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7/3/24



PARLIAMENT OF KENYA
THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT – THIRD SESSION

THE DEPARTMENTAL COMMITTEE ON TRADE, INDUSTRY & COOPERATIVES

**REPORT ON
THE INQUIRY INTO ALLEGED UNFAIR TRADE PRACTICES BY
FOREIGN INVESTORS IN KENYA**

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Table of Contents

EXECUTIVE SUMMARY3

ANNEXTURES5

ABBREVIATIONS & DEFINITION OF TERMS..... Error! Bookmark not defined.

CHAIRPERSON’S FOREWORD7

PART ONE.....9

1.0 PREFACE.....9

1.1 Establishment and Mandate of the Committee9

1.2 Committee Membership11

1.3 Committee Secretariat.....12

PART TWO.....13

2.0 INTRODUCTION.....13

2.1 Terms of Reference13

PART THREE.....14

3.0 SUBMISSIONS.....14

3.1 Submissions by the Ministry of Investments, Trade and Industry.....14

3.2 Submissions by Anti-Counterfeit Authority18

3.3 Submissions by China Square.....19

3.4 Submission by the Association of Small-Scale Traders22

PART FOUR30

4.1 Issues for Determination.....30

PART FIVE.....31

COMMITTEE OBSERVATIONS AND RECOMMENDATIONS.....31

5.1 Committee Observations31

5.2 Committee Recommendations.....32

EXECUTIVE SUMMARY

This report is in regard to an inquiry into alleged unfair trade practices by foreign investors in the country, specifically focusing on China Square Retail Company. The focus on China Square came as a result of complaints from the local traders concerning China Square retail Company. The local traders in the Nairobi markets including Nyamakima, Gikomba and Kamukunji held a strike accusing China Square of undercutting them, and sought the Government's protection.

In response to the hue and cry by the traders, the Departmental Committee on Trade, Industry and Cooperatives invited China Square management together with the Ministry of Trade, Industry and Cooperatives to respond to various issues, regarding foreign investments regulations in the country and the plight of the local traders.

The Committee began its investigations by developing its operational guidelines, and schedule of activities. The Committee held meetings with several individuals from various institutions, including the local traders, received information from the Ministry of Investment, Trade and Industry and China Square Limited.

The Committee made the following key findings and observations;

- There was no evidence submitted by the Ministry of Investment, Trade and Industry that showed the engagements with both local traders and representatives of the Chinese Business Community, as well as, the Chinese Embassy to discuss and agree on modalities to ensure that the interests of both local and foreign investors are protected, to balance both domestic and foreign direct investment.
- Although the Kenya Investment Policy 2019 provides the framework for promotion, facilitation and protection of both domestic and foreign investments in Kenya, the existence of the County Investment policy 2018 in addition to the Kenya Investment policy 2019, may confuse investors, if there is no coordination framework for development and implementation of the policies.
- There is need for Kenya to develop and adopt a coordination framework for development and implementation of policies and legislation that promotes, facilitates and or regulates investments at both National and County Levels. The Gap in law is that registration of

foreign investors under the Investment Promotion Act is not mandatory. Since Section 3(1) provides *that a foreign investor who intends to invest in Kenya may apply to the authority for an investment certificate.*

The Committee made the following key recommendations;

- The Cabinet Secretary in charge of the Ministry of Investment, Trade and Industry in coordination with Council of Governors within 60 days of the adoption of this Report to develop and adopt a coordination framework for development and implementation of investment policies that mirror the two levels of Government.
- Parliament in exercising its legislative authority to review the provisions of Section 3(1) of the Investment Promotion Act that provides *for mandatory requirement for a foreign investor to apply for an investment certificate to ensure compliance with the requirements set out under Section 4(2) of the aforementioned Act.*
- The National Investment Council to prepare annual report on investment proposals filed by foreign investors and submit to the Cabinet Secretary in charge of Investment, Trade and Industry.
- The Cabinet Secretary responsible for Investment, Trade and Industry in consultation with the relevant investment stakeholders to review various investment policy framework and regulation with the aim of coming up with an amicable regulatory and policy frame that is friendly to both foreign and local traders.

The Committee unanimously adopted its report at a sitting held in Committee Room 21, 5th Floor of Bunge Towers on **Thursday 29th February, 2024 at 10.00 a.m.**

ANNEXTURES

1.0 MINUTES

2.0 ADOPTION LIST

3.0 KENYA INVESTMENT POLICY 2019

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CHAIRPERSON'S FOREWORD

This report documents matters of alleged unfair trade practices by foreign investors in Kenya, specifically focusing on China Square Retail Company. The focus on China Square came as a result of complaints from the local traders concerning China Square Retail Company. The local traders in the Nairobi environs including Nyamakima, Gikomba and Kamukunji, held a strike accusing China Square of undercutting them and sought the Government's protection.

The Departmental Committee on Trade, Industry and Cooperatives is established pursuant to Standing Order 216 of the National Assembly standing order and is Mandated to *inter alia*, **Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments; and study the programmes and the policy objectives of Ministries and Departments and effectiveness of the implementation.**

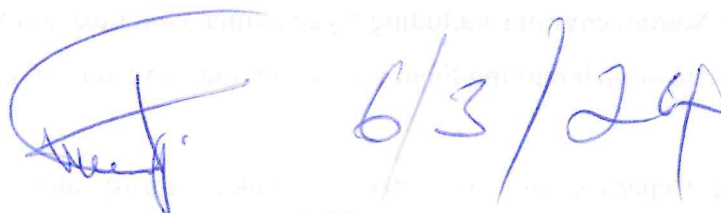
In addition, Articles 95(1) of the Constitution of Kenya calls for the **House to deliberate on and resolve issues of concern of the people.**

In this regard, the Committee held a total of three (3) meetings with the Ministry of Investment, Trade and Industry, the Chief Executive Officer of the Anti-Counterfeit Authority, representative(s) of China Square Unicity Mall and local traders from Nyamakima, Gikomba and Kamukunji.

I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

On behalf of the Departmental Committee on Trade, industry and Cooperatives, and pursuant to the provisions of Standing Order 199(6), it is my pleasant privilege and honour to present to this House

the Report of the Committee, on its inquiry into alleged unfair trade practices by foreign investors in Kenya.

A handwritten signature in blue ink, followed by the date "6/3/2024" also written in blue ink.

Hon. James Mwangi Gakuya, M.P.

CHAIRPERSON

DEPARTMENTAL COMMITTEE ON TRADE, INDUSTRY AND COOPERATIVES

PART ONE

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Departmental Committee on Trade, Industry and Cooperatives is one of the Departmental Committees of the National Assembly established under Standing Order 216, whose mandate pursuant to the Standing Order 216 (5) is as follows;

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

j. To examine any questions raised by Members on a matter within its mandate.

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, Trade, including securities exchange, consumer protection, pricing policies, commerce, industrialization including special economic zones, enterprise promotion and development including Micro, small & medium enterprise (MSMEs), and small and medium enterprise (SMEs), intellectual property, industrial standards, anti-counterfeit and cooperatives development.

3. In executing its mandate, the Committee oversees the Ministry of Investment, Trade and Industry and the Ministry of Cooperatives and Micro, Medium and Small Enterprises (MSMEs).

1.2 Committee Membership

4. The Departmental Committee on Trade, Industry and Cooperatives was constituted by the House on Thursday, 27th October, 2022, and comprises the following Members;

Chairperson

Hon. James Mwangi Gakuya, MP
Embakasi North Constituency

UDA Party

Vice-Chairperson

Hon. Kitany Jebet Marianne, MP
Aldai Constituency

UDA Party

Hon. Dr. Oundo Wilberforce Ojiambo, MP
Funyula Constituency

ODM Party

Hon. Oluoch Anthony, MP
Mathare Constituency

ODM Party

Hon. Adagala Beatrice Kahai, MP
Vihiga Constituency

ANC Party

Hon. Guyo Adhe Wario, MP
North Horr Constituency

KANU Party

Hon. Githinji Robert Gichimu, MP
Gichugu Constituency

UDA Party

Hon. Korir Adams Kipsanai, MP
Keiyo North Constituency

UDA Party

Hon. Kamene Joyce, MP
Machakos Constituency

WDM Party

Hon. Maina Mwago Amos, MP
Starehe

JP Party

Hon. Mwalyo Joshua Mbithi, MP
Masinga Constituency

Independent Member

Hon. Sakimba Parashina Samwel, MP
Kajiado South Constituency

ODM Party

Hon. Wanaina Antony Njoroge, MP
Kieni Constituency

UDA Party

Hon. Waithaka John Machua
Kiambu Constituency

UDA Party

1.3 Committee Secretariat

5. The Committee is facilitated by the following staff;

Ms. Rose Mudibo, OGW
Senior Clerk Assistant/Head of Secretariat

Mr. Ellam Osabwa Omuhinda
Clerk Assistant III

Ms. Doreen Karani
Senior Legal Counsel

Ms. Everlyn Kerubo
Clerk Assistant III

Mr. Arkan Ali Mumin
Research Officer III

Ms. Loice Olesia
Fiscal Analyst III

Ms. Pricillah Saidi
Research Officer III

Mr. Daniel Psirmoi
Media Relations Officer

Mr. George Benjamin
Hansard Reporter III

Ms. Peris Kaburi
Serjeant At Arms

Mr. Cosmas Akhonya
Audio Recording Officer

PART TWO

2.0 INTRODUCTION

6. China Square is a retail company which commenced operations in Kenya on 29th January, 2023. The Company deals in basic consumer goods/household items and hardware, furniture etc. imported from China, Turkey, other parts of the world, as well as sale of locally manufactured brands.
7. The genesis of this inquiry is from complaints by local traders, who felt that China Square was engaged in undercutting trading, and as such, creating unfair competition in the Kenyan market. This posed a risk of foreign investments threatening local traders to close shop as a result of unfair trade practices.
8. The Committee on Trade, Industry and Cooperatives invited China Square on 14th March, 2023, together with the Ministry of Investments, Trade and Industry, to respond to issues regarding foreign investments regulations in the country, and the plight of the local traders.

2.1 Terms of Reference

10. The Committee developed and was guided by the following terms of reference in conducting the inquiry;
 - (a) To establish whether there was indeed unfair trade practice by foreign investors as alleged by local traders;
 - (b) To propose urgent measures to be undertaken by the relevant stakeholders to address the plight and concerns of local traders;
 - (c) To determine whether there existed legal documentation on the proposed buy-out/transfer of the lease held by China Square including the proposed implementation strategy; and
 - (d) To examine regulatory, legislative and policy framework governing foreign investment in Kenya, and propose necessary amendments or enactment of laws to govern the same.

PART THREE

3.0 SUBMISSIONS

11. The Committee held meetings with various institutions and Government Departments including the Ministry of Investments, Trade and Industry, the State Department for Investment Promotion, China Square Limited, Anti-counterfeit Authority and local traders.

3.1 Submissions by the Ministry of Investments, Trade and Industry

The State Department for Investment Promotion submitted that;

12. It was not privy to any documentation on the proposed buy-out/transfer of the lease held by China Square Limited, and that it was also not aware of any proposed implementation strategy.

13. On the issue concerning the regulatory, legislative and policy framework governing investment by non-Kenyans, Kenyan Citizens and implementation, the State Department submitted as follows;

- a. **Policy framework for investments;** The main law governing national investment policy in Kenya is the Kenya Investment Policy 2019. It provides the framework for promotion and facilitation and protection of both domestic and foreign investments in Kenya. There are various sectoral policies developed, implemented and policed by respective Ministries, Departments and Agencies in accordance with their sectoral mandates. The respective County Governments also have various policies in place to govern investment in their respective counties. The existence of many institutions dealing with investment promotion and facilitation continues to confuse investors. This challenge has been recognized in the Kenya Investment Policy 2019 under Section 3.3 (1) necessitating the establishment of this State Department to strengthen the coordination mechanism.
- b. **Regulatory and legislative framework for investments;** the Investment Promotion Act (as enacted in 2004 and amended in subsequent years), establishes the National Investment Council (NIC) and the Kenya Investment Authority (KenInvest), as organs of Government charged with the responsibility of promoting and facilitating domestic and foreign investments in Kenya. However, there exists several pieces of legislation that govern and or

regulate investments at National and County Levels, but no overarching single piece of legislation to govern or regulate all investments in Kenya. County Governments have also enacted their own legislation to govern and or regulate investments in their respective counties.

15. The existence of several policies and pieces of legislations by different regulators is the practice worldwide in countries with similar governance and economic structures as Kenya. However, what creates the difference in respective countries, is how well they coordinate the process of development and implementation of such policies and legislation.
16. The State Department recognized the need for Kenya to develop and adopt a coordination framework for development and implementation of policies and legislation that promote, facilitate and or regulate investments at both National and County Levels. In this regard, the State Department has initiated the process of establishing a National Investment Promotion Coordination Framework (NIPCF), drawing membership from various National Government State Departments, the Council of Governors and respective County Governments. The State Department indicated that it had written to the parties inviting participation and nomination of representatives to a Technical Committee to develop the coordination framework.
17. Under the Investment Promotion Act, foreign investors are required to invest at least USD. 100,000, to acquire an Investment Certificate, which entitles them to 3 Class G and 3 Class D work permits, and 71 licenses as detailed in the second schedule to the Act. However, the Gap in the law is that registration of foreign investors under the Act is not mandatory.
18. The Kenya Investment Policy 2019, in regard to Sector Restrictions, provides that, to ensure investment proposals are consistent with Kenya's national interest, the Government may review major foreign and domestic investment proposals on a case-by-case basis, through the National Investment Council, which can make final recommendations to the Government on those proposals. The review system allows the Government to consider community concerns around foreign ownership of certain assets affecting national interest.
19. The following policy measures apply with respect to sector restrictions;

- a. Restricted/Negative List; KenInvest shall publish a list of restricted sectors on its website and on any promotional materials which comprehensively layout Kenya's national investment policy. This list shall be generated by the NIC in its periodic reviews of the investment climate. The list shall be approved by the Cabinet and or Parliament.
- b. Review; In every three years, the NIC will update and publish the list on sensitive and restricted sectors.
- c. Exemptions; Parliament may grant exemptions from this policy upon recommendation of the NIC for investors seeking to make significant investments in priority sectors, or if the NIC deems such investment are necessary for national interest. Current investments that would otherwise be restricted under this policy shall be grandfathered as of the enactment of the policy, except in instances where such investors wish to expand their investment after policy enactment.

20. Economic liberalization brought about by the Structural Adjustment Programmes (SAPs) implemented in the 1990s, successive administrations in Kenya have reduced or eliminated restrictions on investments in various economic sectors. Currently, Kenya's investment environment is almost fully liberalized. Foreign investors can own upto 100% equity, except in certain sectors, such as Insurance, Telecommunications and Mining. With respect to ownership of land, foreign investors are not allowed freehold interests, but can lease up to a maximum of 99 years (renewable).

21. The State Department through KenInvest has developed a draft negative list of economic sectors and activities to be reserved for local investors and is awaiting public participation, before being submitted to the NIC and Cabinet for approval. Similarly, other protective measures would be considered under the ongoing review of the Investment Promotion Act.

22. On the issue of the measures taken by the Ministry to address the plight and concerns of local traders, the State Department submitted that;

- a. The State Department is currently reviewing regulations on foreign investments, with a view to ensure that foreign investments are not only lawful, but beneficial to the National Development Goals.
- b. The State Department is coordinating development and implementation of National and County Business Climate Reform Action Plan, to address the issues raised in relation to Tax Administration and Enforcement of Quality Inspections and Anti-Counterfeit Measures.
- c. The State Department has been part of engagements with both local traders and representatives of the Chinese Business Community, as well as the Chinese Embassy, to discuss and agree on modalities to ensure that the interests of both local and foreign investors are protected, to balance both domestic and foreign direct investment.

23. On the issue of any legislative or policy gaps identified, the State Department submitted as follows;

- a. **Policy framework for investments;** There is fragmentation and multiplicity of investment policies at the National and County Levels in Kenya. Lack of coordination in policy development, implementation and enforcement by respective Ministries, Departments and Agencies, as well as County Governments creates challenges and loopholes that may be exploited by foreign investors to the detriment of local investors.
- b. **Regulatory and legislative framework for investments;** There is lack of mandatory registration of foreign direct investments at KenInvest for monitoring, tracking and providing aftercare services for optimization of the investment with regard to Kenya's developmental goals.

24. The State Department has initiated the review and revision of the Investment Promotion Act 2004; the Special Economic Zones Act 2015; and, the Export Processing Zones Act 1990. The State Department is also developing the Business Laws (amendment) No. 3 of Act 2023, to address legislative gaps in the business and investment climate. The Draft Bills/Amendment Bills will be subjected to public participation before they can be submitted for legislative action.

3.2 Submissions by Anti-Counterfeit Authority

The Authority submitted that;

25. An intellectual property rights complaint was received by the Authority on 15th February, 2023, from Smithmo Company Limited, the proprietor of Trademark number 84023 - Finder Tools, as per Section 33(1) of the Anti-Counterfeit Act, No.13 of 2008.

26. The complaint alleged suspected Trademark infringement by China Square Limited, located along Thika Road. In response, Enforcement Inspectors from Anti-Counterfeit Authority (ACA) conducted an inspection at China Square Mall inside UNICITY, along Thika Road on February 16th, 2023. During the inspection, the inspectors identified and seized various branded tools, suspected to be infringing trademark number 84023. Subsequently, they proceeded to conduct further investigations into the authenticity of the seized goods.

27. During the course of the investigations, the Authority received communication from the complainant, Smithmo Company Limited, indicating that the goods had been manufactured by "YIWU FINDER IMPORT & EXPORT COMPANY" and were therefore genuine. As a result, they withdrew their complaint against China Square Limited.

28. The Anti-Counterfeit Authority (ACA) confirmed through documentation provided by China Square Limited, that the said manufacturer in China is the legitimate international brand owner of the "Finder" trademark (WIPO trademark certificate number 1424132). Additionally, the manufacturer appointed China Square Limited as an authorized dealer of the goods.

29. Upon verification of the documents and the formal withdrawal of the complaint by the IPRC complainant, the Authority released the seized goods held *in situ* via ACA release form 14 Serial Number 1430, dated 6th March, 2023.

3.3 Submissions by China Square

China square Ltd. Company, through its directors appeared before the Committee and submitted as follows;

30. That they did not receive any formal offer regarding a buy out or transfers, and are therefore not aware of any proposed implementation strategy. They responded that, they have a valid lease agreement with the property owner, and they are operating their business in accordance with all applicable laws and regulations.

31. That as a foreign owned business, the Company responded that they had satisfied the requirements of Section 4 of the Investment Promotion Act No. 6 of 2004, that requires foreign businesses to *inter alia* help in;

- a. Creation of employment for Kenyans;
- b. Acquisition of new skills or technology for Kenyans;
- c. Contribution to tax revenues or other Government revenues;
- d. Transfer of technology to Kenya;
- e. An increase in foreign exchange, either through exports or import substitution;
- f. Utilization of domestic raw materials, supplies and services;
- g. Adoption of value addition in the processing of local, natural and agricultural resources; and
- h. Utilization, promotion, development and implementation of information and communication technology.

32. China Square Ltd. submitted that they obtained all necessary permits and certificates required to operate their business in Kenya, and believe that foreign investment can be a positive force for economic growth and job creation in Kenya.

33. On the issue concerning the regulatory, legislative and policy framework in place to protect the interests of local investors, China Square submitted that they believe that fair competition and a level playing field for all businesses regardless of their country of origin, is the best way to protect the interests of all investors. They stated that they have no intention of hurting local businesses, and

believe that their business model can complement and enhance the offerings of other retailers in Kenya.

34. The Company also stated that, the existing legal framework provides for ways in which a foreign business can be registered and operated in Kenya. Those provisions in themselves speak to the fact that foreign businesses are welcomed, and that their presence does not in any way threaten the interests of other traders.

35. On the issue of any legislative and policy gaps identified in the aforementioned areas, as well as proposed intervention measures, they stated that; they believe that the current regulatory framework in Kenya is generally sufficient to govern any foreign investment.

36. In response to the allegations of dealing in counterfeit goods, China Square submitted that; the allegation was brought about by Smithmo Company Limited, logging a complaint with the Anti-Counterfeit Authority. The Authority then confiscated the goods, did a thorough inspection and confirmed that the said allegations were false and had no basis. The goods were subsequently returned to their stores.

37. The company confirmed that they deal with authentic and genuine goods, and that in fact, their goods pass through all the required tests before reaching their stores.

38. Concerning the business model, China Square responded that they focus on offering a wide range of quality products at affordable prices to Kenyan consumers. Their products are sourced from various suppliers, including local manufacturers, and believe that their presence in the market can help stimulate competition and innovation. They also believe that their investment in Kenya has created jobs and generated tax revenue for the Country.

39. The company stated that their activities are in line with the 2019 Kenya Investment Policy's (KIP) core principles of openness, transparency, inclusivity, sustainable development, economic diversification, domestic empowerment, integration, and investor centeredness.

40. On the issue of concerns about their business harming local traders, the Company submitted that whereas some traders may feel threatened by their presence, they believe that they can coexist with other businesses and offer consumers additional choices and value. They said that they do not intend to drive anyone out of business, and believe that healthy competition benefits all stakeholders.

41. The Company further indicated that although some traders may feel that they are underpricing commodities, the company's pricing accords a reasonable profit margin, even after paying all the requisite taxes. They said that they are firm believes in making life affordable to Kenyan citizens, and that calls for reasonableness in making decisions as to pricing.

42. On the issue about the safety and well-being of their employees and customers, China Square Ltd. submitted that they have invested in security measures, including hiring additional security personnel and installing CCTV cameras in their stores. They have also implemented health and safety protocols to ensure the well-being of their employees and customers, including providing personal protective equipment and adhering to all applicable COVID-19 guidelines.

43. On the issue concerning their contribution and giving back to society, they submitted that, their company has 154 direct employees, 150 of these are Kenyan, many of them in senior position, and only 4 are Chinese. Since they source the bulk of their products locally, there are also several local companies and individuals benefiting from their business. They also attached a list of 41 local suppliers to communicate the extent of their commitment to work with the local community.

44. The company also stated that they are dedicated to improving the lives of ordinary Kenyans in their focus on basic every day-use commodity.

45. In addition, the company stated that they believe in being responsible corporate citizens, and have already engaged in some charitable activities including donating products to local organizations. They further plan to continue seeking out ways to support the community and give back to society, which includes ongoing philanthropic initiatives and partnering with local organizations to make a positive impact.

46. China Square also submitted that Article 40 (1) of the Constitution of Kenya, 2010, provides that subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property of any description, and in any part of Kenya. Hence, they are a legal entity that is supposed to be protected in equal strength with local businesses.

47. In light of the foregoing, it was the Company's prayer that their business having been legally registered in compliance with every legal requirement be considered valid, and hence ripe for the full protection of the Law.

3.4 Submission by the Association of Small-Scale Traders

The local traders appeared before the Committee, and were represented by their Chairperson who submitted as follows;

48. China Square Mall has been engaging in trading and commercial activities that threaten the survival of the businesses of the Association's Members, and that the proliferation of Chinese hawkers, shopkeepers, retail traders, small and medium sized wholesalers and distributors has adversely affected the Members. The Association notes that China Square has been buying directly from the manufactures from China, hence selling goods at a very cheap price. The local traders however are not allowed by the Chinese manufacturers to buy goods directly from them. This has resulted to unfair practices, since the local traders are not able to sell the goods at the same prices with China Square mall. The Association is apprehensive that unless this displacement of Kenyan traders and small-sized entrepreneurs is addressed immediately, there is a high likelihood that social, political and economic tensions will erupt.

49. The Association is concerned that various organs and officials of the Kenyan State have been promoting, aiding and abetting the influx of Chinese nationals into Kenya, and that the establishment of economic activities threatens the survival of its members' businesses, and the livelihoods of over two million Kenyans and over six million dependents.

50. Given that the People's Republic of China (PRC) is the world's second largest economy, there can be no justification why it is encouraging and facilitating the take-over by its nationals of every economic activity from the Members of the Association, and other indigenous traders, entrepreneurs and owners of capital and attendant displacement from gainful economic activity. The Chairperson averred that the China-Kenya international trade, which in 2022 was valued at USD 3.71 Billion (491.14 Billion Shillings) of goods imported by Kenya from China and USD 233 Million (31.22 Billion Shillings) of Kenyan exports to China, should result into some tangible benefits for indigenous Kenyan traders' members of the Association.

51. Due to the substantial efforts and contribution of the Association's Members and other Kenyan traders, the volume and value of trade between China and Kenya has increased exponentially over the last two decades. Specifically, between the year 2000 and 2020, the trade between China and Kenya increased from 106 million Dollars in 2000, to 3.5 billion Dollars in 2020. This increased trade was mutually beneficial as the Chinese manufacturers and traders dominated the source of goods in China, whilst Kenyan importers and traders dominated the retail end in the Kenyan Market.

52. In totality, Kenya exports to China far less than it imports from China. As a case in point in 2022 Kenya's exports to China were valued at USD 233 (31.22 billion Shillings), whilst imported goods valued at USD 3.71 Billion (491.14 billion Shillings). Therefore, there is a trade deficit of 485.08 billion Shillings in favor of China.

53. The Association contends that in view of the enormous trade deficit between Kenya and China, the only way that Kenyans can gain from international trade with China is by ensuring that as many of its citizens as possible get involved and benefit from importation of goods from China. The Association further contends that on account of various reasons, Kenyan traders, including its members have been on the losing end in this regard, over the last years.

54. The Chairman of the Association informed the Committee on the causes/reasons for the challenges facing members of the Association; he pointed out the following causes/reasons:

- a) Failure by the Kenyan Government and its organs to protect local businessmen and traders through enforcement of the relevant provisions of the Constitution;
- i. By virtue of Article 4 of the Constitution, Kenya is a sovereign Republic, founded on the national values and principles of governance referred to in Article 10. These values and principles include social governance and sustainable development. The Association contends that as a sovereign Republic, the Kenyan Government is required to protect economic interests of its citizens, particularly when such interests are in conflict with those of foreign nationals. Furthermore, the Association is convinced that social justice and sustainable development in Kenya can only be illusory unless the Kenyan Government and its organs urgently stem the rapid economic displacement and take-over of economic opportunities by the Chinese in sectors hitherto dominated by Kenyan citizens.
 - ii. The provisions of Articles 12(1) and 18 of the Constitution impose an obligation on Parliament to ensure, *inter-alia*, that all legislations, regulations and policies in the economic sector provide for and secure the interests of Kenyan citizens. Unfortunately, Parliament has not lived up to this sacred obligation of respecting, promoting and protecting the rights, privileges and benefits of Kenyan citizenship for the people of Kenya.
 - iii. Despite the fact that Article 21 of the Constitution imposes a duty on the State and all its organs to take legislative, policy and other measures to achieve, protect, promote and secure the realization of the social and economic rights enshrined in Article 43, the Association avers that this duty has not been honored by the Kenyan Government and its organs and agencies.
 - iv. The Immigration Department has either been corrupted or compromised to allow a steady influx of Chinese nationals who are engaging in low-end economic activities like hawking, retail trade, wholesale trade and distribution of goods manufactured in China and other Asian countries in

sectors that fall within the scope of micro and small-scale trading, which should be reserved for Kenyan citizens.

- v. Section 4(1)(d) of the Investment Promotion Act provides, *inter-alia*, that an applicant shall be entitled to an investment certificate if the investment and the activity related to the investment are lawful and beneficial to Kenya. By virtue of Section 4(2) in determining whether an investment and the activity related to the investment are beneficial to Kenya, the Authority shall consider the extent to which the investment or activity will contribute to the following mandatory conditions;
- i. Creation of employment for Kenyans.
 - ii. Acquisition of new skills or technology for Kenyans.
 - iii. Contribution to tax revenue or the other Government revenues.

55. Notwithstanding the above criteria, the Investment Promotion Authority has been unlawfully issuing investment certificates to Chinese traders and economic migrants to engage in economic activities that not only undermine sustainable development in Kenya and prejudices its citizens, but is also in contravention of conditions set out in Section 4 of the Investment Promotion Act.

56. The Chairman stated that, the association believes that China Square Mall has not been lawfully issued with an investment certificate by the Authority, *inter-alia*, on the following grounds;

- a. China Square Mall exists to enable Chinese Companies to produce products and sell directly in Kenya to escape the economic necessity of having to set up factories in Kenya.
- b. The investment and related activities carried out by China Square Mall are not beneficial to Kenya, because they enable dominance of Chinese traders at the expense of Kenyan traders, and they do not satisfy the mandatory conditions set out in Section 4(2)(a), (b) and (c), let alone the other conditions.
- c. The Chinese traders' activities are in contravention of Section 4(1)(c) of the Investment Promotion Act, in that the businesses are not worth at least one hundred thousand United States of America dollars, or the equivalent in any currency.

57. The Chairman pointed out the failure by the Ministry of Investment, Trade and Industry to implement the National Trade Policy published in May, 2017, and the Sessional Paper No. 5 of 2020 on Kenya Micro and Small Enterprises Policy for Promoting Micro and Small enterprises for Wealth and Employment Creation published in September, 2020. He indicated that there are three major ways in which the Ministry of Investment, Trade and Industry has failed in its implementation role;

- a. The Vision, Mission and Objectives of the National Trade Policy *is to facilitate Kenya's transformation into a competitive export led economy, enhance regional integration and widen participation in both domestic and international trade. The Trade Policy mission will be achieved through the following broad objectives: -*
 - i. *The pursuit of more open, competitive and export-oriented policies that are compatible with the Country's National development objectives;*
 - ii. *The creation of an enabling environment for trade and investment to thrive; and*
 - iii. *The promotion of Counties as centres of trade and investment.*

58. The Chairperson informed the Committee that undoubtedly, one of the objectives of the National Trade Policy is to promote domestic trade and investment guided inter-alia, by the principle of “mitigating any adverse effects of practices by the country” trading partners by invoking and implementing trade defense measures as and when appropriate...” Unfortunately, the Ministry has either ignored or failed to support Kenyan traders in ensuring that Kenyan citizens reap maximum benefits from domestic market and promote the socio-economic benefit of traders and their families, particularly in relation to the trade between China and Kenya and the impact of Chinese nationals in Kenya's domestic trade and market.

59. The Chairman stated that the Ministry is yet to implement this Sessional Paper, at least in terms of protecting the interests of Kenyan traders facing unfair competition by foreigners.

60. The Chairperson informed the Committee that the Association believes that it is completely untenable for the Kenyan Government through agencies of National Government or County Governments, to licence foreign investors to open up businesses that fall within the scope of the MSEs sector. To be sure the Sessional Paper defines micro and small enterprises as follows;

a. **Micro enterprise** means a business activity whose annual turnover is below Kshs 1 Million and meets any of the following criteria;

i) *Employs less than 10 people; or*

ii) *Has total assets as shall be determined from time to time by the Cabinet Secretary (Responsible for matters relating to MSEs)*

b. **Small enterprise** means a business activity whose annual turnover ranges between Kshs 1 million and Kshs 5 million and meets any of the following criteria;

i. *Employs between 10 – 50 people;*

ii. *Has total assets as shall be determined from time to time by the Cabinet Secretary (Responsible for matters relating to MSEs)*

61. He further pointed out that the Association is aware that majority of Chinese businesses wreaking havoc to the business of Kenyan citizens fall within the scope of the MSEs sector.

62. The Chairman submitted that County Governments, particularly Nairobi City County Government, has been facilitating the unlawful businesses of Chinese nationals, by giving them single businesses permits and other licences to engage in retail and wholesale trade, and other small businesses that the Constitution, legislative laws and regulations, plus the policies mentioned above envisage should be done exclusively by Kenyan citizens.

63. The Chairman requested the Committee on behalf of the Association to ensure the following laws, policies and measures are enforced, amended, improved or taken in order to resolve the highlighted challenges;

a. The Kenya Citizenship and Immigration Act.

b. The Citizens and Foreign Nationals Management Services Act (No. 31 of 2011).

c. The County Governments Act, 2011.

d. The Investment Promotion Act, (No.6 of 2004).

e. The Foreign Investments Protection Act, Cap 518.

- f. The Competition Act (No. 12 of 2010).
- g. The Micro and Small Enterprises Act (No. 55 of 2012).

64. The Chairperson further added that given the fact that the Kenyan Government is required to take legislative, policy and other measures to achieve the progressive realization of economic and social rights guaranteed under Article 43 of the Constitution, the Cabinet Secretary responsible for Investments, Trade and Industry should ensure that local businesses and traders are protected by enforcing the policies mentioned above.

65. The Chairman submitted that the Kenya Chinese Chambers of Commerce (KCCC), should be ordered by Parliament to stop facilitating the influx of Chinese entrepreneurs into Kenya to engage in small business in activities like hawking, shop-keeping, running of small restaurants, wholesale and distribution sectors that fall within the scope of micro and small businesses, that should be reserved for Kenyan citizens.

66. The Chairman told the Committee that in order to prevent further entrenchment or establishment of Chinese Businesses in economic fields that should be reserved for citizens of Kenya, the County Government of Nairobi City, should be restrained from issuing single business permits and other licenses to Chinese nationals. The reservation of specified economic fields as exclusive to citizens of Kenya is the only practical way to ensure that Kenya citizenship accrues some benefits and privileges available to traders who are Kenyan citizens and to ensure that practical steps are made to realize the social and economic rights enshrined in Article 43 of the Constitution.

67. The Chairman insisted that that the Investment Promotion Authority should strictly enforce the Investment Promotion Act, to ensure that investment certificates are issued to the right investors whose investments are beneficial to Kenya, and not detrimental to the business and trade interests of Kenyan citizens.

68. The Chairman of the Association requested Parliament to amend the Investment Promotion Act, to provide among other things, that in order for a foreign investor to be issued with an investment certificate it must;

- a) Invest a minimum of capital in foreign currency equivalent to Kshs 500,000,000.
- b) Create employment for a minimum of 100 Kenyan citizens.
- c) Contribute at least fifty million shillings annually to tax revenue or other Government revenues.
- d) Refrain from engaging in trading and business activities in sectors reserved for Kenyan citizens, particularly in retail, wholesale and distribution sectors, plus hospitality industry in establishments that employ less than 100 people, and contain less than 100 accommodation rooms.

69. The Chairman of the Association stated that, Parliament should ensure that pursuant to Articles 12, 21 and 43 of the Constitution, all laws dealing with economic and social rights, business concerns and property ownership are amended to protect, promote and secure the interests of Kenyan citizens.

PART FOUR

4.1 Issues for Determination

Based on the terms of reference, the Committee determines as follows; whether there were indeed unfair trade practices by foreign investors as alleged by local traders;

70. The Association of the local trader submitted that China Square Mall has been engaging in trading and commercial activities that threaten the survival of the businesses of the Association's members, and that the proliferation of Chinese hawkers, shopkeepers, retail traders and small and medium sized wholesalers and distributors has adversely affected its Members. The Association is apprehensive that unless this displacement of Kenyan traders and small-sized entrepreneurs is addressed immediately, there is a high likelihood that social, political and economic tensions will erupt

71. That, China square buys its products directly from the manufacturers, hence their products are cheaper compared to the local traders who are not allowed by Chinese manufacturers to buy directly from them. As a result, the local traders face unfair competition from China Square Ltd.

72. China Square Ltd. submitted that, it focusses on offering a wide range of quality products at affordable prices to Kenyan consumers. They source their products from various suppliers, including local manufacturers, and believe that their presence in the market can help stimulate competition and innovation.

73. China Square added that, whereas some traders may feel threatened by their presence, they believe that they can coexist with other businesses and offer consumers additional choices and value. They said that they do not intend to drive anyone out of business and believe that healthy competition benefits all stakeholders.

75. The Company further indicated that although some traders may feel that they are underpricing commodities, the company's pricing accords a reasonable profit margin even after paying all the requisite taxes. It was noted that they are firm believers in making life affordable to citizens and that calls for reasonableness in making decisions as to pricing.

PART FIVE

COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

5.1 Committee Observations

1. The Committee observed that, the Ministry of Investments, Trade and Industries is currently reviewing regulations on foreign investments, with a view to ensuring that foreign investments are not only lawful, but beneficial to the National Development Goals.
2. Despite the Committee being informed by the Ministry of Investments, Trade and Industries that there have been engagements with both local traders and representatives of the Chinese Business Community, as well as, the Chinese Embassy to discuss and agree on modalities to ensure that the interests of both local and foreign investors are protected to balance both domestic and foreign direct investment, the Committee observed that there was no evidence submitted by the Ministry to demonstrate the same.
3. Based on the submission from China Square Ltd. and the Ministry of Investments, Trade and Industries, the Committee observed that there was no proposed buy-out/transfer of the lease held by China Square Ltd., including the proposed implementation strategy.
4. The Committee noted that due to fragmentation and multiplicity of investment policies at National and County Levels in Kenya, there is lack of coordination in policy development, implementation and enforcement by respective Ministries, Departments and Agencies, as well as, County Governments, which creates challenges and loopholes that may be exploited by foreign investors to the detriment of local investors
5. The Committee notes that although the Kenya Investment Policy 2019 provides for the framework for promotion, facilitation and protection of both domestic and foreign investments in Kenya. The existence of County Investment Policy 2018 and Kenya Investment policy 2019, may confuse investors, if there is no coordination framework for development and implementation of the policies.

6. The Committee noted that under the Investment Promotion Act, foreign investors are required to invest at least USD. 100,000 to acquire an Investment Certificate, which entitles them to 3 Class G and 3 Class D work permits and licenses, as detailed in the second schedule of the Act.

7. The Committee observed that there is a gap in law for registration of foreign investors under the Act, which is not mandatory. Since Section 3(1) provides *that a foreign investor who intends to invest in Kenya may apply to the authority for an investment certificate.*

5.2 Committee Recommendations

Based on the Committee findings and general observations, the Committee makes the following recommendations;

1. That the Cabinet Secretary in charge of the Ministry of Investment Trade and Industry in consultation with Council of Governors within sixty (60) days of the adoption of this report to develop a policy framework for development and implementation of investment policies that mirror the two levels of Government.
2. That Parliament in exercise of its legislative authority, to review the provisions of Section 3(1) of the Investment Promotion Act, to provide a *for mandatory requirement for a foreign investor to apply for an investment certificate to ensure compliance with the requirements, set out under Section 4(2) of the aforementioned Act.*
3. That the National Investment Council to prepare an annual report on investment proposals filed by foreign investors and submit to the Cabinet Secretary in charge of Investment, Trade and Industry and publish in the Kenya Gazette.
4. That the Cabinet Secretary responsible for Investment, Trade and Industry, in consultation with the relevant investment stakeholders to review various investment policies and regulations, with the

aim of coming up with an amicable regulations and policies that are friendly to both foreign and local traders.

Signature.....  Date..... 

HON. JAMES MWANGI GAKUYA, M.P.

CHAIRPERSON

DEPARTMENTAL COMMITTEE ON TRADE, INDUSTRY & COOPERATIVES

