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MOMBASA COUNTY BILLS, 2024

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CONTENT

Bill for Introduction into the County Assembly of Mombasa—

PAGE

The Mombasa County Multi-year Projects Financing Bill, 20241

**THE MOMBASA COUNTY MULTI-YEAR PROJECT
FINANCING BILL, 2024**

ARRANGEMENT OF CLAUSES

Clause

PART I — PRELIMINARY

- 1— Short title and commencement.
- 2— Interpretation.
- 3— Objects and purpose of the Act.

**PART II — CREATION OF A CHARGE AND ELIGIBILITY OF
PROJECTS**

- 4— Creation of a Charge upon the Mombasa County Revenue Fund .
- 5— Creation of Fund and Source of Funding.
- 6— Incorporation of projects into county planning and budgeting documents .
- 7— Eligible Infrastructure Projects.
- 8— Eligibility Criteria.
- 9— Projects/Programmes Financing.

PART III — ADMINISTRATION OF THE FUND

- 10— Fund Administration.
- 11— Responsibilities of the Fund Administrator.

PART IV — FINANCIAL PROVISIONS

- 12— Special Purpose Account.
- 13— Application for Withdrawal of Funds .
- 14— Oversight by the Controller of Budget .
- 15— Payment confirmations.
- 16— Serious material breach.
- 17— Books of Account and Audit .
- 18 — Financial Year.

PART V — MISCELLANEOUS PROVISIONS

- 19 — Application of financial and procurement laws.
- 20 — Suspension of the County Government.

21 — Winding up of the Fund.

22 — Regulations.

**THE MOMBASA COUNTY MULTI-YEAR PROJECTS
FINANCING BILL, 2024**

A Bill for

AN ACT of the County Assembly of Mombasa, to create a charge on the Mombasa County Revenue Fund pursuant to Article 207(2) (a) of the Constitution of Kenya, 2010 and Section 109(6) (b) of the Public Finance Management Act, 2012, and to establish a fund for payment of investors and/or financiers of multi-year projects approved under this Act, and for connected purposes

ENACTED by the County Assembly of Mombasa, as follows—

PART I— PRELIMINARY

Short title and Commencement

1. This Act may be cited as the Mombasa County Multi-Year Projects Financing Act and shall come into operation in accordance with Sections 24 and 25 of the County Governments Act. For purposes of Section 25(2) of the County Governments Act, the Act shall take effect upon publication in the *Kenya Gazette*.

Interpretation

2. In this Act, unless the context otherwise requires—

“Auditor General” has the meaning assigned to it under Article 229 of the Constitution;

“Charge” has the meaning assigned to it under Article 207(2)(a) of the Constitution;

“Chief Officer” means the Chief Officer for the time being responsible for finance;

“Constitution” means the Constitution of Kenya, 2010;

“Controller of Budget” has the meaning assigned to it under Article 228 of the Constitution;

“County” means Mombasa County;

“County Government” means the County Government of Mombasa;

“County Assembly” means the County Assembly of Mombasa;

“County Executive Committee” means the Mombasa County Executive Committee;

“County Executive Committee Member” means the Mombasa County Executive Committee Member for the time being responsible for Finance;

“County Revenue Fund” has the meaning assigned to it under Article 207(1) of the Constitution and Section 109 of the Public Finance Management Act, 2012;

“Financier” means a provider of investment funds for the eligible projects listed under Section 7;

“Fund” means the Mombasa County Multi-Year Projects Financing Fund established under Section 5(1);

“Fund administrator” means the person so designated by the County Executive Committee Member under Section 10;

“Lease” means a contract that gives the lessee the right to the use of property, plant or equipment for a fixed period of time with a fixed schedule of payments to the lessor, and “leasing” shall be construed accordingly;

“Lease to own” means an arrangement where regular payments are made towards ownership of an investment project;

“Infrastructure” means movable and immovable equipment and plant, tangible and intangible, including property, stores, equipment, land and buildings, roads or other structures, software, utilities and services that are incidental to the supply and operation of the infrastructure;

“Investor” means a private or public entity contracted to finance, design, develop, operate and/or maintain projects listed in Section 7 and/or to rehabilitate, modernize, expand, operate and/or manage an existing infrastructure, asset or facility listed in Section 7;

“Investment projects” means new or already existing projects listed in Section 7;

“Payment schedule” or “scheduled payments” means payment instalments to be made by the County to the financier and/or investor as per the applicable project contract;

“Projects” or “Programmes” means the projects listed under Section 7; and

“Special Purpose Account” means the account created under Section 12 of this Act, for payment by the County of its contractual obligations to financiers and/or investors.

Objects and Purpose of the Act

3. The objects and purpose of this Act shall be to—

- (a) create a charge on the Mombasa County Revenue Fund in accordance with Article 207(2)(a) of the Constitution and Section 109(6)(b) of the Public Finance Management Act, 2012;

- (b) establish the Mombasa County Multi-Year Projects Financing Fund and provide for its operations and management;
- (c) establish a Special Purpose Account for payment obligations contracted by the County under this Act;
- (d) provide for cash flow management to meet the agreed scheduled payments to investors and/or financiers;
- (e) ensure that upon completion of contracted payment obligations, ownership of the infrastructure projects vest in the County;
- (f) authorize the Controller of Budget to prioritize payments into the Fund and to deal with defaults; and
- (g) provide for any other connected purposes.

PART II—CREATION OF A CHARGE AND ELIGIBILITY OF PROJECTS

Creation of a Charge upon the Mombasa County Revenue Fund

4. (1) There is created a charge on the Mombasa County Revenue Fund in accordance with Article 207(2) (a) of the Constitution and Section 109(6) (b) of the Public Finance Management Act, 2012;

(2) Money withdrawn from the Mombasa County Revenue Fund pursuant to the charge shall be deposited to the Special Purpose Account of the Fund.

(3) The Fund shall not be used for any other purposes except for the objects and purposes of this Act.

Creation of Fund and Source of Funding

5. (1) There is established a Fund known as Mombasa County Multi-Year Projects Financing Fund.

- (2) The Fund shall be funded by —
 - (a) monies appropriated for purposes of the charge created under this Act;
 - (b) appropriation in-aid through the County Appropriation Act;
 - (c) designated user levies and fees approved in the County Finance Act;
 - (d) investment income;
 - (e) grants and donations; and
 - (f) any monies accruing to or received by the Fund from any other lawful source.

Incorporation of projects into county planning and budgeting documents

6. (1) The County Executive Committee Member shall ensure that—

- (a) the relevant projects financed under this Act are incorporated in the following County planning and budget documents and approved by the County Assembly—
 - (i) The County Integrated Development Plan;
 - (ii) The Annual Development Plan;
 - (iii) The County Budget Review and Outlook Paper;
 - (iv) The County Fiscal Strategy Paper;
 - (v) The approved budget estimates;
 - (vi) The County Spatial Plan (*insert period*); and
 - (vii) any other document as prescribed by the Public Finance Management Act, 2012.
- (b) in every financial year, adequate funds are budgeted and appropriated into the Fund to meet the County's obligations in line with the County's scheduled payment obligations as set out in the relevant multi-year project contracts;
- (c) in compliance with Section 130 (1) (c) of the Public Finance Management Act, 2012, the list of projects, payments and liabilities to be made or incurred in the relevant financial year (listed on a first in first out basis), is provided in the budget documents submitted to the County Assembly;
- (d) the earnings of, or accruals to, the Fund shall be retained in the Fund and shall be spent only for the purposes implementing Multi-Year projects approved for charge upon the Mombasa County Revenue Fund, during any particular period.

(2) The County Assembly shall at the beginning of each financial year approve an amount equal to the approved expenditure requirements for the multi-year projects/ programmes in that financial year, which shall be paid into the Fund.

(3) Monies appropriated into the Fund in respect of a certain multi-year project/programme shall be retained in the Fund and shall be spent only for the purposes of meeting the expenditure requirements of that specific project/programme as approved under the County planning and budget documents and under this Act.

(4) Failure by the County to appropriate adequate amounts to the Fund

to finance the multi-year projects funded under this Act, shall constitute serious material breach (including in terms of Section 94 of the Public Finance Management Act, 2012), for which an investor and/or financier shall be entitled to notify the Cabinet Secretary for National Treasury to enforce payments in line with Articles 190(3) and 225(3) of the Constitution or as otherwise prescribed under the Public Finance Management Act.

Eligible Infrastructure projects

7. The following sectors are eligible for multi-year projects financing for purposes of this Act —

- (a) transportation infrastructure;
- (b) water and sanitation infrastructure;
- (c) power and energy infrastructure;
- (d) e-Government and digitization;
- (e) information, communication and telecommunications infrastructure;
- (f) administrative infrastructure;
- (g) municipality development;
- (h) climate resilience infrastructure;
- (i) industrial or business infrastructure;
- (j) agribusiness aggregation infrastructure;
- (k) educational infrastructure;
- (l) health infrastructure;
- (m) recreational infrastructure; and
- (n) any other projects/programmes as may be approved by the County Executive Committee and the County Assembly and whose funds have been appropriated in accordance with the County planning and budget documents.

Eligibility Criteria

8. (1) The County Executive Committee Member responsible for Infrastructure shall collate and present the multi-year projects to the County Executive Committee for approval.

(2) Expenditure of a multi-year project or programme shall be eligible as a charge under this Act only if the project (whether new or already existing)—

- (a) requires multi-year budgetary allocation;
- (b) is contracted and funded by an investor and/or financier;
- (c) is procured in accordance with applicable procurement laws; and
- (d) Is included in the estimates of revenue and expenditure approved by the County Assembly in accordance with Section 6.

Projects/Programmes Financing

9. Eligible multi-year infrastructure projects/programmes may be financed through any of the following means—

- (a) tenant purchase scheme;
- (b) finance leases or operating leases or lease to own;
- (c) securitization;
- (d) management contracts;
- (e) annuities;
- (f) fees and levies paid by users and beneficiaries as approved by the County Assembly;
- (g) income share contracts;
- (h) public Private Partnerships; or
- (i) any other lawful means that is not considered as borrowing under Kenyan law.

PART III—ADMINISTRATION OF THE FUND

Fund Administration

10. (1) There shall be a Fund administrator who shall be designated in writing by the County Executive Committee Member who shall be the County Chief Officer responsible for Finance.

(2) The Fund Administrator shall —

- (a) report to the County Executive Committee; and
- (b) be accountable to the County Assembly.

Responsibilities of the Fund administrator

11. The Fund administrator shall be responsible for —

- (a) keeping the books of account of the Fund;
- (b) presenting the financial statements of the Fund to the County Assembly;

- (c) preparing annual revenue and expenditure of the Fund relating to the programmes obligations and operational expenses and submitting them to the County Executive Committee Member for approval;
- (d) providing advice to the County Executive Committee on all matters relating to this Act;
- (e) preparing and submitting quarterly reports on the implementation of the projects and schedule of payments to the County Executive Committee Member;
- (f) preparing and submitting bi-annual reports with the County Assembly.
- (g) sharing necessary information and liaising with the National Treasury as may be necessary; and
- (h) performing any other functions that may be relevant to this Act.

PART IV—FINANCIAL PROVISIONS

Special Purpose Account

12. There shall be opened and established a Special Purpose Account of the Fund to be kept at the Central Bank of Kenya.

(2) The purpose of the Special Purpose Account shall be to —

- (a) receive the proceeds of the charge in accordance with Section 4(2);
- (b) disburse funds to contracted financiers and/or investors in accordance with the schedule of payment;
- (c) disburse the approved annual operating budget of the Fund; and
- (d) disburse any other approved expenditure incurred in pursuance of the object and purpose for which the Fund is established.

(3) The County Executive Committee Member and the County Treasury shall ensure that the Special Purpose Account is opened immediately upon contracting the first project under this Act.

(4) Priority of payments for multi-year projects/programmes shall be based on first-in first-out basis.

(5) The County Executive Committee Member and the County Treasury shall at the beginning of every financial year cause to be deposited sufficient funds into the Special Purpose Account to fulfil all scheduled payment obligations, administrative costs, and other eligible expenditure.

(6) The administration fees of the Fund shall not at any time exceed 3% (three percent) of the approved annual budget of the Fund.

Application for withdrawal of funds

13. (1) Upon contracting each project under this Act, the County shall submit the respective contract and contracted schedule of payments (including any variations thereto) to the Controller of Budget.

(2) Each date indicated in the schedule of payments shall constitute the effective charge date against the Mombasa County Revenue Fund in respect of the payment due on that date.

(3) Application for withdrawal of funds from the Mombasa County Revenue Fund to the Special Purpose Account shall be supported by—

- (a) the County Appropriation Act;
- (b) this Act of the County Assembly creating a charge on the Mombasa County Revenue Fund;
- (c) planning and budget documents;
- (d) disbursement schedule in respect of the relevant project contract/programme; and
- (e) any other relevant document as may be required by the Controller of Budget.

(4) An application for withdrawal of funds from the Special Purpose Account to the beneficiaries account shall be supported by—

- (a) the relevant project agreement;
- (b) the name and address of the payee;
- (c) the bank account details of the payee;
- (d) an invoice from the payee;
- (e) confirmation by the fund administrator that the payee has fulfilled obligations in the contract;
- (f) latest bank statements indicating the availability of funds; and
- (g) any other relevant documents as may be required by the Controller of Budget.

Oversight by the Controller of Budget

14. (1) The Controller of Budget shall grant approval for withdrawal of funds at two levels as follows—

- (a) withdrawal of funds from the from the Mombasa County Revenue Fund into the Multi-Year Project Financing Fund (Special Purpose Account); and

- (b) withdrawal of funds from the Special Purpose Account to the respective beneficiaries' account.

(2) The Controller of Budget shall, in the exercise of their mandate, ensure the following conditions are met when reviewing County budget documents and County Revenue Fund requisitions and withdrawal—

- (a) the contracted obligations, administrative costs and other eligible expenditure have been budgeted every financial year;
- (b) the monies approved are credited into the Special Purpose Account; and
- (c) approval for withdrawal of funds from the Special Purpose Account to contracted financiers and/or investors are made in accordance with the contracted payment schedule.

Payment Confirmations

15. (1) A financier and/or investor shall confirm receipt of the scheduled payment from the Special Purpose Account by issuing a payment confirmation certificate within seven (7) days of receipt of payment to the County Executive Committee Member and a copy to the Controller of Budget.

(2) In case of failure by the County to make scheduled payments in accordance with its contractual obligations, the investor and/or financier shall issue a certificate of default to the County Executive Committee Member and a copy to the Controller of Budget.

(3) In case of default, the outstanding portion of the scheduled payments shall for the purposes of this Act be treated as debt in which case relevant provisions of the Public Finance Management Act shall apply.

Serious Material Breach

16. (1) The County shall be in serious material breach (including in terms of Section 94 of the Public Finance Management Act, 2012) if —

- (a) the County fails to establish (or provide evidence of having established) the Special Purpose Account in accordance with this Act;
- (b) the County fails to incorporate projects contracted under this Act in the County planning and budgeting documents and/or the County is in breach of any other provisions of the Public Finance Management Act, 2012 in respect of the matters stipulated under this Act;
- (c) the County has failed to make payments as and when due under this Act; and/or

- (d) at least two certificates of default are issued by a financier and/or investor against the County, and the County fails to pay the outstanding amount within thirty days from the date of issue of the second certificate of default. The second certificate of default shall be issued not less than thirty days after issuance of the first certificate of default.

(2) In case of a serious material breach by the County, a financier and/or investor shall—

- (a) Notify the Cabinet Secretary for National Treasury to enforce payments in line with Articles 190(3) and 225(3) of the Constitution or as otherwise prescribed under the Public Finance Management Act, 2012; and
- (b) Notify the Controller of Budget of the default, who shall halt any further approvals for withdrawal of funds from the Mombasa County Revenue Fund (save in respect of a minimum amount to ensure effective delivery of essential services) and the Special Purpose Account until the breach is remedied.

(3) The interest rate chargeable in case of default shall be an annual rate of four (4) percent above the Central Bank of Kenya five-year bond and shall be recovered first in subsequent payments.

(4) In case of a serious material breach by the County, the investor and/or financier shall be entitled, at its option and to the extent permitted by applicable law, to—

- (a) enter upon the premises constituting the relevant project and take immediate possession of the premises and/or the project/project facilities, wherein the right of the County or its tenants shall immediately be suspended or extinguished;
- (b) proceed by appropriate court action or actions, either at law or in equity, to enforce performance by the County of the applicable covenants under the relevant project contract and to recover damages for the breach thereof;
- (c) following a termination of the leasing of the relevant project/project facilities pursuant to Section 16(4) (a), hold, use, operate or lease to others, the project/project facilities, as the investor/financier may in its sole discretion determine, all free and clear of any rights of the County;
- (d) withdraw and/or suspend provision of services and/or furniture, equipment and other apparatus; and/or
- (e) sell its interests in the project and/or the project facilities to third parties free and clear of any rights of the County.

Books of account and audit

Act No. 18 of 2012

Act No. 34 of 2015

17. The Fund administrator shall —

- (a) cause to be kept books of accounts and other books and records in relation to all obligations financed through the Fund;
- (b) Submit financial statements to the County Executive Committee Member to transmit to the Auditor-General, in respect of each financial year and within three months after the end thereof, a statement of account, and showing the expenditure incurred from the account, and such details as the Public Sector Accounting Standards Board may prescribe from time to time, in accordance with the provisions of the Public Finance Management Act and Public Audit Act;
- (c) furnish such additional information as he or she may deem to be proper and sufficient for the purpose of examination and audit by the Auditor-General in accordance with the provisions of the Public Audit Act; and
- (d) prepare quarterly financial statements in accordance with section 168 of the Public Finance Management Act, 2012 within 15 days after every quarter and submit a copy to the Controller of Budget.

Financial Year

18. (1) The financial year in respect of the Fund shall be the period of twelve months ending on the 30th June in each year.

(2) Any unutilized funds in the Special Purpose Account as at 30th June in each year shall be retained in the Fund and utilized in accordance with this Act.

PART V—MISCELLANEOUS PROVISIONS

Application of financial and procurement laws

19. Eligible multi-year projects shall comply with the following—

- (a) Procurement laws, regulations and guidelines;
- (b) Labour laws;
- (c) Land laws;
- (d) Environmental and climate change laws; and
- (e) All other relevant laws.

Suspension of County Government

20. (1) In the event the County Government is suspended under Article 192 of the Constitution, the obligation of the County Government under this Act shall be honoured by the Interim County Management Board pursuant to Part XIII of the County Governments Act, 2012, without any delay or variation.

(2) A succeeding administration of the County Government shall not modify, vary or in any way affect the obligations and liabilities of the County in respect of the projects contracted under this Act.

Winding up of the Fund

21. (1) The Fund may be wound up by the County Executive Committee Member at the expiry of ten years if—

- (a) the Fund is considered to have successfully completed its objects and purposes; and
- (b) all payment obligations under the Fund have been settled.

(2) Where the conditions in sub-section (1) are not met, the County Executive Committee Member may, until the conditions are met, renew the term of the Fund for a term of up to 10 years with the approval of the County Executive Committee and the County Assembly.

(3) Winding up of the Fund shall be subject to —

- (a) confirmation by the investors and/or financiers that all obligations and commitments for payment have been met;
- (b) verification by the Auditor-General of settlement of the Fund's obligations; and
- (c) receipt of approval for winding up from the County Assembly.

(4) Upon winding up of the Fund—

- (a) the Fund Administrator shall pay any amount remaining in the Fund into the Mombasa County Revenue Fund;
- (b) assets other than monies in the Fund shall be transferred to the County Treasury.

(5) The County Executive Committee Member shall submit a final statement of accounts to the County Assembly and the Auditor-General for audit within six months of the date of the winding up the Fund.

Regulations

22. (1) The County Executive Committee Member may develop Regulations for the proper management of the Special Purpose Account and for the better carrying into effect the provisions of this Act.

(2) Without prejudice to the foregoing, the County Executive Committee Member may make guidelines on the following —

- (a) Multi-year Project approval application templates;
- (b) Certificate of confirmation of payment;
- (c) Certificate of default;
- (d) Reporting formats; and
- (e) Any other guidelines as may be necessary.

(3) Any amendments and/or repeal of this Act shall not retrospectively impact the rights and obligations of the investors and/or financiers under this Act.

MEMORANDUM OF OBJECTS AND REASONS

The principal object of this Bill is to create a charge on the County Revenue Fund pursuant to Article 207(2) (a) of the Constitution and Section 109(6) (b) of the Public Finance Management Act, 2012 and establish a fund for payment of investors or financiers of infrastructure projects in Mombasa County.

Part I of the Bill provides for the preliminaries including the short title and commencement, interpretation as well as the objects of the Bill.

Part II of the Bill provides for creation of a charge on the County Revenue Fund as well as a Fund the source of funding. It also outlines the incorporation of projects in to county planning and budgeting documents and factors that define sectors are eligible for Multi-year projects financing for the purpose of this Bill.

Part III of the Bill provides for the administration of the Mombasa County Multi-year projects financing Fund.

Part IV of the Bill provides for the financial provisions for purposes of the objects under the Bill. It also provides for the establishment of a Special Purpose Account of the Fund as well as the oversight role of the Controller of Budget.

Part V of the Bill provides for the miscellaneous provisions of the Bill and transitional sections.

Statement on limitation of fundamental rights and freedoms

The Bill does not limit any fundamental rights and freedoms and respects the separation of powers of national and county governments.

Statement on Financial Implication of the Bill

The implementation of this Bill shall occasion additional expense which will be provided for in the Budget estimates.

KIBWANA SWALEH,
*Chairperson, Committee on Finance,
Budget and Appropriations.*