1.0. Introduction

The United Nations General Principles for Business and human rights provides three key foundational pillars which include:1

- Pillar 1: The duty of the state to protect against human rights abuses including by third parties such as businesses.
- Pillar 2: The responsibility of businesses to respect human rights including by ensuring that their operations do not harm individuals or communities. Additionally, they are required to take positive measures to ensure that they enhance the enjoyment of human rights.
- Pillar 3: The obligation of the State and the responsibility of businesses to ensure that victims of human rights abuses by businesses have access to both judicial and non-judicial remedies.

The above principles point to the fact that promotion, respect and fulfilment of human rights is key in conducting business.

Revenue generally refers to those listed under the Kenya Revenue Act as well rates levied by the county governments. It includes taxes, duties, fees, levies, charges, penalties, fines or other monies collected or imposed under the written laws set out in the First Schedule of the Kenya Revenue Authority Act, 1995.2 Different entities have a responsibility in law to collect various revenues. The mandate of collecting the above listed revenues is placed under the Kenya Revenue Authority.3 Sources of revenue in Kenya include Domestic revenue sources and External sources. Domestic revenue includes taxes which are levied


2 S 2 of the Kenya Revenue Authority Act, 1995 at http://www.kenyalaw.org/lex//actview.xql?actid=No.%202%20of%201995

3 S 5(1) of the KRA Act
on the citizens, private and public business individuals. Revenue broadly forms part of the country’s budget which in turn enables a nation to sustain its operations. The government uses the revenue collected as capital and re-current expenditures. Article 201 of the Constitution of Kenya provides for principles that guide all aspects of public finance. Art. 201 (b) (ii) provides for equitable sharing of National revenue between national and county governments. Equitable sharing of revenue calls for revenue transparency management to ensure proper accountability on use of revenue collected by the country.

This section discusses revenue transparency management with a focus on public procurement and disposal, Public licensing, Taxation and human rights, Ease of doing business and Beneficial ownership.

Public procurement: Public procurement means procurement by procuring entities using public funds. Public procurement impacts how revenues are spent. The bulk of government expenditure is on procurement. § 3 of the PPAD Act provides for values and principles that guide public procurement to include:

(a) the national values and principles provided for under Article 10;
(b) the equality and freedom from discrimination provided for under Article 27;
(c) affirmative action programmes provided for under Articles 55 and 56;
(d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);
(e) the principles of public finance under Article 201;
(f) the values and principles of public service as provided for under Article 232;
(g) principles governing the procurement profession, international norms;
(h) maximisation of value for money;
(i) promotion of local industry, sustainable development and protection of the environment; and
(j) promotion of citizen contractors

The above principles are essential in ensuring transparency and accountability in the use of revenue. The country has however witnessed various trends of corrupt practices that pose a hindrance to effective and efficient procurement processes. The auditor General’s report documents incidences in which revenue has not been properly utilized by the National and County Governments. In most cases, the procurement rules and regulations

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4 § 2 of the Public Procurement and Asset Disposal Act, 2015 accessed from http://www.kenyalaw.org/lex//actview.xql?actid=No.%2033%20of%202015
were not adhered to, procurement plans were not developed and value for money wasn’t achieved among others. On the other hand, a number of scandals have emerged which raises concerns about loss of revenue through procurement. Mechanisms have been put in place such as establishing a Public Procurement Regulatory Authority to regulate public procurement issues, adoption of e-procurement systems, employment of procurement professionals in the procurement units among others in a bid to streamline procurement processes but all these measures haven’t led to sealing of all the existing gaps that lead to loss of revenue.

Public licencing: Public Licencing occurs at the national and county level as per the distribution of roles of the two governments. Licencing is key in promotion of business environment. It is worth noting that registration and licensing services are severely affected by bribery which makes it costly to start a business. On the other hand, the licences are renewed after a period of time a fact that exposes business owners to existing bureaucracies in securing such renewals. The licencing regime is regulated by multiple laws and regulations, this is based on the nature and type of business. Lack of proper management of the licencing processes have a direct impact on the ease of doing business hence loss of potential revenue.

Taxation and human rights

Tax administration in Kenya is governed by Tax Procedures Act, 2015. The object and purpose of the Act is to provide uniform procedures for—consistency and efficiency in the administration of tax laws; facilitation of tax compliance by taxpayers; and effective and efficient collection of tax. According to the Global Competitiveness Report 2015-2016, Companies reported that irregular payments and bribes in the process of tax payments are very common. Further the GCR 2016-2017 identified tax rates among the most problematic factors for business. Additionally, TI-Kenya’s 2017 East Africa Bribery pointed out that the process of filing taxes is burdensome.

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5 2014/2015 Auditor General’s Report

6 Transparency international, East African Bribery Index- Kenya 2014

7 S 2(1) of the Tax Procedures Act, 2015 available at http://www.kenyalaw.org/lex//actview.xhtml?actid=No.%2029%20of%202015

The above factors have a high likelihood of promoting tax evasion and avoidance which has a direct impact on revenue collection.

**Beneficial ownership:** “Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.” 9 S 2 of the Capital Markets Act defines a beneficial owner as a natural person who, whether alone or with associates, is the ultimate owner or controller of a legal person or arrangement, or, if there is no legal person or arrangement, the person on whose behalf a transaction is being conducted. The legal framework governing beneficial ownership is not well developed as information regarding beneficial owners is not readily available. This provides a loophole in knowing the beneficiaries from various companies however, several steps are being taken to enhance the framework.

### 2.0. Business and Human Rights Obligations

Kenya has enacted a number of laws, signed and ratified various conventions that form part of its business and human rights obligations. These have a direct and indirect impact on revenue transparency and include:

- Constitution of Kenya, 2010
- Public Procurement and Asset Disposal Act, 2013
- Public Private Partnerships Act, 2012
- Supplies Practitioners Management Act, 2007
- Capital Markets Act
- Kenya Revenue Authority Act, 1995
- Tax Procedures Act, 2015
- Companies Act, 2015

At the regional and international levels, Kenya is a signatory to the UN Convention against Corruption and the AU Convention on Preventing and Combating Corruption. The UNCAC criminalises both public and private acts of corruption and calls on states

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to, prevent and combat; cooperate with other states in the fight against corruption including asset recovery; and promote integrity, accountability and proper management of public resources.

The OECD guidelines are also key in promotion of business and human rights. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws.\(^\text{10}\) Business generally play a crucial role in employment creation, technological and skills transfer, supply of goods and services, and contribute significantly to public revenue through tax payments.\(^\text{11}\) The Kenya Vision 2030 commits to ensuring that a conducive environment for business is created, maintained and continuously improved; further, the Vision has committed to support the growth of infrastructure for Small-Medium Enterprises given that they are Kenya’s main employment creation sector.\(^\text{12}\)

The Sustainable Development Goals too have aspirations of improving the tax regime. Goal 17.1 provides for strengthening of domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection.\(^\text{13}\) Putting up measures to support realization of the mentioned goal would highly contribute to improvement of tax and revenue collection within the country.

The ILO Multinational Enterprises Declaration encourages enterprises to obey national laws and respect international standards; to contribute to the realization of the fundamental principles and rights at work and to consult with government, employers’

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\(^\text{12}\) KNCHR’s paper on Promoting business responsibility for human rights

\(^\text{13}\) The 2030 Agenda for sustainable goals available at [https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf](https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf)
and workers’ organizations to ensure that operations are consistent with national development priorities.\textsuperscript{14}

3.0. Issues, Analysis and Impacts

A desk review of existing laws, regulations, policies and analysis of feedback received from the various stakeholders points to existence of gaps in revenue transparency as such the need to enhance mechanisms for revenue transparency management.

3.1. Issues raised from stakeholder consultation forums

3.1.1. Nakuru Regional Consultations Report

- The business community while discussing taxation brought out the issue on double taxation giving an example of the transport sector
- On Revenue Collection and Licensing the following was noted:
  - There is no monitoring in the license and taxation department that looks into what has been collected in a certain period of time
  - There are no clear guidelines when it comes to placement of licenses
  - There are excessive penalties in case of default in paying for license
  - License and permits are very costly in the county
  - Issuance of business permits for businesses in the wrong areas e.g. a bar near a school
  - Con artistes posing as county employees and they end up conning people

3.1.2. Thika Regional Consultations Report

- Increased cases of corruption and scandals leading to low investment level.

• Low income collection due to most businesses evading to pay tax.

• Widened income inequality due to exorbitant profits accrued by businesses through dubious dealings.

• Stagnation, threat to sustained or low growth of the country’s economy due to mischievous operations of businesses.

• Cumbersome processes in acquiring operations documents/requirements in starting a businesses.

• Raise in the cost of doing business.

• Strict investment regulations leading to reduced number of businesses operations.

• Increased poverty rate resulting to low investment rate by businesses.

• Unfavourable businesses operations environment e.g. constrained political environment.

• Constrained services delivery by the state resulting from low level on investments.

• Social discontent amongst the communities and businesses especially when trust is compromised through businesses’ dubious operations.

• Mismanagement and misallocation of revenue collected from businesses.

• Overtaxing businesses leading to low investment rate.

• Conflict of interest

• Inadequate training on revenue collection and management.

3.1.3. Mombasa Regional Consultations Report

• Business owners noted that taxes were too high and irregular;

• Community representatives complained of unfair business practices;

• Representatives of business owners and civil society pointed out the existence of rampart corruption in revenue collection;

• Business people complained of delay and non-payment for services and goods delivered to county governments thereby crippling businesses;
3.1.4. Kakamega Regional Consultations Report

- Community members and business people raised issue of corruption in revenue collection and control by cartels in the country government and others;
- Business people also complained of indiscriminate charges of business licenses/permits (where businesses are charged same fees irrespective of size)

3.1.5. Turkana Regional Consultations Report

- Members of the Public were not aware of the exact revenue that the County Government collects from Businesses in the area and as such could not hold their government accountable.

3.1.6. Kisumu Regional Consultations Report

- Corruption is a big hindrance to enjoyment of rights
- Citizens not aware of how to hold county government accountable on the utilization of development funds in the county

3.2. Expert’s experience in relation to revenue transparency

3.2.1. Public Procurement and disposal

A report by the Ethics and Anti-Corruption Commission identifies bribery as a contributory factor in increasing up to 10-20% of contract costs. This practice contributes to the high cost of doing business and denies businesses fair competition in public procurement. Other practices identified as hindering transparency and accountability in the procurement cycle include: interference from external influencers especially politicians and senior civil servants; conflict of interest by public officials involved in the procurement processes or having intricate details to influence the procurement process; corruption and other malpractices in the procurement process go unreported.15

3.2.2. Public licensing and Ease of doing business (incentives)

Public licensing of business entities is a function of government at national and county levels. This function affects ease of commencing and carrying out businesses as well as the running costs. It is therefore very important that public licensing is effectively carried out to avoid instances such as multiple licensing costs and bureaucratic processes that

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hinder business operations. Licensing is however important in ensuring standardization of sector specific business engagements and planning and policy formulation.

Kenya is ranked 92 among 190 economies in the ease of doing business, according to the latest World Bank annual ratings. The World Bank provide policy makers trying to improve their economy’s regulatory environment for business with comparative data on regulatory environment in other economies. The Doing Business 2017 report measures and tracks changes in regulations affecting 11 areas in the life cycle of a business: starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts, resolving insolvency and labour market regulation.

The government of Kenya has initiated reforms to create an enabling environment for business in Kenya including: the enactment of the Companies Act 2015 and Insolvency Act 2015 as well as the establishment of the Business Service Registration Board. The Automation of Registration Services through E-governance has simplified the registration process of business names, companies, and societies in the country making it a one day affair. The Business Service Registration Board is responsible for implementation of the ease of doing business interventions. The main challenges in implementing the reforms across Kenya are the need for coordinating across the different levels of government and building capacity to ensure efficient and quality service delivery.

3.2.3. Taxation and human rights

The nexus between paying taxes and service delivery by government is the most accountable and practical way of ensuring revenue transparency. The duty of citizens to pay taxes is paramount in enabling the government to implement programmes aimed at fulfilling the people’s aspirations on social economic rights and other service delivery

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16 https://tradingeconomics.com/kenya/ease-of-doing-business

17 http://www.doingbusiness.org/


20 The Business Registration and Service Act, 2015 - An Act of Parliament to establish the Business Registration Service to ensure effective administration of the laws relating to the incorporation, registration, operation and management of companies, partnerships and firms.

obligations. The Guide on Resource Revenue Transparency developed by the International Monetary Fund (MF)\textsuperscript{22} gives a summary of good fiscal transparency practices for resource revenue management to include:

- Clarity of Roles and Responsibilities
- Open Budget Processes
- Public Availability of Information
- Assurances of Integrity\textsuperscript{23}

Kenya has an elaborate constitutional and supporting legal framework which defines the roles and responsibilities of state agencies at all levels. With the adoption of a devolved system of governance and subsequent administrative reforms since August of 2010 when the Constitution was promulgated, some challenges on the relationship between the national and county levels of government continue to be experienced especially in relation to revenue sharing and enforcing effective oversight frameworks.

The Constitution of Kenya (2010) has extensive provisions on transparent, participatory and accountable use of public resources. The right of citizens to access information held by the state is provided for under Article 35 and is further buttressed by the Access to Information Act 2016 which gives effect to Article 35 and confers on the Commission on Administrative Justice the oversight and enforcement functions and powers in ensuring its implementation. Public participation is provided for under the Constitution as one of the national values and principles of governance in addition to being one of the objectives for the adoption of the devolved system of governance. The Constitution further provides for public participation as one of the principles of public finance in addition to responsible financial management and clear fiscal reporting.

Even with the elaborate legal provisions on transparency and participation, Kenya is yet to fully embrace open budget processes and guaranteed public availability of information. The County Governance Status Report 2016 by Transparency International Kenya\textsuperscript{24} highlighted that a majority of citizens were unable to access information from


\textsuperscript{23} Available at: \url{https://www.imf.org/external/np/fad/trans/guide.htm}

\textsuperscript{24} Available at: \url{http://tikenya.org/wp-content/uploads/2017/06/county-governance-status-report.pdf}
county governments and rated service delivery as below average at the county level. The need to ensure easy access of citizens to relevant budgetary information is therefore necessary to ensure revenue transparency.

Reports indicate that despite a high proportion of total revenue being resourced domestically, 66.25%, little (as a proportion of the whole) is invested in sectors that promote the realisation of economic, social and cultural rights.\textsuperscript{25} Corruption is another obstacle which negatively affects effective service delivery and prevents resources to reach the intended beneficiary. The Kenyan government is said to lose one-third of the national budget to corruption – the equivalent of approximately $6 billion (Kshs.608 billion) every year.\textsuperscript{26} Addressing corruption in the public sector should therefore be a priority in ensuring effective use of revenues collected and at the same time give Kenyans confidence on their contribution to the country's growth.

3.3. Public Licensing

Licensing in Kenya is done at the National and County levels with various legislative frameworks and policies developed by both the National and County governments as guided by Schedule four of the Constitution of Kenya. This arrangement has created various issues of concerns which were raised by stakeholders in the different counties where the hearings took place.

In Nakuru County, the issues raised by stakeholders on Revenue Collection and Licensing include\textsuperscript{27}:

- Lack of monitoring in the license and taxation department on what has been collected in a certain period.
- No clear guidelines when it comes to placement of licenses
- Excessive penalties in case of default in paying for license
- Costly License and permits
- Issuance of business permits for businesses in the wrong areas e.g. a bar near a school
- Con artistes posing as county employees and they end up conning people


\textsuperscript{26} http://www.reuters.com/article/us-kenya-corruption-idUSKCN0WC1H8 - Accessed on February 3, 2017

\textsuperscript{27} National Action Plan on Businesses and Human Rights – Nakuru Regional Consultation Report
In Kakamega the issues raised by stakeholders included:

- Indiscriminate charges of business licenses/permits (where businesses are charged same fees irrespective of size)
- Corruption in revenue collection/control by cartels in the country government and others

In Thika, the issues raised by stakeholders included:

- Increased cases of corruption and scandals leading to low investment level.
- Low income collection due to most businesses evading to pay tax.
- Cumbersome processes in acquiring operations documents/requirements in starting business ventures hence raising the cost of doing business.
- Strict investment regulations leading to reduced number of businesses operations.
- Social discontent amongst the communities and businesses especially when trust is compromised through businesses’ dubious operations.

In Kisumu and Mombasa stakeholders identified corruption as a big hindrance to enjoyment of rights when it comes to licensing.

In Turkana, members of the public were not aware of the exact revenue that the County Government collects from Businesses in the area and as such could not hold their government accountable.

Corruption remains a major threat to the achievement of economic and social development in Kenya. Low levels of prosecution and seemingly run-away corruption has seen the country ranked 145 out of 176 countries on Transparency International’s corruption perception index 2016. This has been a cross cutting factor in all the counties mentioned above hence the need to have transparent licensing procedures and to reduce the licenses required for businesses.

### 3.4. Beneficial ownership

In Kenya, various legislations touch on beneficial ownership, without necessarily giving it an express definition. Beneficial ownership is mainly regarded in reference to nominee arrangements (It is worth pointing out that common law constitutes part of the laws of

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29 National Action Plan on businesses and Human Rights – Thika Regional Forum Report

Kenya, and therefore, the concept of nominee arrangements would be enforceable by the courts) and trust arrangements.

The Capital Markets Act clearly defines ‘beneficial ownership’ to mean a natural person who, whether alone or with associates, is the ultimate owner or controller of a legal person or arrangement, or, if there is no legal person or arrangement, the person on whose behalf a transaction is being conducted.

Apart from legal entities that are subject to the Proceeds of Crime and Anti-Money Laundering (POCAMLA) Act and Regulations, Kenyan law does not require legal entities to collect and maintain information on beneficial ownership i.e. natural persons who ultimately control the legal entity. In this regard, the law does not seem to differentiate between legal ownership and control.

There remains a weak legal framework on access of information relating to beneficial ownership as the information can only be received upon a spirited enquiry. The lack of automation complicates access to information further. The Kenya Revenue Authority relies on the parties to a nominee arrangement/trust arrangement to disclose such information.

Section 54B of the Income Tax Act requires that parties carrying on business provide any information on change of particulars to the Kenya Revenue Authority. In the case of nominee arrangements, parties are required to disclose the particulars of the ultimate beneficiary, and in the case of trust arrangements, trustees are required to disclose full details of the trust, which include, information on the settlors and the beneficiaries. The Income Tax Act however, does not provide for any sanctions for failure of the parties to provide this information.

Section 123 of the POCAMLA Act states that for any investigations under the Act, the Commissioner General of the Kenya Revenue Authority or any official designated by that person for this purpose, shall be notified of such investigation with a view to mutual cooperation and the sharing of information.

4.0. Recommendations

Following the issues raised by both stakeholders, experts and analysis from existing reports and available frameworks that promote revenue transparency, the following actions are recommended;

31 S 2 of the Capital Markets Act

32 Proceed of Crime and Anti-Money Laundering Act
a. There is need to strengthen domestic resource mobilization capacity with the aim of investing in economic, social and cultural rights. This will require a review of any policies, laws or agreements that undermine domestic resource mobilization capacity including and not limited to tax incentive regimes, double taxation agreements, and production sharing contracts and discourage tax avoidance.\textsuperscript{33}

b. Kenya having signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (commonly known as the Common Reporting Standards - OECD) which provides for all forms of administrative assistance in tax matters, such as the exchange of information on request, spontaneous exchange, automatic exchange, tax examinations abroad, simultaneous tax examination and assistance in tax collection, there is need to fastrack the adoption of the provisions in an effort to bring to tax offshore income accrued by Kenyans and not previously disclosed to the Kenya Revenue Authority.

c. There is the need to strengthen the legal framework to enhance access to information for beneficial owners

d. Creation public awareness on county licencing processes

e. Digitalization of license payment to avoid instances of double payment

f. Set mechanisms that will promote independent checks and balances in management of revenue at the national and county levels

g. Harmonization of the licencing regime to incentivize business initiatives