency of the Company and make it more responsive to market forces.

SUBMISSION FROM THE MANAGING TRUSTEE AND CEO NSSF

514. The Managing Trustee informed members that the NSSF was in concurrence with the laid-out strategy agreed upon by the shareholders to revive EAPC PLC.

SUBMISSION FROM HOLCIM

515. Holcim was concerned about the financial situation at EAPC PLC, but despite the monumental financial challenges, Holcim was optimistic that EAPC PLC can resolve the various obligations without more financial outlay from the shareholders.

516. The Holcim group was therefore in full support of the revival plan as laid out and agreed by the shareholders

Committee observation and finding

517. The Committee observed that, it was necessary that the EAPC PLC elaborates the measures it was taking to ensure that the planned regularization of land occupied by squatters succeeds without legal bottlenecks.
518. The Committee noted that the EAPC PLC needed to prioritize the refurbishment of the factory in order to improve operational efficiency and increase its attractiveness of the intended acquisition of strategic private investors.
519. The Committee also observed that there was need for EAPC PLC to open up their intent to sale to the public and not necessarily confine itself to the squatters and other government agencies, this could be achieved through advertising in the dailies.
520. The committee observed that EAPC PC management needed to disclose the connection between the recent demolitions witnessed in the EAPC PLC land and the revival strategy of the company.

Committee Recommendations

521. The Committee recommends that the short-term plans proposed by the stakeholders be expedited. These include;
- i. regularization of LR 8784/144, LR 8784/145 and LR 8784/653 covering nine hundred and seven (907) acres.
 - ii. sale of eighteen (18) parcels of land measuring fifty (50) acres each on LR10424 (Thirteen (13) plots of fifty (50) acres each will be sold to KWS for wildlife migratory corridor while the remaining five (5) plots of fifty (50) acres each be offered competitively to the public)
 - iii. release of compensation for land compulsorily acquired by the Government for SGR measuring forty-three (43) acres on LR 10424 and Mombasa Road Dualling measuring twenty -eight (28) acres on LR8786 acquired by KENHA.
522. The Committee recommends that the National Government should explore other measures that will make EAPC PLC viable including but not limited to privatization.

2.0.FAIR VALUATION OF INVESTMENT PROPERTIES

523. As disclosed in Note 15, the Group's and Company's investment properties consist of investment in land carried at fair value. The Directors engaged an independent professional valuer to determine the fair value as at 30 June 2019. The valuer has determined the open market value using comparable property prices within the vicinity.
524. Determination of fair value on investment properties involves significant judgement and assumptions. Judgement and assumption in the following areas were of most significant importance to the audit.
- (i) Impact of informal settlers - a significant portion of the Group's land is occupied by squatters. In arriving at the fair value of the investment properties, the Directors have deducted the estimated cost of evicting the informal settlers. Significant judgement was exercised by the Board of Directors in determining the cost of evicting the informal settlers and securing the land.
 - (ii) In arriving at the market value, the independent valuers considered sales of comparable properties in the vicinity of the Group's land. However, the properties considered are smaller than the Group's properties and may not be comparable. Assumptions have been made in adjusting sales values of the comparable properties to factor in the size of the Group's land.

Management Response

525. The company undertakes annual revaluation of its Investment Properties in line with the requirements relevant accounting standards. To achieve this the Company engages independent professional valuers to determine market value which usually discounted for attendant cost (given encumbrances on the land) for prudence to arrive at the true market value of the Properties. Estimates for the eviction cost is based on gazetted rates for National Police Service and hired cost of equipment.

Committee observation and finding

526. The Committee noted that the response from the management was satisfactory.

Committee Recommendations

527. The matter stands resolved.

3.0.LOSS IN SALE OF LAND

528. In 2012, the Company entered in a consent to sell 337 acres of land to a local buyer at a price of KES 2.2 million per acre against the carrying value of KES 5.2 million per acre. However, the buyer defaulted on the provisions of the consent by not providing an acceptable bank security within the period of consent. The case was taken to court after which the parties settled at a renegotiated price of KES 4.5 million per acre on 3 May, 2019 leading to a loss of KES 233 million against the carrying value.

Management Response

529. Sometime in the year 2005, Superior Homes (Kenya) Limited (SHKL) purchased 163 acres of land on LR No.8784/4 from the Company. The transaction was completed and the land successfully transferred to Superior Homes (Kenya) Limited.
530. Through an agreement dated 1st September 2005, parties further entered into an agreement for option to purchase an additional 337 acres to be hived off from LR No.8784/4.
531. As per the terms of the Agreement hereinabove.
- i. EAPC PLC gave Superior Homes an option to purchase Three Hundred and Thirty-Seven (337) Acres at the rate of Sh. 292,000 per Acre.
 - ii. The option was to be exercised within twelve (12) months upon execution of the Agreement.
 - iii. In consideration of the above option and in order to purchase the 337 Acres of Land, Superior Homes was to deposit Kenya Shillings One Hundred Thousand (Kshs100,000/- being an option fee.
532. Pursuant to the agreement hereinabove, Superior Homes purported to express their intention to exercise their option to purchase the 337 Acres vide a letter dated 19th September, 2006. However, Superior Homes failed to exercise the option in the express terms of the Agreement and the company informed Superior Homes that the option to purchase had lapsed for want of compliance with the Land Control Board Act.
533. Consequently, Superior Homes (Kenya) Limited filed suit, HCCC 371 of 2011, (also known as (ELC) Case No. 931 of 2013) against the Company seeking among other, orders compelling the Company to sell the 337acres at Kshs.292,200.00 per acre.

534. In order to amicably settle the matter, the Company and Superior Homes entered into a Consent on 30th of November, 2012 which was adopted as an order of the court and a decree issued on 17th December, 2014. As per the decree;
- i. The Purchase Price for the entire parcel of land measuring 337 acres was revised to Kshs. 2,225,519.28 per Acre totaling to Kenya Shillings Seven Hundred and Fifty Million (KShs.750,000,000/=);
 - ii. Superior Homes was to pay a deposit of Kenya Shillings One Hundred Million (KShs.100,000,000/=) within seven (7) days from the date of the Decree to be held in a stakeholder capacity by the Company's Advocates in the transaction, Letangule & Company Advocates;
 - iii. Superior Homes was to provide an acceptable Bank Guarantee to secure the balance of the purchase price of Kenya Shillings Six Hundred and Fifty Million (KShs.650,000,000/=); and
 - iv. The completion period was to be one hundred and forty-five (145) days from the date of the Decree.
535. However, Superior Homes failed to secure and provide a bank guarantee as per the terms of the decree hereinabove and the Company terminated the sale agreement citing non-completion. As a result, Superior Homes moved to the High Court and filed case Number ELC 931 of 2013 seeking extension of time to complete the transaction for another 120 days. Upon hearing of the parties, the Court allowed Superior Homes Application and extended the completion period for a further 120 days vide a ruling dated 11th March, 2014.
536. The Company was dissatisfied with the Ruling and lodged an Appeal No. 158 of 2014, EAPC PLC Vs Superior Homes (Kenya) Limited on the basis that a consent agreement can only be varied by a further agreement by the parties to the consent and not unilaterally by one party unless a fresh suit is filed to challenge the consent order. Simultaneously, the Company filed an Application (Civil Application Nai 75 of 2014 (UR 61/2014) seeking stay of execution pending the Hearing and determination of the Appeal. The Application seeking stay was allowed vide a Ruling dated 28th November, 2014.
537. Before the determination of the Appeal, and in an attempt to resolve the matter, Superior Homes made an enhanced offer of Kshs 2,800,000 per acre vide a letter dated 21st October, 2016.
538. Upon consideration of the offer, the Company declined to accept the offer vide a letter dated 3rd November, 2016 noting that the offer was below the market value of the property

which was estimated to be above Kshs 5, 630,000 per acre. Superior Homes declined to improve their offer and the negotiations were abandoned.

539. Vide a Judgement dated 22nd September, 2017, the Court of Appeal returned a judgement in favour of Superior Homes effectively extending/enlarging the completion period by a further 120 days from the date of the Judgement.
 540. On 29th January, 2019, Superior Homes made another offer, proposing to purchase the parcel at Kshs 4,500,000 per acre in two phases, the 1st phase being the transfer of 160 acres and the 2nd phase being the transfer of 177 acres.
 541. Superior Homes however later included other conditions which the company found extraneous, such as construction of a wall and clearance of squatters and maintaining the cleared state of Land.
 542. On 16th July, 2020 Superior Home made another offer which substantially altered the initial offer and the consent recorded in court inter alia;
 - i. The total acreage to be purchased by Superior Homes was reduced from 337 acres to 87 acres.
 - ii. The Purchase Price for the 87 acres was to adjusted upwards from 2,200,000 per acre to 2,700,000 per acre bring the total consideration for the purchase of the 87 acres to Kshs 234,900,000.
 543. On 8th October, 2021, Superior Homes through their Advocates, filed a Contempt of Court Application seeking to commit the Directors of the Company to Civil Jail for failure to comply with the court orders to complete the transaction with 120 days as directed by the Court of Appeal.
 544. On 10th February, 2021, Superior Homes made another offer to purchase the 87 acres at an adjusted price from 2,200,000 to Kshs 3,100,000 per acre bringing the total consideration for the 87 acres to Kshs 269,700,000.
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545. In order to amicably settle the matter and avoid the risk of the director's being committed to civil jail for contempt, the parties agreed to pursue an out of court settlement. After numerous meetings and negotiations, the parties entered into a consent dated 14th April 2022. The terms of the Consent were interalia;
- i. Superior Home to purchase a portion of 100 acres of land at the agreed amount of Kenya Shillings Four Million, Five Hundred Thousand (Kshs.4, 500, 000.00) per acre to be hived off parcel LR. No.10424 as opposed to the earlier offer on LR. 8784/4.
 - ii. The completion period is 120 days from the date of signing the Sale agreement or any other date that the parties may agree in writing.
546. Simultaneously, with the signing of the Consent, the parties signed a Sale Agreement dated 14th April, 2022 to implement the consent.
547. Superior Homes (K) Limited vide its Advocates letter dated- 5th June 2023 rescinded the Sale Agreement dated 14th April, 2022.
548. In view of the above, EAPC PLC stated as follows:
- i. That the basis of the transaction was the orders issued in and arising from **Civil Appeal No. 158 of 2014; East African Portland Cement Co. Ltd Vs Superior Homes (K) Limited** and **Milimani HCC ELC 931 of 2013 Superior Homes (K) Limited Vs East African Portland Cement Company Limited**. Therefore, it is imperative that any analysis of the transaction takes into account this contextual background.
 - ii. If the aforementioned orders, were to be strictly upheld, the Company was obligated to sell the property at Kshs.2,225,519.28 per acre and not Kshs. 4, 500, 000.00 per acre or risk the Company directors being committed to civil jail for being in contempt of Court.

- iii. That in the prevailing circumstances, selling the property at Kshs.4, 500, 000.00 per acre was in the best interest of the Company.
- iv. The Sale Agreement has been rescinded and the matter therefore reverts back to court as other solutions are sought.

Committee Findings and Observations

- 549. The Committee noted that EAPC PC needed to register a consent in court for the cancellation of the sale agreement between EAPC PLC and Superior Homes Kenya PLC before releasing any funds to Superior Homes.
- 550. The Committee also noted that the perceived loss in sale of land would cease once the consent is registered and executed in court on the cancellation of the sale agreement.

Committee Recommendations

- 551. The Committee recommends that EAPC PLC to register the consent in court for the cancellation of the sale agreement between EAPC PLC and Superior Homes Kenya PLC.

4.0. TAX MATTERS

4.1. NON-REMITTANCE OF; 1) PAY AS YOU EARN (PAYE) TAX DEDUCTIONS AND 2) VALUE ADDED TAX (VAT)

- 552. Sections 3(2)(a)(ii), 5 and 37 of the Income Tax Act Cap 470 requires employers to deduct PAYE at source and remit the same to the tax authorities before the 9th day of the subsequent month of pay. However, as at 30 June, 2019, the Company had not remitted PAYE amounting to KES 376 million for the 12 months' period (1 July, 2018 to 30 June, 2019). Cumulatively, the Company holds a provision of KES 945 million of unremitted PAYE and KES 496 million being the penalties there on. The Company is in breach of law and is exposed to the consequences of non-compliance with the income tax law. Section 13(3) of Value Added Tax Act Cap 476 requires entities to remit VAT payable to tax authorities before the 20th day of the subsequent month of collection. However, as at 30 June, 2019, the Company had not remitted VAT balances totaling to KES 221 million in principal and penalties and interest of KES 63 million. The Company is in breach of law and is exposed to the consequences of non-compliance with the value added tax law.

553. Further, and as disclosed in Note 30(1) to the financial statements, the Kenya Revenue Authority carried out an audit on the Company, covering corporate tax, employees' taxes, withholding tax and VAT for the period from 2005 to 2008. KRA raised an assessment of KES 2.5 billion out of which KES 1.7 billion has been resolved with the tax authorities. The Company has paid KES 122 million and appealed a further KES 473 million through the local tax committee which subsequently ruled in favor of the Company. KRA later appealed in the High Court against the local committee ruling, but the matter is yet to be determined. Additional liabilities may arise from this matter.

Management Response

554. For the current calendar year, the Company has settled all due taxes however, the company has a legacy principal tax arrears of KES 1.2 billion (KES 2.2B with penalties and taxes) debt been unable to remit these taxes owing to a constrained working capital position and has banked on realization of proceeds from sale of land to clear the outstanding balances. The Company also entered into a repayment plan with KRA based on proceeds from sale of land to Kenya Railways Corporation where 30% of each installment is remitted to clear outstanding tax balances. However, delayed payments have led to increments in outstanding balances. The Company is currently engaging with the Government to retire all these tax and other government related debts in exchange for land earmarked for affordable housing.
555. The Company is confident in its defense of the tax audit matter which was ruled in its favor by the local tax committee. Considering no substantive appeal has been filed by the Authority, the matter is disclosed as a contingent liability in the financial statements.

Committee Observations

556. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

4.2. NON-REMITTANCE OF EMPLOYEES PENSION CONTRIBUTIONS

557. Sections 53 and 53A of the Retirement Benefits Act, 1997 requires entities to timely remit contributions by the employee's, failure to which, the entities will be penalized. However, as at 30 June, 2019, the Company had accrued pensions of KES 91 million in principle, penalties and interest. These unremitted contributions date back to August, 2018. The Company is in breach of law and is exposed to the consequences of non-compliance with the retirement benefits law.

Management Response

558. The Company is aware of the breach which occurred due to working capital challenges. Delayed realization of proceeds from sale of land have impacted repayment efforts. However, the Company is committed to bridge the working capital deficit and remit the pension scheme contributions.

Committee Observations

559. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

4.3.NON-REMITTANCE OF MINING LEVIES

560. Legal Notice No. 222 of the Mining Act (Cap 306) dated 18 December, 2013 requires cement producers to pay a cement mineral levy at the rate of KES 140 per ton of cement with effect from 1 January, 2014. As at 30 June, 2019, the Company had accruals of non-remitted mining levy amounting to KES 327 million. The Company is in breach of law and is exposed to the consequences of non-compliance with the mining regulations

Management Response

561. The Company is aware of the breach which occurred due to working capital challenges. However, the Company is currently in discussions with the Government to retire unpaid mining levy in exchange for land earmarked for affordable housing.

Committee Observations

562. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

4.4.NON-REMITTANCE OF UNCLAIMED DIVIDENDS

563. Section 20 of the Unclaimed Financial Assets Act, 2011 requires entities to remit unclaimed assets, including but not limited to ownership interests (shares and dividends), with a period of abandonment of three (3) years. As at 30 June, 2019, the Company held in its books, accrued dividends payable amounting to KES 102 million. Part of this amount has been outstanding for more than three (3) years exposing the Company to increased penalties. The Company was therefore in breach of Law.

Management Response

564. The Company paid a dividend in the 2012 & 2015 to minority shareholders (6% of total shareholding) in order to satisfy shareholder's needs for a return. However, the majority shareholders, represented on the Board, opted to defer receipt of dividends to a future

date dependent on resurgence of Company's cash flows. To the extent that the main shareholders are represented in the Company's Board, and that the accrued dividends were occasioned by a decision of the Board of Directors, then the Company holds the view that the dividends are not unclaimed as the recipients are known.

Committee Findings and Observations

565. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

FINANCIAL YEAR 2019/2020

The Auditor General gave an unqualified opinion and raised the following concerns

1.0.MATERIAL UNCERTAINTY RELATED TO GOING CONCERN

566. The Auditor General drew attention to Note 2(a) to the financial statements, which indicated that the Group and Company incurred a net loss from operations of KES 2,769,347,000 (2019: KES 3,361,888,000) and KES 2,768,466,000 (2019: KES 3,327,605,000) respectively during the year ended 30 June, 2020. Further, the Group and Company's current liabilities exceeded the current assets by KES 13,829,524,000 (2019: KES 10,170,657,000) and KES 13,868,616,000 (2019: KES 10,189,500,000) respectively.
567. The Company defaulted on a loan from one of the key lenders and in September, 2019, the Company obtained approval from shareholders to dispose some of the idle land to retire the debt. Factors that have affected performance have been explained in the Directors' Report and Managing Director's Report. In particular, the cement production plant continues to operate significantly below capacity due to working capital constraints, lack of essential spare parts and loss of market share to competitors. Further, due to the cash flow constraints, the Company has been unable to settle the amounts due to its key suppliers and regulatory authorities including Kenya Revenue Authority and pension liabilities.
568. The Company had significant litigations and claims against it which, if successful, may result in claims that are unlikely to be settled, given the entity's current financial position. Details of the significant claims include employee related claims arising from unpaid salaries based on the Collective Bargaining Agreement (CBA) terms with an estimated total exposure of KES 1.5 billion, debt claims by suppliers for unpaid bills for services

rendered and goods delivered totaling to KES 397 million and claims arising from disputed deliveries, breach of distribution contracts and termination of supplier contracts totaling KES 196 million. Most of these claims have been provided for in the financial statements.

569. In addition, the Company has been unable to settle amounts due to statutory authorities which include Pay as You Earn (PAYE) of KES 1,347,853,000, Value Added Tax (VAT) of KES 356,000,000 and pension liabilities of KES 39,000,000 being principal, penalties and interests.

These events or conditions, along with other matters as set forth in Note 2(a), indicate that a material uncertainty exists that may cast significant doubt on the Group's and Company's ability to continue as a going concern.

Management Response

570. The Directors were confident that the Group and Company would remain a going concern over the next 12 months. In making this assessment the directors had considered in detail all pertinent facts as outlined below:

- a. A thorough review of the budgetary and forecasting process to ensure that appropriate assumptions have been considered in developing the Group's forecast.
- b. Consideration of the timing and uncertainty of the cash flows to reflect the underlying maturity of the liabilities and assets.
- c. Consideration of the Group's financial adaptability.
- d. Review of possible exposures to contingent liabilities
- e. Review of the Group's risk mitigation practices and their adequacy for business related risks such as interest rates, currency exchange rate risk and credit risk.
- f. Review of other considerations relevant to business continuity such as maintenance of key suppliers and customers; maintenance of stable labour work force and key staff.
- g. Review of the stability of the Group's cost structure.
- h. Key areas of focus that include:
 - i. Review of the entire mine to market process with a view to enhance efficiency, minimize wastage and capitalize on opportunities to contain costs.
 - ii. Plant refurbishment with a view to lower production costs whilst maintaining quality standards
 - iii. Increase revenue through new product development.

- iv. Retire corporate loan through balance restructuring and improve working capital – This matter has been concluded.
- v. Continuous engagement with creditors to agree on payment plans based on paying ability of the company and in line with projected cash flows

571. For the year ended 30 June 2022 the Board of Directors and Management took the following measures to address and mitigate the above conditions:

- a. Conducted a thorough assessment and review of the market, competition and competition trends and strengths and the potential impact. The Company is convinced that both the domestic Kenyan market and the regional market present vast business opportunities that it can tap into by improving its production capacity and product offering.
- b. Developed its 5-year strategic plan which will be implemented on short term, medium term and long-term business focus through phased execution approach as detailed below:
 - (i) Rapid Results Initiative (RRI) for the first 100 days whose objective will be to kick off the new strategy cycle named 'New Dawn'. A phased approach for plant refurbishment has embarked in earnest, with the kiln shell replacement underway with target completion in September 2022. The Kiln shell is now replaced;
 - (ii) The second phase shall run for 15 months as a Transformation phase, whose objective will be to fix and stabilize business operations. Other plant refurbishment activities are planned to coincide with receipt of land sale proceeds which will restore the Company to its rightful position as the low-cost producer of choice in the region; and
 - (iii) The third phase will be the rest of the strategy period and shall be used to grow and sustain the Company.
- c. Closure and settlement of some of the old debts through workable payment plans and negotiations.
- d. Pursue waiver of penalties and interest from lenders and other creditors.
- e. Recapitalize the business through sale of land. The Company has embarked on a regularization plan of LR 8784/144, 8784/145 & 8784/653 totaling 907 acres which had been heavily populated with squatters. This plan ensures that the local community has first right of purchase with expected proceeds of KES 5 billion. Furthermore, the Company has also subdivided 1000 acres of the adjacent property LR 10424 into 50-acre plots which are on sale with expected proceeds totaling to approximately KES 5 billion. These measures, in addition to the retirement of KCB debt (which is currently concluded) and reclassification of National

Government debt (Subsidiary agreement) will significantly impact working capital, from a deficit of KES 12 billion to a surplus of KES 1.5 billion.

STAKEHOLDERS SUBMISSIONS

SUBMISSION FROM THE STATE DEPARTMENT FOR INDUSTRY AND EAPC PLC PROPOSED TURNAROUND PLAN

572. The Going Concern emphasis of matter raised by the Auditor General was picked by the Parliamentary Public Investment Committee on Commercial Affairs and Energy. The Committee directed that the shareholders must address the conditions that are casting material uncertainty on the going concern status of the business.
573. Pursuant to the meeting before the Public Investment Committee on 13th July 2023, the Committee directed the Principal Secretary for Industry to lead a roundtable meeting with all stakeholders of East African Portland Cement PLC with a view to developing a comprehensive strategy for the revival of the Company.
574. The Board and Management held a two-day roundtable meeting with the Company's Shareholder representatives in August 2023. During the roundtable meeting, the shareholders and stakeholders identified working capital deficit and poor plant status as the key bottlenecks bedeviling the Company in actualizing its turnaround plan targets.

SHORT TERM PLAN

575. The Committee was informed that the shareholders and stakeholders agreed on a three-pronged initiative to inject cash in to the business and finalize the turnaround plan. These are as follows:
- iv. Release of outstanding compensations from the Government for land acquired to dual Mombasa Road and for the SGR corridor. The National Land Commission gazetted the acquisition on 17th November 2023 with expectation of award, valuation, settlement in the current Financial Year.
 - v. Regularization of the Land densely occupied by squatters. The process commenced and is projected to generate KES 5B in the current financial year.
 - vi. Compulsory acquisition of 10424 and 7815 (3,563.64 acres) by Kenya Wildlife Service for wildlife Migratory Corridor.

576. Actualization of these initiatives was expected to generate KES 15.6B in the short term and the total realization from the initiatives was expected to be 40B.
577. The required support is in terms of clearance of squatters and easement of bureaucratic approvals to avert the daily deterioration that is happening at the Company. It was estimated that the Company is accruing losses of KES 5M per day and the delayed realization of the proposed initiative will further derail the recovery process.
578. On realization of the above initiatives, the Company will be able to grow utilization of the installed capacity from 50% in the current year to 83% by FY 2026. The growth is projected to accrue from the proposed plant refurbishment program, availing of the requisite raw materials through injection of working capital and elimination of business disruptions through settlement of the legacy indebtedness. The increased business level (83% capacity utilization by FY 2026) is projected to generate an annual revenue of KES 10B and profit from operations of KES 400M by FY 2026.

LONG TERM PLAN

579. To address fundamental problems of the business, the three main shareholders agreed during the roundtable meeting held in August 2023 to fund the business through sale of land to facilitate settlement of the existing indebtedness that continues to cast material uncertainty on the going concern of the business.
580. For sustainability, there was need for a structural adjustment of the ownership. This will enable the Company to resolve its Governance structure and the State Corporation Compliance requirements in the face of a competitive operating environment in the cement industry.
581. This proposal is subject to relevant legal and regulatory approvals noting that the Company is listed in the Nairobi Securities Exchange.

SUBMISSION FROM THE NATIONAL TREASURY

582. Public Investment Committee on Commercial Affairs and Energy in a meeting held on 13th July 2023 directed EAPC PLC, State Department of Industry and main shareholders to hold a round-table meeting to address the material uncertainty related to going concern of Company.

583. The parties as indicated above held a two-day round table meeting in August 2023, where the following observations were made:
- i. EAPC PLC is a manufacturer of cement in East Africa (Kenya), listed at Nairobi Securities Exchange (NSE) and is deemed a state corporation by virtue of a majority shareholding (52%), owned by the National Treasury (25%) and NSSF (27%);
 - ii. Other shareholders are Cemential Holdings (14.6%); Associated International (14.6%); Bamburi Cement (12.5%) and other shareholders (6%). EAPC PLC began experiencing financial problems in 2012;
 - iii. Turnover of EAPC PLC declined from Kshs.10.17 billion in 2011 to Kshs.2.8billion in 2019. The accruing losses from operations led to successive negative cash from operations that generated negative working capital. This led to the Company solely depending on KCB Bank Loan facility to bridge the negative working capital. In 2019, KCB recalled its entire loan facility, when the liquidity position of EAPC PLC further deteriorated and the company was unable to settle salaries and wages (which stood at 60% of the revenue) as well as loan repayments and interests;
 - iv. The Cabinet on 1st August 2019 approved Balance Sheet Restructuring (sale of idle land), the company managed to retire the KCB Loan (Kshs.6.8 billion) through debt property Swap, implemented a redundancy program that reduced staff cost from Kshs.245million per month to Kshs.75million per month and undertook partial plant refurbishment that was to enable the company to increase plant reliability; and
 - v. Current challenges facing EAPC PLC are:
 - a) delays in finalization of plant refurbishment to remain competitive;
 - b) inadequate cash flow for working capital;
 - c) modalities of retiring legacy debts; and
 - d) removal of illegal settlers from its parcels of land in Athi River.

584. Arising from the above observations and in compliance with the direction of the Committee, Shareholders and EAPC PLC Board and Management under the leadership of Principal Secretary State Department of Industry discussed and among others agreed on:

Short-term revival plan premised on:

- a) regularization of the land densely occupied by squatters;
- b) sale of 18 parcels of land measuring 50 acres;

- c) release of compensation for land compulsorily acquired by the Government for SGR and Mombasa Road Dualling; and
- d) actualization of the Deed of Settlement entered between the Company and Government for surrender of LR.NO.10425.

585. Revival of EAPC PLC and to address the above and going concern, the following immediate actions were agreed upon to be undertaken:

- a) The company in the immediate term requires Kshs.895million for the next phase of the plant refurbishment program and Kshs.1.1 billion for optimization in order to achieve operational excellence and cost leadership;
- b) For optimization and proper production scheduling, the Company needs injection of working capital of Kshs.2.5billion to operationalize its quarries. To allow proper production scheduling, there is need for sufficient stock covers for coal and other raw materials. Much of the current inefficiencies are hinged on sub-optimal sourcing due to inability to offer settlement guarantees;
- c) Retirement of legacy debts; the company has a huge creditor balance of Kshs.12.8billion that arose from successive years of operational losses. Currently, there is court order granted to Employees for a court award of Kshs.1.4billion arising from a case filed in 2016. Unmitigated, the legacy debts problem has the potential of degenerating into receivership demands; and
- d) Eviction of squatters and illegal settlers on the Company land. The squatters and illegal settlers have settled in the company's investment properties (8784/144/145 And 653). The vastness of the land is 8,300 acres. This has been achieved.

586. Based on the above explanation it is The National Treasury's considered opinion that the Company be placed under the Privatization program to allow private sector participation and full commercialization of the company. We believe that Privatization will improve the efficiency of the Company and make it more responsive to market forces.

SUBMISSION FROM THE MANAGING TRUSTEE AND CEO NSSF

587. The Managing Trustee informed members that the NSSF was in concurrence with the laid-out strategy agreed upon by the shareholders to revive EAPC PLC.

SUBMISSION FROM HOLCIM

588. Holcim was concerned about the financial situation at EAPC PLC, but despite the monumental financial challenges, Holcim was hopeful that EAPC PLC can resolve the various obligations without more financial outlay from the shareholders.

589. The Holcim group was therefore in full support of the revival plan as laid out and agreed by the shareholders.

Committee observation and finding

590. The Committee observed that, it was necessary that the EAPC PLC elaborates the measures it was taking to ensure that the planned regularization of land occupied by squatters succeeds without legal bottlenecks.
591. The Committee noted that the EAPC PLC needed to prioritize the refurbishment of the factory in order to improve operational efficiency and increase its attractiveness of the intended acquisition of strategic private investors.
592. The Committee also observed that there was need for EAPC PLC to open up their intent to sale to the public and not necessarily confine itself to the squatters and other government agencies, this could be achieved through advertising in the dailies.
593. The committee observed that EAPC PC management needed to disclose the connection between the recent demolitions witnessed in the EAPC PLC land and the revival strategy of the company.

Committee Recommendations

594. The Committee recommends that the short-term plans proposed by the stakeholders be expedited. These include;
- i. regularization of LR 8784/144, LR 8784/145 and LR 8784/653 covering nine hundred and seven (907) acres.
 - ii. sale of eighteen (18) parcels of land measuring fifty (50) acres each on LR10424 (Thirteen (13) plots of fifty (50) acres each will be sold to KWS for wildlife migratory corridor while the remaining five (5) plots of fifty (50) acres each be offered competitively to the public)
 - iii. release of compensation for land compulsorily acquired by the Government for SGR measuring forty-three (43) acres on LR 10424 and Mombasa Road Dualling measuring twenty -eight (28) acres on LR8786 acquired by KENHA.
595. The Committee recommends that the National Government should explore other measures that will make EAPC PLC viable including but not limited to privatization.

2.0.FAIR VALUATION OF INVESTMENT PROPERTIES

596. As disclosed in Note 15 to the financial statements, the Group's and Company's investment properties consist of investment in land carried at fair value. The Directors engaged independent professional valuers to determine the fair value as at 30 June 2020. The valuers determined the open market value using recent property transactions prices within the vicinity of the Group's land. A significant portion of the Group's land is occupied by informal settlers. As disclosed in Note 15 to the financial statements, the Directors have exercised judgement in determining the classification of the encroached land as investment property. The fair value of the land occupied by squatters is based on open market values, determined by the independent valuers, as adjusted by the Directors' estimated cost of evicting the squatters and securing the land. The determination of the cost of evicting the informal settlers involved estimates and significant judgements.

Management Response

597. The company undertakes annual revaluation of its Investment Properties in line with the requirements relevant accounting standards. To achieve this the Company engages independent professional valuers to determine market value which usually discounted for attendant cost (given encumbrances on the land) for prudence to arrive at the true market value of the Properties. Estimates for the eviction cost is based on gazetted rates for National Police Service and hired cost of equipment.

Committee Observations

598. The Committee noted that the response from the management was satisfactory.

Committee Recommendations

599. The matter stands resolved.

3.0.LOSS IN SALE OF LAND

600. As previously reported, in 2012, the Company entered in a consent to sell land LR. No.8784/4, Athi River (measuring 337 acres) to a local buyer at a price of KES 2,200,000 per acre against the carrying value of KES 5,200,000 per acre. However, the buyer defaulted on the provisions of the consent by not providing an acceptable bank security within the period of consent. The case was taken to court after which the parties settled at a renegotiated price of KES 4,500,000 per acre on 3 May, 2019. The company thereafter revalued the investment property to a carrying value of KES 5,256,291 per acre. As a

result, the renegotiated price of KES 4,500,000 per acre resulted to an impairment loss of KES 254,870,067.

Management Response

601. Sometime in the year 2005, Superior Homes (Kenya) Limited (SHKL) purchased 163 acres of land on LR No.8784/4 from the Company. The transaction was completed and the land successfully transferred to Superior Homes (Kenya) Limited.
 602. Through an agreement dated 1st September 2005, parties further entered into an agreement for option to purchase an additional 337 acres to be hived off from LR No.8784/4.
 603. As per the terms of the Agreement hereinabove.
 - i. EAPC PLC was give Superior Homes an option to purchase Three Hundred and Thirty-Seven (337) Acres at the rate of Sh. 292,000 per Acre.
 - ii. The option was to be exercised within 12 months upon execution of the Agreement.
 - iii. In consideration of the above option to purchase the 337 Acres of Land, Superior Homes was to deposit Kenya Shillings One Hundred Thousand (Kshs 100,000/- being an option fee.
 604. Pursuant to the agreement hereinabove, Superior Homes purported to express their intention to exercise their option to purchase the 337 Acres vide a letter dated 19th September, 2006. However, Superior Homes failed to exercise the option in the express terms of the Agreement and the company informed Superior Homes that the option to purchase had lapsed for want of compliance with the Land Control Board Act.
 605. Consequently, Superior Homes (Kenya) Limited filed suit, HCCC 371 of 2011, (also known as (ELC) Case No. 931 of 2013) against the Company seeking among other, orders compelling the Company to sell the 337 acres at Kshs.292,200.00 per acre.
 606. In order to amicably settle the matter, the Company and Superior Homes entered into a Consent on 30th of November, 2012 which was adopted as an order of the Court and a decree issued on 17th December, 2014. As per the decree;
-

- i. The Purchase Price for the entire parcel of land measuring 337 acres was revised to Kshs. 2,225,519.28 per Acre totaling to Kenya Shillings Seven Hundred and Fifty Million (KShs.750,000,000/=);
- ii. Superior Homes was to pay a deposit of Kenya Shillings One Hundred Million (KShs.100,000,000/=) within seven (7) days from the date of the Decree to be held in a stakeholder capacity by the Company's Advocates in the transaction, Letangule & Company Advocates;
- iii. Superior Homes was to provide an acceptable Bank Guarantee to secure the balance of the purchase price of Kenya Shillings Six Hundred and Fifty Million (KShs.650,000,000/=); and
- iv. The completion period was to be one hundred and forty-five (145) days from the date of the Decree;

607. However, Superior Homes failed to secure and provide a bank guarantee as per the terms of the decree hereinabove and the Company terminated the sale agreement citing non-completion. As a result, Superior Homes moved to the High Court and filed case Number ELC 931 of 2013 seeking extension of time to complete the transaction for another 120 days. Upon hearing of the parties, the Court allowed Superior Homes Application and extended the completion period for a further 120 days vide a ruling dated 11th March, 2014.

608. The Company was dissatisfied with the Ruling and lodged an Appeal No. 158 of 2014, EAPC PLC Vs Superior Homes (Kenya) Limited on the basis that a consent agreement can only be varied by a further agreement by the parties to the consent and not unilaterally by one party unless a fresh suit is filed to challenge the consent order. Simultaneously, the Company filed an Application (Civil Application No. 75 of 2014 (UR 61/2014) seeking stay of execution pending the Hearing and determination of the Appeal. The Application seeking stay was allowed vide a Ruling dated 28th November, 2014.

609. Before the determination of the Appeal, and in an attempt to resolve the matter, Superior Homes made an enhanced offer of Kshs 2,800,000 per acre vide a letter dated 21st October, 2016.

610. Upon consideration of the offer, the Company declined to accept the offer vide a letter dated 3rd November, 2016 noting that the offer was below the market value of the property which was estimated to be above Kshs 5, 630,000 per acre. Superior Homes declined to improve their offer and the negotiations were abandoned.

611. Vide a Judgement dated 22nd September, 2017, the Court of Appeal returned a judgement in favour of Superior Homes effectively extending/enlarging the completion period by a further one hundred and twenty (120) days from the date of the Judgement.
612. On 29th January, 2019, Superior Homes made another offer, proposing to purchase the parcel at Kshs 4,500,000 per acre in two phases, the 1st phase being the transfer of one hundred and sixty (160) acres and the 2nd phase being the transfer of one hundred and seventy seven (177) acres.
613. Superior Homes however later included other conditions which the company found extraneous, such as construction of a wall and clearance of squatters and maintaining the cleared state of Land.
614. On 16th July, 2020 Superior Home made another offer which substantially altered the initial offer and the consent recorded in court inter alia;
- i. The total acreage to be purchased by Superior Homes was reduced from 337 acres to eight seven (87) acres.
 - ii. The Purchase Price for the eighty-seven (87) acres was to adjusted upwards from 2,200,000 per acre to 2,700,000 per acre bring the total consideration for the purchase of the 87 acres to Kshs 234,900,000.
 - iii.
615. On 8th October, 2021, Superior Homes through their Advocates, filed a Contempt of Court Application seeking to commit the Directors of the Company to Civil Jail for failure to comply with the court orders to complete the transaction with 120 days as directed by the Court of Appeal.
616. On 10th February, 2021, Superior Homes made another offer to purchase the eighty-seven (87) acres at an adjusted price from 2,200,000 to Kshs 3,100,000 per acre bringing the total consideration for the eight seven (87) acres to Kshs 269,700,000.
617. In order to amicably settle the matter and avoid the risk of the director's being committed to civil jail for contempt, the parties agreed to pursue an out of court settlement. After numerous meetings and negotiations, the parties entered into a consent dated 14th April 2022. The terms of the Consent were inter alia;
- i. Superior Home to purchase a portion of 100 acres of land at the agreed amount of Kenya Shillings Four Million, Five Hundred Thousand (Kshs.4, 500, 000.00)

per acre to be hived off parcel LR. No.10424 as opposed to the earlier offer on LR. 8784/4.

- ii. The completion period is 120 days from the date of signing the Sale agreement or any other date that the parties may agree in writing.
618. Simultaneously, with the signing of the Consent, the parties signed a Sale Agreement dated 14th April, 2022 to implement the consent.
619. Superior Homes (K) Limited vide its Advocates letter dated- 5th June 2023 rescinded the Sale Agreement dated 14th April, 2022.
620. In view of the above, the management stated as follows:-
- i. That the basis of the transaction was the orders issued in and arising from **Civil Appeal No. 158 of 2014; East African Portland Cement Co. Ltd Vs Superior Homes (K) Limited** and **Milimani HCC ELC 931 of 2013 Superior Homes (K) Limited Vs East African Portland Cement Company Limited**. Therefore, it is imperative that any analysis of the transaction takes into account this contextual background.
 - ii. If the aforementioned orders, were to be strictly upheld, the Company was obligated to sell the property at Kshs. 2,225,519.28 per acre and not Kshs. 4, 500, 000.00 per acre or risk the Company directors being committed to civil jail for being in contempt of Court.
 - iii. That in the prevailing circumstances, selling the property at Kshs.4, 500, 000.00 per acre was in the best interest of the Company.
 - iv. The Sale Agreement has been rescinded and the matter therefore reverts back to court as other solutions are sought.

Committee Findings and Observations

621. The Committee noted that EAPC PLC needed to register a consent in court for the cancellation of the sale agreement by Superior Homes Kenya PLC before releasing any funds to Superior Homes.
622. The Committee also noted that the perceived loss in sale of land would cease once the consent is registered and executed in Court on the cancellation of the sale agreement.

Committee Recommendations

623. The Committee recommends that EAPC PLC to register the consent in court for the cancellation of the sale agreement between EAPC PLC and Superior Homes Kenya PLC.

4.0.LAND INVADED BY INFORMAL SETTLERS

624. The Auditor General reported that the investment properties LR No 8784/4 (1,330 acres) was almost 70% invaded by informal settlers while LR 8786 (745 acres) and LR 10424 (3,292 acres) were partially occupied by informal settlers. The Company continued to pursue several avenues to reclaim the occupied properties. An estimated cost of evicting the informal settlers amounting to KES 376,904,000 had been adjusted in the financial statements in arriving at the fair value of investment properties.

Management Response

625. LR 8786 and a portion of LR had 8784 since been transferred to KCB at a value of KES 6.6 billion as settlement of corporate loan which transferred the encumbrance loss to the Lender. The Company sought to undertake Regularization program on the remainder of 8784 which is 907 acres to ensure that the squatters had first right of purchase of the land and any vacant portion sold by public tender.
626. Further, on all remaining parcels, the company was at an advanced discussion with the National Government on building synergy and alignment of the company strategic objectives with the development agenda of the government which would secure the land.

Additional Information on Squatters and illegal settlers on the Company land

627. The parcels of land belonging to the Company in Mavoko, Athi River which were classified as investment property were occupied with illegal grabbers. Some of the properties (8784/144/145 and 653) were occupied to the magnitude of 70% as per the 2018 Auditor General Report. The other properties were also heavily occupied.
628. The vastness of the land (8,300 acres), the financial health of the Company and the litigious nature of the squatters on the land (court orders) had made it prohibitive for the Company to undertake meaningful protection of the land.
629. The Company and the National Government's strategic interests varied across the parcels of the land. Given the magnitude of invasion of squatters on LR Nos. 8784/144/145 and 653 (which are held for sale), the company offered first right of refusal to the squatters under a regularization program. The registration process was currently ongoing.

630. The Company surrendered 4,272 acres to the National Government (LR No. 10425). The land was freed from the encumbrances and was earmarked for the affordable housing project.
631. Regarding LR 10424 and part of LR 7815, the Company was at an advanced engagement with the Kenya Wildlife Service with a view of compulsorily acquiring the land for purposes of wildlife migratory corridor connecting the Nairobi National Park to Kapiti plains. The remainder of 7815 was expected to house the expansion of Export Processing Zone in Athi River (EPZ-A).

Committee Findings and Observations

632. The Committee noted that the issue on informal settlers could only be resolved through implementation of the strategies agreed upon by shareholders.

Committee Recommendations

633. The matter stands unresolved.

5.0.TAX MATTERS

5.1.NON-REMITTANCE OF; 1) PAY AS YOU EARN (PAYE) TAX DEDUCTIONS AND 2) VALUE ADDED TAX (VAT)

634. The Auditor General reported that sections 3(2)(a)(ii), 5 and 37 of the Income Tax Act Cap 470 required employers to deduct PAYE at source and remit the same to the tax authorities before the 9th day of the subsequent month of pay. However, as at 30 June, 2020, the Company had not remitted PAYE amounting to KES 52,500,000 for the twelve (12) months period. Cumulatively the Company made a provision of KES 779,000,000 of unremitted PAYE and KES 571,000,000 being the penalties there on. The Company was in breach of law and was exposed to the consequences of non- compliance with the income tax law.
635. Further, section 13(3) of the Value Added Tax Act Cap 476 requires entities to remit VAT payable to tax authorities before the 20th day of the subsequent month of collection. However, the Company had not remitted VAT totaling KES 259,000,000 in principal and penalties and interest of KES 97,000,000 as at 30 June, 2020. The Company was in breach of law and therefore exposed to the consequences of non- compliance with the value added tax law.

636. Further, and as disclosed in Note 29(1) to the financial statements, Kenya Revenue Authority carried out an audit on the Company, covering corporate tax, employees' taxes, withholding tax and VAT for the period from 2005 to 2008. KRA raised an assessment of KES 2.5 billion out of which KES 1.7 billion had been resolved with the tax Authority. The Company paid KES 122,000,000 and appealed against a further KES 473,000,000 through the local tax committee which subsequently ruled in favor of the Company. KRA later appealed in the High Court against the local committee ruling. The substantive appeal to the High Court had however not been filed by KRA. The Directors are of the view that no additional liabilities may arise from this matter.

Management Response

637. For the current calendar year, the Company had settled all due taxes however, the company has a legacy principal tax arrears of KES 1.2 billion (KES 2.2B with penalties and taxes) debt been unable to remit these taxes owing to a constrained working capital position and has banked on realization of proceeds from sale of land to clear the outstanding balances. The Company also entered into a repayment plan with KRA based on proceeds from sale of land to Kenya Railways Corporation where 30% of each installment is remitted to clear outstanding tax balances. However, delayed payments have led to increments in outstanding balances. The Company is currently engaging with the Government to retire all these tax and other government related debts in exchange for land earmarked for affordable housing.
638. The Company was confident in its defence of the tax audit matter which was ruled in its favour by the local tax committee. Considering no substantive appeal had been filed by the Authority, the matter was disclosed as a contingent liability in the financial statements.

Committee Observations and Findings

639. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

6.0. NON-REMITTANCE OF EMPLOYEES PENSION CONTRIBUTIONS

640. Sections 53 and 53A of the Retirement Benefits Act, 1997 required entities to timely remit contributions by the employee's, failure to which, the entities will be penalized. However, the Company had accrued pensions of KES 101,000,000 in principle, penalties and interest as at 30 June, 2020. These unremitted contributions date back to August, 2018.

641. The Company was in breach of law and is exposed to the consequences of non-compliance with the retirement benefits law through penalties and non-payment of retirement benefits to its employees upon retirement.

Management Response

642. The Company was aware of the breach which occurred due to working capital challenges. Delayed realization of proceeds from sale of land have impacted repayment efforts. However, the Company is committed to bridge the working capital deficit and remit the pension scheme contributions.

Committee Findings and Observations

643. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

7.0. NON-REMITTANCE OF MINING LEVIES

644. Legal Notice No. 222 of the Mining Act (Cap 306) dated 18 December, 2013 requires cement producers to pay a cement mineral levy at the rate of KES 140 per ton of cement with effect from 1 January, 2014. The Company had accruals of non-remitted mining levy amounting to KES 363,000,000 as at 30 June, 2020. The Company was in breach of law and exposed to the consequences of non-compliance with the mining regulations.

Management Response

645. The Company is aware of the breach which occurred due to working capital challenges. However, the Company is currently in discussions with the Government to retire unpaid mining levy in exchange for land earmarked for affordable housing.

Committee Findings and Observations

646. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

8.0. NON-REMITTANCE OF UNCLAIMED DIVIDENDS

647. Section 20 of the Unclaimed Financial Assets Act, 2011 requires entities to remit unclaimed assets, including but not limited to ownership interests (shares and dividends),

with a period of abandonment of three (3) years. As at 30 June, 2020, the Company held in its books, accrued dividends payable amounting to KES 102,000,000. Part of this amount has been outstanding for more than three (3) years exposing the Company to increased penalties. The Company was therefore in breach of law.

Management Response

648. The Company paid a dividend in the 2012 & 2015 to minority shareholders (6% of total shareholding) in order to satisfy shareholder's needs for a return. However, the majority shareholders, represented on the Board, opted to defer receipt of dividends to a future date dependent on resurgence of Company's cash flows. To the extent that the main shareholders are represented in the Company's Board, and that the accrued dividends were occasioned by a decision of the Board of Directors, then the Company holds the view that the dividends are not unclaimed as the recipients are known.

Committee Findings and Observations

649. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

9.0.LOANS EXCEEDING BANK BORROWING LIMITS

650. The Company's agreement with Kenya Commercial Bank sets out the approved borrowing limits for the various facilities advanced by the Bank to the Company. As at 30 June, 2020, the Company had exceeded the approved borrowing limit by KES 2,770,882,000 (outstanding amount is KES 6,040,524,000 while the approved limit is KES 3,269,702,000). The non-compliance with the debt arrangement exposes the Company to consequences such as recall of facilities and adverse credit rating, hence difficulties in obtaining additional financing as well as possible loss of the assets charged as security for the debt.

Management Response

651. The Company held two term loans, post import finance and insurance premium finance facilities with Kenya Commercial Bank with an aggregate approved limit of Kshs 3,269,702,000 as at 30 June 2020. The Company also had an overdraft facility with an approved limit of Kshs 970,000,000 as at 30 June 2020. Owing to a tight working capital position, the Company breached repayment covenants on the overdraft and working capital facilities. Consequently, KCB recalled the outstanding debt leading to a Settlement Deed signed on 18th October 2019. The Settlement deed required consolidation of

outstanding debts under all the facilities into one term loan and provided a one-year moratorium of repayments of outstanding principal and interest.

652. The debt to Kenya Commercial Bank has since been fully settled in August 2022 through land transfer of LR 8786 and a portion of LR 8784 to the tune of KES 6.6 billion.

Committee Observation and Finding

653. The Committee examined the matter raised under this query and was satisfied with the explanation and documentation provided by the Accounting Officer.

Committee Recommendations

654. The Accounting officer should adhere to section 68 of the PFM Act.
655. The matter stands resolved.

10.0. LACK OF EXECUTED AGREEMENT FOR GOVERNMENT LOAN

656. Note 23 to the financial statements indicates that the Company holds in its books a government debt of KES 1,483,077,000 (2019: KES 1,079,799,000) payable to the Government of Kenya as at 30 June, 2020. The loan amount accumulated from the interest and principal repayment made on Japanese - OECT loan by the Government of Kenya on behalf of the Company as the Government was the guarantor. The loan agreement between the Company and the Government indicating the terms of the loan and the agreed amount was not availed for audit verification. Interest on this Government loan was not accrued during the year under audit. As a result, it was not possible to ascertain the terms of the loan or the actual outstanding loan amount due to the Government as at 30 June, 2020.

Management Response

657. The Company sought the assistance of Government to repay the loan after a constrained working capital position in September 2016. The JICA loan was obtained in 1990 through a government-to-government financing arrangement, and was used to convert the cement manufacturing process from a wet process to dry process. The new plant was commissioned in 1996, and the loan has a moratorium on payment for ten years. The Company paid the loan bi annually from 2010 before the Government took over

repayments in September 2016. The final repayment was made in September 2020. The Company has since concluded negotiations with The National Treasury and concurred with draft subsidiary loan repayment agreement which is awaiting approval by The National Treasury. The outstanding loan amounts were confirmed in writing to the Office of the Auditor General.

Committee Findings and Observations

658. The Committee noted that the National Treasury and the management were in consultations on draft subsidiary loan repayment agreement.
659. The Committee observed that the audit query was as a result of the first audit query on the material uncertainty related to going concern of the company.

FINANCIAL YEAR 2020/2021

1.0.MATERIAL UNCERTAINTY RELATED TO GOING CONCERN

660. I draw attention to Note 2(a) to the financial statements, which indicates that the Group and Company incurred a net loss from operations of KES 2,769,347,000 (2019: KES 3,361,888,000) and KES 2,768,466,000 (2019: KES 3,327,605,000) respectively during the year ended 30 June, 2020. Further, the Group and Company's current liabilities exceeded the current assets by KES 13,829,524,000 (2019: KES 10,170,657,000) and KES 13,868,616,000 (2019: KES 10,189,500,000) respectively.
661. The Company defaulted on a loan from one of the key lenders and in September, 2019, the Company obtained approval from shareholders to dispose some of the idle land to retire the debt. Factors that have affected performance have been explained in the Directors' Report and Managing Director's Report. In particular, the cement production plant continues to operate significantly below capacity due to working capital constraints, lack of essential spare parts and loss of market share to competitors. Further, due to the cash flow constraints, the Company has been unable to settle the amounts due to its key suppliers and regulatory authorities including Kenya Revenue Authority and pension liabilities.

662. The Company had significant litigations and claims against it which, if successful, may result in claims that are unlikely to be settled, given the entity's current financial position. Details of the significant claims include employee related claims arising from unpaid salaries based on the Collective Bargaining Agreement (CBA) terms with an estimated total exposure of KES 1.5 billion, debt claims by suppliers for unpaid bills for services rendered and goods delivered totaling to KES 397 million and claims arising from disputed deliveries, breach of distribution contracts and termination of supplier contracts totaling KES 196 million. Most of these claims have been provided for in the financial statements.
663. In addition, the Company has been unable to settle amounts due to statutory authorities which include Pay as You Earn (PAYE) of KES 1,347,853,000, Value Added Tax (VAT) of KES 356,000,000 and pension liabilities of KES 39,000,000 being principal, penalties and interests. These events or conditions, along with other matters as set forth in Note 2(a), indicate that a material uncertainty exists that may cast significant doubt on the Group's and Company's ability to continue as a going concern.

Management Response

664. The directors remain confident that the Group and Company will remain a going concern over the next 12 months. In making this assessment the directors have considered in detail all pertinent facts as outlined below:
- a. A thorough review of the budgetary and forecasting process to ensure that appropriate assumptions have been considered in developing the Group's forecast.
 - b. Consideration of the timing and uncertainty of the cash flows to reflect the underlying maturity of the liabilities and assets.
 - c. Consideration of the Group's financial adaptability.
 - d. Review of possible exposures to contingent liabilities
 - e. Review of the Group's risk mitigation practices and their adequacy for business related risks such as interest rates, currency exchange rate risk and credit risk.
 - f. Review of other considerations relevant to business continuity such as maintenance of key suppliers and customers; maintenance of stable labour work force and key staff.
 - g. Review of the stability of the Group's cost structure.
 - h. Key areas of focus that include:
 - i. Review of the entire mine to market process with a view to enhance efficiency, minimize wastage and capitalize on opportunities to contain costs.

- ii. Plant refurbishment with a view to lower production costs whilst maintaining quality standards
 - iii. Increase revenue through new product development.
 - iv. Retire corporate loan through balance restructuring and improve working capital – The matter has been concluded.
 - v. Continuous engagement with creditors to agree on payment plans based on paying ability of the company and in line with projected cash flows.
- i. For the year ended 30 June 2022 the Board of Directors and Management took the following measures to address and mitigate the above conditions:
 - j. Conducted a thorough assessment and review of the market, competition and competition trends and strengths and the potential impact. The Company is convinced that both the domestic Kenyan market and the regional market present vast business opportunities that it can tap into by improving its production capacity and product offering.
 - k. Developed its 5-year strategic plan which will be implemented on short term, medium term and long-term business focus through phased execution approach as detailed below:
 - (i) Rapid Results Initiative (RRI) for the first 100 days whose objective will be to kick off the new strategy cycle named ‘New Dawn’. A phased approach for plant refurbishment has embarked in earnest, with the kiln shell replacement underway with target completion in September 2022. The Kiln shell is now replaced.
 - (ii) The second phase shall run for 15 months as a Transformation phase, whose objective will be to fix and stabilize business operations. Other plant refurbishment activities are planned to coincide with receipt of land sale proceeds which will restore the Company to its rightful position as the low-cost producer of choice in the region
 - (iii) The third phase will be the rest of the strategy period and shall be used to grow and sustain the Company
 - l. Closure and settlement of some of the old debts through workable payment plans and negotiations.
 - m. Pursue waiver of penalties and interest from lenders and other creditors.
 - n. Recapitalize the business through sale of land. The Company has embarked on a regularization plan of LR 8784/144, 8784/145 & 8784/653 totaling 907 acres which had been heavily populated with squatters. This plan ensures that the local community has first right of purchase with expected proceeds of KES 5 billion. Furthermore, the Company has also subdivided 1000 acres of the adjacent

property LR 10424 into 50-acre plots which are on sale with expected proceeds totaling to approximately KES 5 billion. These measures, in addition to the retirement of KCB debt (which is currently concluded) and reclassification of National Government debt (Subsidiary agreement) will significantly impact working capital, from a deficit of KES 12 billion to a surplus of KES 1.5 billion.

STAKEHOLDERS SUBMISSIONS

SUBMISSION FROM THE STATE DEPARTMENT FOR INDUSTRY AND EAPC PLC PROPOSED TURNAROUND PLAN

665. The Going Concern emphasis of matter raised by the Auditor General was picked by the Parliamentary Public Investment Committee on Commercial Affairs and Energy. The Committee directed that the shareholders must address the conditions that are casting material uncertainty on the going concern status of the business.
666. Pursuant to the meeting before the Public Investment Committee on 13th July 2023, the Committee directed the Principal Secretary for Industry to lead a roundtable meeting with all stakeholders of East African Portland Cement PLC with a view to developing a comprehensive strategy for the revival of the Company.
667. The Board and Management held a two-day roundtable meeting with the Company's Shareholder representatives in August 2023. During the roundtable meeting, the shareholders and stakeholders identified working capital deficit and poor plant status as the key bottlenecks bedeviling the Company in actualizing its turnaround plan targets.

SHORT TERM PLAN

668. The Committee was informed that the shareholders and stakeholders agreed on a three-pronged initiative to inject cash in to the business and finalize the turnaround plan. These are as follows:
- vii. Release of outstanding compensations from the Government for land acquired to dual Mombasa Road and for the SGR corridor. The National Land Commission gazetted the acquisition on 17th November 2023 with expectation of award, valuation, settlement in the current Financial Year.
 - viii. Regularization of the Land densely occupied by squatters. The process commenced and is projected to generate KES 5B in the current financial year.
 - ix. Compulsory acquisition of 10424 and 7815 (3,563.64 acres) by Kenya Wildlife Service for wildlife Migratory Corridor.

669. Actualization of these initiatives was expected to generate KES 15.6B in the short term and the total realization from the initiatives was expected to be 40B.
670. The required support is in terms of clearance of squatters and easement of bureaucratic approvals to avert the daily deterioration that is happening at the Company. It was estimated that the Company is accruing losses of KES 5M per day and the delayed realization of the proposed initiative will further derail the recovery process. On realization of the above initiatives, the Company will be able to grow utilization of the installed capacity from 50% in the current year to 83% by FY 2026. The growth is projected to accrue from the proposed plant refurbishment program, availing of the requisite raw materials through injection of working capital and elimination of business disruptions through settlement of the legacy indebtedness. The increased business level (83% capacity utilization by FY 2026) is projected to generate an annual revenue of KES 10B and profit from operations of KES 400M by FY /2026.

LONG TERM PLAN

671. To address fundamental problems of the business, the three main shareholders agreed during the roundtable meeting held in August 2023 to fund the business through sale of land to facilitate settlement of the existing indebtedness that continues to cast material uncertainty on the going concern of the business.
672. For sustainability, there was need for a structural adjustment of the ownership. This will enable the Company to resolve its Governance structure and the State Corporation Compliance requirements in the face of a competitive operating environment in the cement industry.
673. This proposal is subject to relevant legal and regulatory approvals noting that the Company is listed in the Nairobi Securities Exchange.

SUBMISSION FROM THE NATIONAL TREASURY

674. Public Investment Committee on Commercial Affairs and Energy in a meeting held on 13th July 2023 directed EAPC PLC, State Department of Industry and main shareholders to hold a round-table meeting to address the material uncertainty related to going concern of Company.
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675. The parties as indicated above held a two-day round table meeting in August 2023, where the following observations were made:
- i. EAPC PLC is a manufacturer of cement in East Africa (Kenya), listed at Nairobi Securities Exchange (NSE) and is deemed a state corporation by virtue of a majority shareholding (52%), owned by the National Treasury (25%) and NSSF (27%);
 - ii. Other shareholders are Cemential Holdings (14.6%); Associated International (14.6%); Bamburi Cement (12.5%) and other shareholders (6%). EAPC PLC began experiencing financial problems in 2012;
 - iii. Turnover of EAPC PLC declined from Kshs.10.17 billion in 2011 to Kshs.2.8billion in 2019. The accruing losses from operations led to successive negative cash from operations that generated negative working capital. This led to the Company solely depending on KCB Bank Loan facility to bridge the negative working capital. In 2019, KCB recalled its entire loan facility, when the liquidity position of EAPC PLC further deteriorated and the company was unable to settle salaries and wages (which stood at 60% of the revenue) as well as loan repayments and interests;
 - iv. The Cabinet on 1st August 2019 approved Balance Sheet Restructuring (sale of idle land), the company managed to retire the KCB Loan (Kshs.6.8 billion) through debt property Swap, implemented a redundancy program that reduced staff cost from Kshs.245million per month to Kshs.75million per month and undertook partial plant refurbishment that was to enable the company to increase plant reliability; and
 - v. Current challenges facing EAPC PLC are:
 - a) delays in finalization of plant refurbishment to remain competitive;
 - b) inadequate cash flow for working capital;
 - c) modalities of retiring legacy debts; and
 - d) removal of illegal settlers from its parcels of land in Athi River.

676. Arising from the above observations and in compliance with the direction of the Committee, Shareholders and EAPC PLC Board and Management under the leadership of Principal Secretary State Department of Industry discussed and among others agreed on:

Short-term revival plan premised on:

- a) regularization of the land densely occupied by squatters;
- b) sale of 18 parcels of land measuring 50 acres;

- c) release of compensation for land compulsorily acquired by the Government for SGR and Mombasa Road Dualling; and
- d) actualization of the Deed of Settlement entered between the Company and Government for surrender of LR.NO.10425.

677. Revival of EAPC PLC and to address the above and going concern, the following immediate actions were agreed upon to be undertaken:

- a) The company in the immediate term requires Kshs.895million for the next phase of the plant refurbishment program and Kshs.1.1 billion for optimization in order to achieve operational excellence and cost leadership;
- b) For optimization and proper production scheduling, the Company needs injection of working capital of Kshs.2.5billion to operationalize its quarries. To allow proper production scheduling, there is need for sufficient stock covers for coal and other raw materials. Much of the current inefficiencies are hinged on sub-optimal sourcing due to inability to offer settlement guarantees;
- c) Retirement of legacy debts; the company has a huge creditor balance of Kshs.12.8billion that arose from successive years of operational losses. Currently, there is court order granted to Employees for a court award of Kshs.1.4billion arising from a case filed in 2016. Unmitigated, the legacy debts problem has the potential of degenerating into receivership demands; and
- d) Eviction of squatters and illegal settlers on the Company land. The squatters and illegal settlers have settled in the company's investment properties (8784/144/145 And 653). The vastness of the land is 8,300 acres. This has been achieved.

678. Based on the above explanation it is The National Treasury's considered opinion that the Company be placed under the Privatization program to allow private sector participation and full commercialization of the company. We believe that Privatization will improve the efficiency of the Company and make it more responsive to market forces.

SUBMISSION FROM THE MANAGING TRUSTEE AND CEO NSSF

679. The Managing Trustee informed members that the NSSF was in concurrence with the laid-out strategy agreed upon by the shareholders to revive EAPC PLC.

SUBMISSION FROM HOLCIM

680. Holcim was equally concerned about the financial situation at EAPC PLC, but despite the monumental financial challenges, Holcim believes EAPC PLC can resolve the various obligations without more financial outlay from the shareholders.

681. The Holcim group was therefore in full support of the revival plan as laid out and agreed by the shareholders.

Committee observation and finding

682. The Committee observed that, it was necessary that the EAPC PLC elaborates the measures it was taking to ensure that the planned regularization of land occupied by squatters succeeds without legal bottlenecks.
683. The Committee noted that the EAPC PLC needed to prioritize the refurbishment of the factory in order to improve operational efficiency and increase its attractiveness of the intended acquisition of strategic private investors.
684. The Committee also observed that there was need for EAPC PLC to open up their intent to sale to the public and not necessarily confine itself to the squatters and other government agencies, this could be achieved through advertising in the dailies.
685. The committee observed that EAPCC management needed to disclose the connection between the recent demolitions witnessed in the EAPC PLC land and the revival strategy of the company.

Committee Recommendations

686. The Committee recommends that the short-term plans proposed by the stakeholders be expedited. These include;
- i. regularization of LR 8784/144, LR 8784/145 and LR 8784/653 covering nine hundred and seven (907) acres.
 - ii. sale of eighteen (18) parcels of land measuring fifty (50) acres each on LR10424 (Thirteen (13) plots of fifty (50) acres each will be sold to KWS for wildlife migratory corridor while the remaining five (5) plots of fifty (50) acres each be offered competitively to the public)
 - iii. release of compensation for land compulsorily acquired by the Government for SGR measuring forty three (43) acres on LR 10424 and Mombasa Road Dualling measuring twenty -eight (28) acres on LR8786 acquired by KENHA.
687. The Committee recommends that the National Government should explore other measures that will make EAPC PLC viable including but not limited to privatization.

2.0. FAIR VALUATION OF INVESTMENT PROPERTIES

688. As disclosed in Note 15 to the financial statements, the Group's and Company's investment properties consist of investment in land carried at fair value. The Directors engaged independent professional valuers to determine the fair value as at 30 June 2020. The valuers determined the open market value using recent property transactions prices within the vicinity of the Group's land. A significant portion of the Group's land is occupied by informal settlers. As disclosed in Note 15 to the financial statements, the Directors have exercised judgement in determining the classification of the encroached land as investment property. The fair value of the land occupied by squatters is based on open market values, determined by the independent valuers, as adjusted by the Directors' estimated cost of evicting the squatters and securing the land. The determination of the cost of evicting the informal settlers involved estimates and significant judgements.

Management Response

689. The company undertakes annual revaluation of its Investment Properties in line with the requirements relevant accounting standards. To achieve this the Company engages independent professional valuers to determine market value which usually discounted for attendant cost (given encumbrances on the land) for prudence to arrive at the true market value of the Properties. Estimates for the eviction cost is based on gazetted rates for National Police Service and hired cost of equipment.

Committee Observation

690. The Committee noted that the response from the management was satisfactory.

Committee Recommendations

691. The matter stands resolved.

3.0.LOSS IN SALE OF LAND

692. As previously reported, in 2012, the Company entered in a consent to sell land LR. No.8784/4, Athi River (measuring 337 acres) to a local buyer at a price of KES 2,200,000 per acre against the carrying value of KES 5,200,000 per acre. However, the buyer defaulted on the provisions of the consent by not providing an acceptable bank security within the period of consent. The case was taken to court after which the parties settled at a renegotiated price of KES 4,500,000 per acre on 3 May, 2019. The company thereafter revalued the investment property to a carrying value of KES 5,256,291 per

acre. As a result, the renegotiated price of KES 4,500,000 per acre resulted to an impairment loss of KES 254,870,067.

Management Response

693. Sometime in the year 2005, Superior Homes (Kenya) Limited (SHKL) purchased 163 acres of land on LR No.8784/4 from the Company. The transaction was completed and the land successfully transferred to Superior Homes (Kenya) Limited.
694. Through an agreement dated 1st September 2005, parties further entered into an agreement for option to purchase an additional 337 acres to be hived off from LR No.8784/4.
695. As per the terms of the Agreement hereinabove;
- i. EAPC PLC was give Superior Homes an option to purchase Three Hundred and Thirty-Seven (337) Acres at the rate of Sh. 292,000 per Acre.
 - ii. The option was to be exercised within 12 months upon execution of the Agreement.
 - iii. In consideration of the above option to purchase the 337 Acres of Land, Superior Homes was to deposit Kenya Shillings One Hundred Thousand (Kshs 100,000/- being an option fee.
696. Pursuant to the agreement hereinabove, Superior Homes purported to express their intention to exercise their option to purchase the 337 Acres vide a letter dated 19th September, 2006. However, Superior Homes failed to exercise the option in the express terms of the Agreement and the company informed Superior Homes that the option to purchase had lapsed for want of compliance with the Land Control Board Act.
697. Consequently, Superior Homes (Kenya) Limited filed suit, HCCC 371 of 2011, (also known as (ELC) Case No. 931 of 2013) against the Company seeking among other, orders compelling the Company to sell the 337acres at Kshs.292,200.00 per acre.
698. In order to amicably settle the matter, the Company and Superior Homes entered into a Consent on 30th of November, 2012 which was adopted as an order of the court and a decree issued on 17th December, 2014. As per the decree;
- i. The Purchase Price for the entire parcel of land measuring 337 acres was revised to Kshs. 2,225,519.28 per Acre totaling to Kenya Shillings Seven Hundred and Fifty Million (KShs.750,000,000/=);

- ii. Superior Homes was to pay a deposit of Kenya Shillings One Hundred Million (KShs.100,000,000/=) within seven (7) days from the date of the Decree to be held in a stakeholder capacity by the Company's Advocates in the transaction, Letangule & Company Advocates;
 - iii. Superior Homes was to provide an acceptable Bank Guarantee to secure the balance of the purchase price of Kenya Shillings Six Hundred and Fifty Million (KShs.650,000,000/=); and
 - iv. The completion period was to be one hundred and forty-five (145) days from the date of the Decree.
699. However, Superior Homes failed to secure and provide a bank guarantee as per the terms of the decree hereinabove and the Company terminated the sale agreement citing non-completion. As a result, Superior Homes moved to the High Court and filed case Number ELC 931 of 2013 seeking extension of time to complete the transaction for another 120 days. Upon hearing of the parties, the Court allowed Superior Homes Application and extended the completion period for a further 120 days vide a ruling dated 11th March, 2014.
700. The Company was dissatisfied with the Ruling and lodged an Appeal No. 158 of 2014, EAPC PLC Vs Superior Homes (Kenya) Limited on the basis that a consent agreement can only be varied by a further agreement by the parties to the consent and not unilaterally by one party unless a fresh suit is filed to challenge the consent order. Simultaneously, the Company filed an Application (Civil Application Nai 75 of 2014 (UR 61/2014) seeking stay of execution pending the Hearing and determination of the Appeal. The Application seeking stay was allowed vide a Ruling dated 28th November, 2014.
701. Before the determination of the Appeal, and in an attempt to resolve the matter, Superior Homes made an enhanced offer of Kshs2,800,000 per acre vide a letter dated 21st October, 2016.
702. Upon consideration of the offer, the Company declined to accept the offer vide a letter dated 3rd November, 2016 noting that the offer was below the market value of the property which was estimated to be above Kshs5, 630,000 per acre. Superior Homes declined to improve their offer and the negotiations were abandoned.

703. Vide a Judgement dated 22nd September, 2017, the Court of Appeal returned a judgement in favour of Superior Homes effectively extending/enlarging the completion period by a further 120 days from the date of the Judgement.
704. On 29th January, 2019, Superior Homes made another offer, proposing to purchase the parcel at Kshs4,500,000 per acre in two phases, the 1st phase being the transfer of 160 acres and the 2nd phase being the transfer of 177 acres.
705. Superior Homes however later included other conditions which the company found extraneous, such as construction of a wall and clearance of squatters and maintaining the cleared state of land.
706. On 16th July, 2020 Superior Home made another offer which substantially altered the initial offer and the consent recorded in court inter alia:-
- i. The total acreage to be purchased by Superior Homes was reduced from 337 acres to 87 acres.
 - ii. The Purchase Price for the 87 acres was to adjusted upwards from 2,200,000 per acre to 2,700,000 per acre bring the total consideration for the purchase of the 87 acres to Kshs234,900,000.
707. On 8th October, 2021, Superior Homes through their Advocates, filed a Contempt of Court Application seeking to commit the Directors of the Company to Civil Jail for failure to comply with the court orders to complete the transaction with 120 days as directed by the Court of Appeal.
708. On 10th February, 2021, Superior Homes made another offer to purchase the 87 acres at an adjusted price from 2,200,000 to Kshs3,100,000 per acre bringing the total consideration for the 87 acres to Kshs269,700,000.
709. In order to amicably settle the matter and avoid the risk of the director's being committed to civil jail for contempt, the parties agreed to pursue an out of court settlement. After numerous meetings and negotiations, the parties entered into a consent dated 14th April 2022. The terms of the Consent were inter alia;
- i. Superior Home to purchase a portion of 100 acres of land at the agreed amount of Kenya Shillings Four Million, Five Hundred Thousand (Kshs.4, 500, 000.00) per acre to be hived off parcel LR. No.10424 as opposed to the earlier offer on LR. 8784/4.

- ii. The completion period is 120 days from the date of signing the Sale agreement or any other date that the parties may agree in writing.
710. Simultaneously, with the signing of the Consent, the parties signed a Sale Agreement dated 14th April, 2022 to implement the consent.
711. Superior Homes (K) Limited vide its Advocates letter dated- 5th June 2023 rescinded the Sale Agreement dated 14th April, 2022.
712. In view of the above, the management stated as follows:
- i. That the basis of the transaction was the orders issued in and arising from **Civil Appeal No. 158 of 2014; East African Portland Cement Co. Ltd Vs Superior Homes (K) Limited and Milimani HCC ELC 931 of 2013 Superior Homes (K) Limited Vs East African Portland Cement Company Limited**. Therefore, it is imperative that any analysis of the transaction takes into account this contextual background.
 - ii. If the aforementioned orders, were to be strictly upheld, the Company was obligated to sell the property at Kshs.2,225,519.28 per acre and not Kshs.4, 500, 000.00 per acre or risk the Company directors being committed to civil jail for being in contempt of Court.
 - iii. That in the prevailing circumstances, selling the property at Kshs.4, 500, 000.00 per acre was in the best interest of the Company.
 - iv. The Sale Agreement has been rescinded and the matter therefore reverts back to court as other solutions are sought.

Committee Findings and Observations

713. The Committee noted that EAPC PLC needed to register a consent in court for the cancellation of the sale agreement by Superior Homes Kenya PLC before releasing any funds to Superior Homes.
714. The Committee also noted that the perceived loss in sale of land would cease once the consent is registered and executed in court on the cancellation of the sale agreement.

Committee Recommendation

715. The Committee recommends that EAPC PLC to register the consent in court for the cancellation of the sale agreement between EAPC PLC and Superior Homes Kenya PLC.

4.0.LAND INVADED BY INFORMAL SETTLERS

716. The investment properties LR No 8784/4 (1,330 acres) is almost 70% invaded by informal settlers while LR 8786 (745 acres) and LR 10424 (3,292 acres) are partially occupied by informal settlers. The Company continued to pursue several avenues to reclaim the occupied properties. An estimated cost of evicting the informal settlers amounting to KES 376,904,000 has been adjusted in the financial statements in arriving at the fair value of investment properties.

Management Response

717. LR 8786 and a portion of LR has 8784 since been transferred to KCB at a value of KES 6.6 billion as settlement of corporate loan which transferred the encumbrance loss to the Lender. The Company seeks to undertake Regularization program on the remainder of 8784 which is 907 acres to ensures that the squatters have first right of purchase of the land and any vacant portion sold by public tender.
718. Further, on all remaining parcels, the company is at an advanced discussion with the National Government on building synergy and alignment of the company strategic objectives with the development agenda of the government which will secure the land.

Additional Information on Squatters and illegal settlers on the Company land

719. The parcels of land belonging to the Company in Mavoko, Athi River which are classified as investment property are infested with illegal grabbers. Some of the properties (8784/144/145 and 653) are occupied to the magnitude of 70% as per the 2018 Auditor General Report. The other properties are also heavily occupied.
720. The vastness of the land (8,300 acres), the financial health of the Company and the litigious nature of the squatters on the land (court orders) had made it prohibitive for the Company to undertake meaningful protection of the land.
721. The Company and the National Government's strategic interests vary across the parcels of the land. Given the magnitude of invasion of squatters on LR Nos. 8784/144/145 and

653 (which are held for sale), the company offered first right of refusal to the squatters under a regularization program. The registration process is currently ongoing.

722. The Company surrendered 4,272 acres to the National Government (LR No. 10425). The land was freed from the encumbrances and is earmarked for the affordable housing project.
723. Regarding LR 10424 and part of LR 7815, the Company is at an advanced engagement with the Kenya Wildlife Service with a view of compulsorily acquiring the land for purposes of wildlife migratory corridor connecting the Nairobi National Park to Kapiti plains. The remainder of 7815 is expected to house the expansion of Export Processing Zone in Athi River (EPZ-A)

Committee Observations and Findings

724. The Committee noted that the issue on informal settlers can only be resolved through implementation of the strategies agreed upon by shareholders.

Committee Recommendation

725. The matter stands unresolved.

5.0.TAX MATTERS

5.1. NON-REMITTANCE OF; 1) PAY AS YOU EARN (PAYE) TAX DEDUCTIONS AND 2) VALUE ADDED TAX (VAT)

726. Sections 3(2)(a)(ii), 5 and 37 of the Income Tax Act Cap 470 requires employers to deduct PAYE at source and remit the same to the tax authorities before the 9th day of the subsequent month of pay. However, as at 30 June, 2020, the Company had not remitted PAYE amounting to KES 52,500,000 for the twelve (12) months period. Cumulatively the Company made a provision of KES 779,000,000 of unremitted PAYE and KES 571,000,000 being the penalties there on. The Company was in breach of law and is exposed to the consequences of non- compliance with the income tax law.
727. Section 13(3) of the Value Added Tax Act Cap 476 requires entities to remit VAT payable to tax authorities before the 20th day of the subsequent month of collection. However, the Company had not remitted VAT totaling KES 259,000,000 in principal and penalties and interest of KES 97,000,000 as at 30 June, 2020. The Company was in breach of law and therefore exposed to the consequences of non- compliance with the value added tax law.

728. Further, and as disclosed in Note 29(1) to the financial statements, Kenya Revenue Authority carried out an audit on the Company, covering corporate tax, employees' taxes, withholding tax and VAT for the period from 2005 to 2008. KRA raised an assessment of KES 2.5 billion out of which KES 1.7 billion had been resolved with the tax Authority. The Company paid KES 122,000,000 and appealed against a further KES 473,000,000 through the local tax committee which subsequently ruled in favor of the Company. KRA later appealed in the High Court against the local committee ruling. The substantive appeal to the High Court had however not been filed by KRA. The Directors are of the view that no additional liabilities may arise from this matter.

Management Response

729. For the current calendar year, the Company has settled all due taxes however, the company has a legacy principal tax arrears of KES 1.2 billion (KES 2.2B with penalties and taxes) debt been unable to remit these taxes owing to a constrained working capital position and has banked on realization of proceeds from sale of land to clear the outstanding balances. The Company also entered into a repayment plan with KRA based on proceeds from sale of land to Kenya Railways Corporation where 30% of each installment is remitted to clear outstanding tax balances. However, delayed payments have led to increments in outstanding balances. The Company is currently engaging with the Government to retire all these tax and other government related debts in exchange for land earmarked for affordable housing.

730. The Company was confident in its defence of the tax audit matter which was ruled in its favour by the local tax committee. Considering no substantive appeal has been filed by the Authority, the matter is disclosed as a contingent liability in the financial statements.

Committee Observations and Findings

731. The Committee observed that the audit query was as a result of the first audit query on the material uncertainty related to going concern of the company.

6.0. NON-REMITTANCE OF EMPLOYEES PENSION CONTRIBUTIONS

732. Sections 53 and 53A of the Retirement Benefits Act, 1997 requires entities to timely remit contributions by the employee's, failure to which, the entities will be penalized. However,

the Company had accrued pensions of KES 101,000,000 in principle, penalties and interest as at 30 June, 2020. These unremitted contributions date back to August, 2018.

733. The Company was in breach of law and is exposed to the consequences of non-compliance with the retirement benefits law through penalties and non-payment of retirement benefits to its employees upon retirement.

Management Response

734. The Company is aware of the breach which occurred due to working capital challenges. Delayed realization of proceeds from sale of land have impacted repayment efforts. However, the Company is committed to bridge the working capital deficit and remit the pension scheme contributions.

Committee Observations and Findings

735. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

7.0.NON-REMITTANCE OF MINING LEVIES

736. Legal Notice No. 222 of the Mining Act (Cap 306) dated 18 December, 2013 requires cement producers to pay a cement mineral levy at the rate of KES 140 per ton of cement with effect from 1 January, 2014. The Company had accruals of non-remitted mining levy amounting to KES 363,000,000 as at 30 June, 2020. The Company was in breach of law and exposed to the consequences of non-compliance with the mining regulations.

Management Response

737. The Company is aware of the breach which occurred due to working capital challenges. However, the Company is currently in discussions with the Government to retire unpaid mining levy in exchange for land earmarked for affordable housing.

Committee Observations and Findings

738. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

8.0.NON-REMITTANCE OF UNCLAIMED DIVIDENDS

739. Section 20 of the Unclaimed Financial Assets Act, 2011 requires entities to remit unclaimed assets, including but not limited to ownership interests (shares and dividends), with a period of abandonment of three (3) years. As at 30 June, 2020, the Company held in its books, accrued dividends payable amounting to KES 102,000,000. Part of this amount has been outstanding for more than three (3) years exposing the Company to increased penalties. The Company was therefore in breach of law.

Management Response

740. The Company paid a dividend in the 2012 & 2015 to minority shareholders (6% of total shareholding) in order to satisfy shareholder's needs for a return. However, the majority shareholders, represented on the Board, opted to defer receipt of dividends to a future date dependent on resurgence of Company's cash flows. To the extent that the main shareholders are represented in the Company's Board, and that the accrued dividends were occasioned by a decision of the Board of Directors, then the Company holds the view that the dividends are not unclaimed as the recipients are known.

Committee Observations and Findings

741. The Committee observed that the audit query was as a result of the material uncertainty related to going concern of the company.

9.0.LOANS EXCEEDING BANK BORROWING LIMITS

742. The Company's agreement with Kenya Commercial Bank sets out the approved borrowing limits for the various facilities advanced by the Bank to the Company. As at 30 June, 2020, the Company had exceeded the approved borrowing limit by KES 2,770,882,000 (outstanding amount is KES 6,040,524,000 while the approved limit is KES 3,269,702,000). The non-compliance with the debt arrangement exposes the Company to consequences such as recall of facilities and adverse credit rating, hence difficulties in obtaining additional financing as well as possible loss of the assets charged as security for the debt.

Management Response

743. The Company held two term loans, post import finance and insurance premium finance facilities with Kenya Commercial Bank with an aggregate approved limit of Kshs 3,269,702,000 as at 30 June 2020. The Company also had an overdraft facility with an approved limit of Kshs.970,000,000 as at 30 June 2020. Owing to a tight working capital position, the Company breached repayment covenants on the overdraft and working

capital facilities. Consequently, KCB recalled the outstanding debt leading to a Settlement Deed signed on 18th October 2019. The Settlement deed required consolidation of outstanding debts under all the facilities into one term loan and provided a one-year moratorium of repayments of outstanding principal and interest.

744. The debt to Kenya Commercial Bank has since been fully settled in August 2022 through land transfer of LR 8786 and a portion of LR 8784 to the tune of KES 6.6 billion.

Committee Observation

745. The Committee observed at the time of examination that the management response was sufficient enough to resolve the matter.

Committee recommendation

746. The matter stands resolved.

10.0. LACK OF EXECUTED AGREEMENT FOR GOVERNMENT LOAN

747. Note 23 to the financial statements indicates that the Company holds in its books a government debt of KES 1,483,077,000 (2019: KES 1,079,799,000) payable to the Government of Kenya as at 30 June, 2020. The loan amount accumulated from the interest and principal repayment made on Japanese - OECT loan by the Government of Kenya on behalf of the Company as the Government was the guarantor. The loan agreement between the Company and the Government indicating the terms of the loan and the agreed amount was not availed for audit verification. Interest on this Government loan was not accrued during the year under audit. As a result, it was not possible to ascertain the terms of the loan or the actual outstanding loan amount due to the Government as at 30 June, 2020.

Management Response

748. The Company sought the assistance of Government to repay the loan after a constrained working capital position in September 2016. The JICA loan was obtained in 1990 through a Government-to-Government financing arrangement, and was used to convert the cement manufacturing process from a wet process to dry process. The new plant was commissioned in 1996, and the loan has a moratorium on payment for ten years. The Company paid the loan bi annually from 2010 before the Government took over repayments in September 2016. The final repayment was made in September 2020. The Company has since concluded negotiations with The National Treasury and concurred with draft subsidiary loan repayment agreement which is awaiting approval by The

National Treasury. The outstanding loan amounts were confirmed in writing to the Office of the Auditor General.

Committee Observations and Findings

- 749. The Committee noted that the National Treasury and the management were in consultations on draft subsidiary loan repayment agreement.
- 750. The Committee observed that the audit query was as a result of the first audit query on the material uncertainty related to going concern of the company.

Signed..... *DAV/LOU* Date..... *06/12/2023*

THE HON. DAVID LOSIAKOU PKOSING, CBS, M.P
CHAIRPERSON, PUBLIC INVESTMENTS COMMITTEE ON COMMERCIAL AFFAIRS & ENERGY



