SPECIAL ISSUE

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NAIROBI CITY COUNTY BILLS, 2019

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THE NAIROBI CITY COUNTY CORPORATIONS BILL, 2019

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THE NAIROBI CITY COUNTY CORPORATIONS BILL, 2019

A Bill for

AN ACT of the County Assembly of Nairobi City, to provide for a framework for establishment and dissolution of County Corporations and for connected purposes

ENACTED by the County Assembly of Nairobi City, as follows—

Short title

1. This Act may be cited as Nairobi City County Corporations Act, 2019.

Interpretation

2. In this Act—

"accounting officer" has the meaning assigned to it under section 2 of the Public Finance Management Act, 2012;

"auditor-General" means the Auditor-General appointed as such under section 4 of the Public Audit Act, 2015;

"board" means a commission, a board of directors, a board of trustees, board of governors, or council constituted in accordance with section 9;

"chief executive officer" means the person appointed and employed as such under section 20 or the person for the time being exercising the executive powers of a County Corporation;

"county assembly" means County Assembly of Nairobi City as established under Article 176 of the Constitution;

"county executive committee" means the County Executive Committee of Nairobi City as established in accordance with Article 176 of the Constitution;

"county executive committee member for finance' means the member of a County Executive Committee responsible for the financial affairs of the County and for the County Treasury;

"county corporation" means a—

(a) body corporate established before or after the commencement of this Act by or under an Act of the County Assembly but not—

(i) a co-operative society established under the Co-operative Societies Act (Cap. 490);

(ii) a building society established in accordance with the Building Societies Act (Cap. 489);

(iii) a company incorporated under the Companies Act, 2015 which is not wholly owned or controlled by the County Corporation;

"county revenue fund" means the revenue fund established under Article 207 (1) of the Constitution of Kenya 2010.

"county treasury" means the Nairobi City County Treasury as established under Section 103 of the Public Finance Management Act, 2012;

"financial year" has the meaning assigned to it under Article 260 of the Constitution;

"responsible county executive committee member" means the County Executive Committee Member under which County Corporation falls and "parent Department" shall be construed accordingly; and

"public officer" has the meaning assigned to it in Article 260 of the Constitution of Kenya, 2010.

Object of the Act

3. The object of the Act is to—

(a) to provide a legal framework for the establishment, management, operation and regulation of County Corporations;

(b) to give effect to the provisions of the Constitution with respect to the management of public affairs including—

(i) the national values and principles of governance set out by Article 10 of the Constitution;

(ii) the principles of leadership and integrity set out in Chapter Six of the Constitution;

(iii) the values and principles of public service set out under Article 232 of the Constitution; and

(c) to provide a uniform code of governance for County Corporations.

PART II—ESTABLISHMENT AND DISSOLUTION OF COUNTY CORPORATIONS

Establishment of a County Corporation

4. (1) The responsible County Executive Committee Member may, by order published in the Kenya *Gazette* or by a county legislation establish a County Corporation on approval of the County Executive Committee, upon taking into account the recommendations of the County Treasury regarding the financial implications of establishing the County Corporation to perform the functions specified in that order or legislation.

(2) A County Corporation established under this section shall—

(a) have perpetual succession;

(b) in its corporate name be capable of suing and being sued; and

(c) subject to this Act, be capable of holding and alienating movable and immovable property.

Guiding principles for the establishment of a County Corporation

5. In determining the need for the establishment of a County Corporation the responsible County Executive Committee Member shall ensure that —

(a) there shall be a role for a county government entity to fill a gap left by the market forces through—

(i) social inclusion, where the County Government entity addresses social inequity by redistributing resources in ways that improve opportunity and support for individuals, families and communities, allowing them to participate in the economy and society consistent with the County Government's social inclusion agenda; or

(ii) correction of market failure, where the County Government entity's activity shall address market failures by improving social and economic welfare through improved resource allocation, where the benefits of County Government intervention outweigh its cost;

(b) activities promoted by the County Corporation shall have clear and consistent objectives and be effective in achieving county objectives and represent value for money for the expenditure of taxpayer funds;

(c) a County Corporation shall operate on commercial principles and with a defined commercial income stream that substantially supports the associated commercial activities; and

(d) there is no overlap or duplication of functions when establishing a County Corporation within the County Government.

Criteria for establishing a County Corporation

6. (1) In order to establish a County Corporation—

(a) the responsible County Executive Committee Member shall submit a written proposal to the County Executive Committee Member for finance, with detailed justification for establishing the County Corporation; and

(b) the proposal in paragraph (a) shall be informed by a feasibility assessment of the proposed County Corporation for the purpose of ascertaining—

(i) the economic and financial viability of establishing a County Corporation;

(ii) whether the proposed activity cannot be conducted through an existing County Corporation or the parent department;

(iii) whether or not there is need to establish a new County Corporation;

(iv) the functions and objective that its establishment is supposed to attain;

(v) how the activities of the proposed County Corporation shall fit in the County department's legislative mandate and medium term strategy, and aid the realization of the objectives of the programmes associated with that department;

(vi) how the activities of the proposed County Corporation shall fit in the overall medium term plan of County Government;

(vii) how they impact the fiscal position of the County Government; and

(viii) the amount of County Government share.

(2) The feasibility and viability assessment conducted under paragraph (b) shall be submitted to the County Executive Committee Member for finance for approval.

(3) Upon approval of the business case, the necessary establishment processes shall be undertaken by the relevant department.

(4) The County Executive Committee Member for Finance shall be regularly updated on the progress of a County Corporation.

(5) The County Executive Committee Member for finance shall conduct regular review of County Corporation to assess the relevance of the mandate and the justification for their continued existence and where

necessary make recommendations to the responsible County Executive Committee Member for the dissolution or merger of corporations.

Dissolution of a County corporation

7. (1) A County Corporation may be dissolved only with the prior approval of the County Executive Committee for finance in accordance with this Act.

(2) Subject to the provisions of this Act, a County Corporation may be dissolved—

(a) upon expiry of the duration of the County Corporation as may be defined in the instrument of establishment;

(b) where a County Corporation has carried out the mandate for which it was established;

(c) upon re-organization of the County Corporation and associated government functions; and

(d) upon a merger of the County Corporation with another.

(3) The accounting officer responsible for the County Corporation in question shall follow-up implementation of the findings and eventual recommendations for dissolution to ensure compliance.

(4) The County Executive Committee Member for finance may by notice in the *Gazette* prescribe guidelines for dissolution and mergers of county corporations.

(5) Upon approval by County Executive Committee Member for finance of the recommendations to dissolve or merge a County Corporation, the responsible County Executive Committee Member shall cause the dissolution or merge the corporation with another.

(6) Upon dissolution of a County Corporation, the funds corresponding to County Government equity in the County Corporation shall be deposited into the County Revenue Fund.

(7) Upon dissolution of a County Corporation, the responsible County Executive Committee Member shall vest all the assets and liabilities of the County Corporation concerned to the relevant department in the county.

(8) A County Corporation shall not vest its assets in any other entity without prior approval of the County Executive Committee Member for finance.

PART III—MANAGEMENT OF COUNTY CORPORATIONS

Board

8. There shall be a Board for every County Corporation which shall supervise and control the business, property, and affairs of the County Corporation.

Appointment, composition and size of the Board

9. (1) A Board appointment shall—

(a) be made in line with Article 27 of the Constitution of Kenya, 2010;

(b) be through a transparent and formal process governed by the overriding principle of merit;

(c) take into consideration the mix of skills and competencies required for the achievement of the County Corporation's long-term goals; and

(d) not be more than nine members.

(2) At least one Board member shall be the representative of the County Executive Committee Member responsible for Finance, who is a bona-fide member of a professional body regulating the Accountancy profession, and in compliance with the requirements of the professional body.

(3) At least one third of the Board members shall be independent upon appointment and maintain their independence during their term of service on the Board.

(4) For purposes of subsection (3) above, a Board member shall be considered independent if he or she—

(a) is not in the service of Government or its entities and is not connected or does not have any relationship, whether pecuniary or otherwise, with the County Corporation, its associated companies, subsidiaries, or any holding company;

(b) has not been employed by the County Corporation in an executive capacity within the last five years;

(c) is not associated to an advisor or consultant to the County Corporation or a member of the county corporation's senior management or a significant customer or supplier of the County Corporation;

(d) has no personal service contract with the County Corporation or a member of the County Corporation's senior management;

(e) is not a member of the immediate family of any person described above.

(5) A chairperson of a County Corporation shall be appointed by the Governor and shall at a minimum possess the qualifications, skills and experience as advised by the County Public Service Board.

(6) The Board members of County Corporation shall be appointed by the responsible County Executive Committee Member and shall at a minimum possess the qualifications, skills and experience as advised by the County Public Service Board.

(7) Each Board member shall be formally appointed to the Board through a notice in the *Gazette* and thereafter an appointment letter.

(8) Board members shall be appointed by name, and shall sit on the Board in their personal capacity.

(9) The responsible County Executive Committee Member shall, in consultation with the County Public Service Board develop guidelines for the inclusion of alternate members to the Boards.

Role of the Board

10. The Board shall—

(a) exercise its role collectively and not individually;

(b) determine the organization's mission, vision, purpose and core values;

(c) set and oversee the overall strategy and approve significant policies of the organization;

(d) ensure that the strategy is aligned with the purpose of the organization and the legitimate interests and expectations of its shareholders and other stakeholders;

(e) ensure that the strategy of the organization is aligned to the long term goals of the organization on sustainability so as not to compromise the ability of future generations to meet their own needs;

(f) approve the organizational structure;

(g) approve the annual budget of the organization;

(h) monitor the organization's performance and ensure sustainability;

(i) enhance the corporate image of the organization;

(j) ensure availability of adequate resources for the achievement of the organization's objectives; and

(k) ensure effective communication with stakeholders.

Role of the Chairperson

11. The Chairperson shall—

(a) provide overall leadership to the Board;

(b) play a key role in setting the agenda for Board meetings;

(c) conduct efficient Board meetings and guide the Board's decision-making process;

(d) harness the collective skills of the Board and its committees;

(e) lead the annual Board Evaluation Process;

(f) ensure appropriate balance of power between the Chief Executive Officer and the Board;

(g) be available for consultations with Board members and the Chief Executive Officer;

(h) ensure that there is a formal succession plan for Board members;

(i) ensure new Board members are inducted in accordance with the agreed induction programme;

(j) promote a positive image of the organization;

(k) encourage a culture of transparency and teamwork among Board members; and

(l) provide quarterly updates on governance matters and any related issues to the responsible County Executive Committee Member and the County Public Service Board.

Term limit

12. (1) The tenure of a Board member shall not exceed a cumulative term of six years or two terms of three years each provided that upon first implementation of this Act, the appointing authority may extend the term of not more than a third of the members of the Board.

(2) A Board member, except for the chairperson, shall serve on a part time basis.

(3) The renewal of a Board Member's tenure for a second term shall be subject to a favorable evaluation.

(4) The appointing authority shall ensure that the tenures of Board members are staggered to ensure a phased transition.

Multiple directorship

13. (1) A Board member shall not hold such position in more than two County Corporation at any one time.

(2) A Chairperson of a County Corporation shall not hold such position in any other County Corporation concurrently.

Board independence

14. (1) Board members shall—

(a) exercise independent judgment in discharging its duties;

(b) disclose all real or perceived conflicts of interest and manage these within an agreed framework;

(c) be free to seek independent advice in connection with their duties following an agreed procedure; and

(d) not have served in the same organization as an employee until a minimum period of five years has elapsed.

(2) Board members nominated by stakeholders shall recognize that they owe their duties to the organization and not their nominating authority.

Vacation of Office

15. (1) The office of a member of the Board appointed under Section 9 shall become vacant if the member—

(a) is adjudged bankrupt;

(b) resigns in writing to the relevant appointing authority;

(c) is convicted of a criminal offence and sentenced to a term of imprisonment of not less than six months;

(d) is absent, without reasonable cause, from 3 consecutive meetings of the Board;

(e) is incapacitated by prolonged physical or mental illness from performing his duties as a member of the Board;

(f) dies; or

(g) becomes an employee of the County Corporation.

Meetings and procedure of a Board

16. (1) A Board member shall—

(a) dedicate adequate time and effort for meetings; and

(b) attend at least two thirds of the Board meetings.

(2) A Board shall meet at least once in every quarter.

(3) The Chairperson shall chair all Board meetings and in their absence or inability to chair for whatever reason, the members present shall appoint one of their number to preside over the meeting.

(4) The quorum for Board meetings shall be five members where the total Board membership is seven to nine and four where the total membership is below seven.

(5) Board papers shall be made available to Board members not less than 7 days before the date of the meeting.

Committees of the Board

17. (1) A Board shall—

(a) establish not more than four committees of the Board provided that the Board shall be at liberty to establish such ad-hoc committees as required to deal with any ad-hoc matters requiring focused attention;

(b) establish an Audit Committee, and a maximum of three other committees, to discharge the following functions—

(i) technical matters;

(ii) strategy;

(iii) compliance;

(iv) human Resources; and

(v) Finance.

(c) provide Terms of Reference for each committee which shall set out, as a minimum, objectives, delegated authority, operations and reporting mechanism to the Board;

(d) review the mandate of the committees periodically;

(e) determine the frequency of committees meetings;

(f) appoint the chairperson of each committee; and

(g) annually review the effectiveness and performance of its committees.

(2) The Chairperson of the Board shall not be a member of any committee save for an ad hoc committee.

(3) Committee members shall have the necessary skills and expertise to execute their responsibilities.

(4) Where required skills are not available to the committee, the Board may, with the approval of the County Public Service Board, co-opt non-Board members to the committee.

(5) The committees shall make recommendations to the Board.

Board Evaluation

18. (1) The County Public Service Board shall determine the performance criteria of the Board.

(2) The County Public Service Board shall facilitate and undertake an annual evaluation of the performance the annual evaluation.

(3) The evaluation shall cover the Board as a whole, its committees, individual members, the chairperson, and the Chief Execution Officer.

(4) The re-appointment for a subsequent term for any Board member or Chief Executive Officer shall be based on a favorable evaluation as spelt out in the evaluation tool.

Remuneration of the Board

19. The Board, in consultation with the County Public Service Board and on the advice of the Salaries and Remuneration Commission shall develop a remuneration policy that shall determine the payment of such allowances, Board member's fees, attendance allowances and bonuses.

Chief Executive Officer

20. (1) There shall be a Chief Executive Officer for every County Corporation.

(2) The Board shall, through open, transparent and competitive recruitment processes, appoint suitably qualified persons to be the Chief Executive Officers of the County Corporation.

(3) The Chief Executive Officer shall—

(a) be the secretary of the Board;

(b) be the accounting officer of the County Corporation;

(c) be responsible for—

(i) carrying into effect the decisions of the County Corporation;

(ii) day-to-day administration and management of the affairs of the County Corporation;

(iii) supervision of the staff of the County Corporation; and

(iv) perform such other duties as may be assigned by the Board.

Qualifications of the Chief Executive Officer

21. To qualify for appointment as a Chief Executive Officer of a County Corporation, a person shall—

(a) be a Kenyan Citizen;

(b) possess a degree in any related field from a recognized university;

(c) have had the relevant experience for a period of not less than five years; and

(d) meets the requirements of Chapter six of the Constitution.

Term of Office of the Chief Executive Officer

22. (1) The Chief Executive Officer shall hold office for a term of four years, on such terms and conditions as the Board may determine, and shall be eligible for re-appointment for one further term.

(2) The Chief Executive Officer shall be an ex-officio member of the Board.

Separation of roles

23. (1) The role of the Board shall be separated from that of the Management.

(2) The office of the Chairperson and that of the Chief Executive Officer shall be held by different persons.

Liability

24. Board members shall be held liable for their acts and omissions arising from their negligence, default, breach of duty or breach of trust.

Common seal

25. (1) The common seal of the County Corporation shall be kept in the custody of the Chief Executive officer or of such other person as the Board may direct, and shall not be used except upon the order of the Board.

(2) The common seal of the County Corporation, when affixed to a document and duly authenticated, shall be judicially and officially noticed,

and unless the contrary is proved, any necessary order or authorization by the Board under this section shall be presumed to have been duly given.

(3) The common seal of the County Corporation shall be authenticated by the signature of the chief executive officer.

PART IV—CONTROL OF THE FINANCES OF COUNTY CORPORATIONS

Annual Estimates

26. (1) Every County Corporation shall cause to be prepared and shall, not later than the end of January in every year, submit to the responsible County Executive Committee Member and the County Treasury for approval, estimates of the County Corporation's revenue and expenditure for the following financial year.

(2) The financial estimates prepared under subsection (1), shall be accompanied by proposals for funding for all projects to be undertaken by the Corporation, or the implementation of which shall continue during the financial year to which those estimates relate.

(3) Annual estimates and proposals for funding projects shall not be implemented until they have been approved by the responsible County Executive Committee Member for with the concurrence of the County Treasury.

Expenditure not included in annual estimates

27. A County Corporation shall not, without the prior approval in writing of the responsible County Executive Committee Member and the County Treasury, incur any expenditure for which provision has not been made in an annual estimate prepared and approved in accordance with section 26.

Borrowing by County Corporations

28. The power of a County Corporation to borrow money shall be exercised only—

(a) with the approval of the County Executive Committee on recommendation by the County Executive Committee Member for finance; and

(b) with approval of the County Assembly, subject to such limitations and conditions as may be imposed by the Public Finance Management Act, 2012.

Dealing with assets

29. (1) The assets of a County Corporation may be disposed of—

(a) if they are current assets in the normal course of business carried on by that County Corporation;

(b) where the disposal and the utilization of the proceeds have been taken into account in an annual estimate prepared and approved in accordance with section 28;

(c) by way of sale or otherwise with the approval of the responsible County Executive Committee Member and the County Treasury where such disposal has not been taken into account in the estimates.

(3) Subject to subsection (1), the County Executive Committee Member for finance may, in consultation with the County Public Service Board, make rules for the acquisition and disposal of assets by County Corporations and different rules may be made with respect to different County Corporations; and such rules shall be brought to the notice of the County Corporations and other relevant person.

(4) This section does not apply with respect to procurements or disposals to which the Public Procurement and Asset Disposal Act, 2015 applies.

Books of accounts, records and audits

30. (1) Every County Corporation shall keep or cause to be kept proper books recording all the property, undertakings, funds, activities, contracts, transactions and other business of the County Corporation.

(2) The County Executive Committee Member for Finance may prescribe the form of any book required to be kept under subsection (1) and unless a form has been prescribed, a form suitable for the purpose shall be used.

(3) The accounts of every County Corporation shall be audited and reported on annually in accordance with the Public Audit Act 2015.

Accountability

31. (1) A Board shall be responsible for the proper management of the affairs of a County Corporation and shall be accountable for the moneys, financial business and management of a County Corporation.

(2) The County Assembly committee for public investments may summon the chairperson or a Board member of a County Corporation to answer on behalf of the Board any question arising from a report, including a special report of the Auditor-General concerning the County Corporation.

Renewal of depreciating assets, etc., and disposal of surplus funds

32. (1) Every County Corporation shall make provision for the renewal of depreciating assets by the establishment of sinking funds and for contributions to such reserve and stabilization funds as may be required.

(2) Where there are any surplus moneys after making the provision required by subsection (1) the surplus moneys shall be disposed of in such manner as the responsible County Executive Committee Member, in consultation with the Board, may, in writing, direct.

(3) Notwithstanding subsection (2), the County Executive Committee Member for Finance may require the whole or any part of the surplus moneys to be paid into the County Revenue Fund where the exigencies of the financial situation so require.

Restriction on loans to Board members and staff

33. (1) Notwithstanding any other written law establishing a County Corporation or its memorandum and articles of association, a County Corporation shall not grant a member of the Board or staff of a County Corporation any loan, advance or credit facility except in accordance with regulations made by the responsible County Executive Committee Member with the approval by the County Treasury.

(2) In the absence of the regulations referred to under subsection (1) such loan, advance or credit facility may be granted in accordance with terms and conditions approved by the County Public Service Board.

PART V—MISCELLANEOUS PROVISIONS

Offences and penalty

34. A County Corporation which, or an officer thereof who, fails to render or submit or make available for inspection any record, book, account or information required by or pursuant to this Act, or which or who restricts the Auditor-General in the performance of his or her duties shall be guilty of an offence and punishable by a fine not exceeding ten thousand shillings or imprisonment for a term not exceeding three years or both.

Regulations

35. The County Executive Committee Member for finance may make regulations generally for the better carrying into effect the provisions of this Act.

MEMORANDUM OF OBJECTS AND REASONS

This Bill seeks to provide for a framework for establishment and dissolution of County Corporations and for connected purposes.

PART—I of the Bill provides for preliminary matters which mainly the short title, interpretation and objects of the Act.

PART—II of the Bill provides establishment of County Corporation, the guiding principles, and criteria for the establishment of County Corporation and its dissolution.

PART—III of the Bill provides for the management of County Corporations. It includes the appointment and composition of the board, the role of the board, the term of office of the board, the vacation of office, meeting and procedures, its remuneration, separation of powers, liability and the common seal.

PART—IV of the Bill provides for control of the finances of County Corporations. It sets out that every County Corporation has to submit annual budget estimates, the procedure for borrowing by County Corporations, dealing with its assets, books of account and restrictions on loans to Board members and staff.

PART—V of the Bill provides for the miscellaneous provisions mainly the offences and penalty and the regulations.

The enactment of this Bill shall occasion additional expenditure of public funds which shall be provided through the estimates.

Dated the 27th day of May, 2019

KABIRO MBUGUA,
Member of the County Assembly.