

**Report
of
The Task Force for the Audit and Examination of
the Delivery of Legal Services to Nairobi City
County Government
(Appointed vide Gazette Notice No. 13609 of 2013)**

Presented to

**Hon. Dr. Evans O. Kidero,
Governor of the Nairobi City County**

Task Force Chairman

Jinaro Kibet, Advocate

November, 2015

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Dr. Evans Kidero
Governor
Nairobi City County
P.O. Box 30075-00100
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Your Excellency,

LETTER OF TRANSMITTAL

The Task Force for the Audit and Examination of the Delivery of Legal Services to Nairobi City County Government (NCCG) was appointed by the Governor vide Kenya Gazette Notice Vol. CXV - No. 147 of 11th October 2013 to audit and examine Legal Services and make recommendations that will give the County Government ability to reform and manage its legal workload as well as legal debts while strengthening capacity to deliver services.

The terms of reference of the Task Force were as follows:-

- (a) To review the organizational structure and hierarchical level of the county legal unit within the county government and recommend –
 - (i) An organizational structure that will generally enable and facilitate effective overall delivery of services in the county;
 - (ii) The organizational relationship between that unit and the office of the Governor and other organs and departments of the county government that make use of legal services;
- (b) To audit all ongoing legal cases and advise the Governor on the way forward with respect to each case;
- (c) To advise the Governor with respect to the legal fees demanded by the advocates from the County Government on the respective cases;
- (d) To determine the reasons/causes for the unusual high number of cases against the defunct Nairobi City Council and recommend any change in the management of the affairs of the County Government so as to minimize litigation and /or legal disputes involving the county government and, in this regard, also develop a legal risk evaluation tool;
- (e) To peruse any past reports on the delivery of legal services to the defunct Nairobi City Council by other public and other agencies and recommend implementation strategies of their recommendations, if any;

- (f) Recommend considerations to be taken into account in the procurement of legal services so as to ensure equity to service providers, implementation of the constitutional and other government policy pronouncements on procurement and to the optimum value from service providers;
- (g) To consider any other matter related and incidental to the foregoing and make such recommendations as may be appropriate
- (h) To report to the Governor its findings and recommendations.

The Task Force executed its mandate through **consultations, solicitation of ideas, and reviewing all matters related to the past practices in legal service delivery.**

The Task Force presented its Interim Report to your Excellency on the 16th January, 2014. We are pleased to note that at the time of submission of this final report a number of recommendations contained in the interim report have been implemented. These include:

- (i) The revamping of the Office of the Legal Advisor and its renaming to the office of the County Attorney and the appointment of substantive office holder therefore enabling the office holder to advise the County Executive Committee and the Governor.
- (ii) The placement of the legal department under the office of the County Attorney for effective provision of legal services.
- (iii) Postponement of the prequalification of external lawyers to the panel of County Government
- (v) Controls in place by the Office of County Attorney with regard to issuance of instructions to external lawyers.

We express our gratitude for the honour, privilege and trust bestowed upon us to serve in the Task Force and for the guidance and advice received from you in the course of our work.

It is with great honour that we submit this Report.

Mr. Jinaro Kipkemoi Kibet

.....
Chairman

Dr. Festo Fadamula

.....
Secretary

Mr. Apollo Mboya

.....
Member

Mr. Vincent Robi

.....
Member

Mr Charles Mutinda

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Member

Mr. Anthony Ongondi

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Member

Mr. Karisa Iha

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Special Advisor to the Task Force

Mr. Fred Riaga

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Member

Mr. Jacob Ngwele

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Member

Mr. Gad Awuonda

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Member

Ms. Mercy Kamau

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Member

Mr. Paul Aol

.....
Head of Secretariat

EXECUTIVE SUMMARY

According to the 2014 Kenya Economic Survey by the Kenya Bureau of Statistics, Nairobi City County contributes about 60% of the national Gross Domestic Product.

The new Constitution of Kenya 2010 has placed upon County Governments a governance responsibility hitherto, the sole domain of the national government. Major decisions are now being handled by the county governments but without the necessary legal capacity to advise and steer legal services. There are complex and conflict prone interactions between the national government and County Government. The Unique position of Nairobi as the capital city of the Republic of Kenya underscores the complex constitutional and legal arrangements between it and the national government and other entities that require a strong and properly legal services delivery unit.

With over 13,000 employees, the Nairobi City County Government (NCCG) is one of Kenya's largest employers, surpassing many major corporations and other public sector entities. The City Government has also one the largest litigation workloads of any public institution in Kenya.

The demands on NCCG are also changing rapidly. Growing service needs and limited resources require new strategies in resource utilization. The thicket of litigation the City faces is not only a drain on the scarce resources but also image the City negatively as an efficient and effective public institution. According to 2013 Report by the Kenya National Audit Office, the NCCG inherited over 2800 cases from the defunct City Council of Nairobi (hereinafter referred to as 'City Council') likely to create a burden of billions of shillings in legal fees and other attendant liabilities. The CCN had Kshs. 1,190,576,213.58 in pending legal bills as at 28th February, 2013.

The legal department, inherited from the defunct City Council lack capacity for delivery of the legal services required by CCNG. The current legal workload is difficult to navigate, frustrates sound financial planning, dissuades prospective partners, decreases the responsiveness of City government to the needs of Nairobi residents, and prevents the City from delivering the best services efficiently and effectively for each hard-earned Shilling.

This report presents findings and makes recommendations that will contribute towards improving the efficiency and effectiveness of legal services to the NCCG.

The successful implementation of the recommendations of the Task Force shall require the support of the Legal Department and the other Departments of the NCCG and adequate budgetary provisions.

TASK FORCE TERMS OF REFERENCE

The Governor, Dr. Evans Kidero, through the Kenya Gazette Notice Vol. CXV - No. 147 appointed the Task-Force to Audit and Examine the Delivery of Legal Services to Nairobi City County Government with the specific terms of reference as follows:

- (a) To review the organizational structure and hierarchical level of the county legal unit within the county government and recommend –
 - (i) An organizational structure that will generally enable and facilitate effective overall delivery of services in the county;
 - (ii) The organizational relationship between that unit and the office of the Governor and other organs and departments of the county government that make use of legal services;
- (b) To audit all ongoing legal cases and advise the Governor on the way forward with respect to each case;
- (c) To advise the Governor with respect to the legal fees demanded by the advocates from the County Government on the respective cases;
- (d) To determine the reasons/causes for the unusual high number of cases against the defunct Nairobi City Council and recommend any change in the management of the affairs of the County Government so as to minimize litigation and /or legal disputes involving the county government and, in this regard, also develop a legal risk evaluation tool;
- (e) To peruse any past reports on the delivery of legal services to the defunct Nairobi City Council by other public and other agencies and recommend implementation strategies of their recommendations, if any;
- (f) Recommend considerations to be taken into account in the procurement of legal services so as to ensure equity to service providers, implementation of the constitutional and other government policy pronouncements on procurement and to the optimum value from service providers;
- (g) To consider any other matter related and incidental to the foregoing and make such recommendations as may be appropriate
- (h) To report to the Governor its findings and recommendations.

METHODOLOGY

The Task Force established guiding principles, determined the scope of work and interpreted the Terms of Reference to effectively deliver on its mandate. The Task Force drew a schedule of work for its meetings and undertook desktop review of previous reports on the Nairobi City Council including:

- (i) Kenya Anti-Corruption Commission (2007): Examination Report on the Systems, Policies, Procedures, and Practices of the City Council of Nairobi.
- (ii) Kenya National Audit Office Review (September 2013): Preliminary Review of the Nairobi City County Legal Department
- (iii) The Extra-Ordinary Inspection Team Detailing Corruption and Financial mismanagement at Nairobi City Council [Rweria Report (2004)].

The Task Force perused the case files, held consultations with staff in the legal department and other relevant county officials, external consultants, representatives of law firms with claims on account of provision of legal services to the defunct Nairobi City Council and subsequently the Nairobi City County Government.

The Task Force established a research unit which carried out detailed reviews of all the case files availed by the legal department.

Finally, the Task Force embarked on the writing of the report

CHAPTER 1:

BACKGROUND

The current set up of the Legal Services Department of the former City Council of Nairobi (NCC) and now Nairobi City County traces its origins to the now repealed Local Government Act. Section 129 of the repealed Local Government Act placed the responsibility on the Town Clerk to be the City Council's Chief Executive and Legal Adviser in all matters upon which his or her advice was necessary, including the Standing Orders thereof and legislation. The section also defined and specified the powers, duties and responsibilities of the Town Clerk.

The Act recognized that proper legal advice was critical in steering the City Council towards achieving its objectives within the available resources. It followed therefore that when the Town Clerk was not legally qualified he/she had to hire the services of qualified personnel to provide legal services to the City Council. Even where Town Clerk was legally qualified, it was not feasible for the Town Clerk alone to adequately handle all legal matters in a city like Nairobi. The Town Clerk therefore needed a team that would guide the Council to achieve its objectives according to the Law.

1.1: Structure of the Legal Department

The current Legal Affairs Department structure was approved by the Ministry of Local authorities in October 2007. The approved structure had a total establishment of 207 members (both professional and support staff) headed by a Director.

The Department has five sections namely; *Administration, Litigation, Prosecution, City Court, and Conveyancing.*

1.2 Current Legal Affairs Department Staffing

Currently, the Department has 76 members of staff out of an establishment of two hundred and seven therefore suffering an overall shortfall of 130 members of staff. The Department has only twelve (12) advocates against an establishment of 52, out of whom only three (3) handle litigation matters. Consequently the capacity to provide the required legal services is highly compromised resulting in the County Government having to resort to engaging external law firms.

As noted in the Rweria Report (2004), the process of engaging external lawyers has always been haphazard as there is no policy in place to guide the allocation of briefs to the lawyers. The absence of the policy has opened the system to abuse, engagement of firms with inadequate capacity to handle complex briefs and inequitable distribution of work. According

to the Rweria Report, the Town Clerk had the sole discretion of placing a law firm into the panel of advocates.

Currently, the NCCG has about 50 external lawyers on its panel with only a handful handling the cases.

Some of these lawyers sued the client (NCC) while still on record in some other cases.

These lawyers are expected to liaise with the legal officers in handling all the litigation issues involving the County. The list of current external lawyers on the County Government's panel is in Appendix 1.

The Task Force proposes a policy to guide the shortlisting and assignment of briefs to external advocates. This appears in appendix 2.

CHAPTER 2

FINDINGS

After holding 70 sessions, reviewing two thousand five hundred and twenty eight (2528) case files, interrogating representatives from twelve (12) law firms (demanding over 70% of the County's alleged outstanding legal fees), analyzing the highest fees demanded, considering thousands of instruction letters, among many other documents, the Task Force made a number of findings and recommendations.

In preparing the recommendations, the Task Force strongly believes that the implementation of recommendations will have a positive financial and governance impact on Nairobi County by:

- (i) improving the efficiency and effectiveness of the NCCG Legal services,
- (ii) reducing the costs incurred by the County Government (and, therefore taxpayers) from unnecessary litigation, inefficiency, and unethical practices.

The Task Force established that over the years the legal department has by design been subjected to a minor player in the defunct City Council of Nairobi and now County Government. The department lacked autonomy and was answerable to the Town Clerk of the defunct NCC and thereafter, County Secretary in the County Government. This state of affairs enabled past Town Clerks to also act as heads of legal services and were in charge of allocations, revocations, selection of the firms which represented the Council in courts, how much these firms were paid, and at what point they would be paid. Many Town Clerks exercised these powers injudiciously leading to a huge number of double allocations, illegal revocations, and the turning of the City Council into the proverbial cash cow for colluding legal practitioners.

The Task Force makes the following key findings:

2.1. The current capacity of the Legal Department is incapable of rendering adequate legal services

The Task-Force established that in its current form and structure, the NCCG Legal Department lacks the capacity to render efficient and quality legal services to the County Government. The Task-Force noted that Director of Legal services also lacked control over officers in the legal department. For example, officers issued instructions to external lawyers in an *ad hoc* manner sometimes without sharing such instructions with the head of department and other officers. This resulted in poor co-ordination in cases being allocated to the lawyers, poor supervision of the handling of cases by external advocates, and instances of multiple instructions in respect to

one matter. In some cases external lawyers take on cases without any instructions from the department.

Prior to the appointment of the County Attorney in April 2015, the Director of Legal Services acted under the direction of the County Secretary and oversaw an understaffed department lacking not only in human resource but also lacking adequate budgetary allocation. This state of affairs restricted the ability of the Legal Department to professionally and independently advise on legal matters.

The County Attorney has recently assumed responsibility as head of the Legal Department. The County Attorney attends meetings of County Executive Committee in an advisory capacity and also reports to the Governor directly. The Task Force is satisfied that the new arrangement put in place will ensure effective and efficient delivery of legal services to the NCCG.

2.2. Lack of Monitoring of Brief Assigned to External Lawyers

Predominantly, the County utilizes the services of external lawyers. From the Task-Force's assessment, services offered by these lawyers are poorly supervised and/or monitored or not supervised at all resulting into rendering inadequate legal services. Over 60% of cases are also lost and even where the County obtains court awards, there are no follow ups to recover the awards or costs. There is no evidence of the recovery of any awards or costs granted in favour of the County Government despite the substantial legal fees paid to the external lawyers.

Lack of supervision of the services offered by the external lawyers is the main cause of cases not being concluded even where the advocates ought to apply for dismissal of cases for lack of prosecution. In cases where injunctive orders have been issued against the NCCG, the same stay in place in perpetuity. In **Chief Magistrates Court Civil Case NO. 3552 of 13 Cheraik Management Services Ltd -Vs- City Council of Nairobi**, the Plaintiff filed case claiming General Damages and Injunctive Orders from the County Government to restrain the County from evicting the Plaintiff from the Car Park premises on the property known as L.R. No. 209/11412 Nairobi along Kenyatta Avenue. The plaintiff is using the property as parking yard to third parties.

The Task-Force found that in several cases including **Chief Magistrate's Court Civil Case No. 197 of 2012 Moses Irungu Mwangi -V- City Council of Nairobi & 2 Others** consent judgments were recorded in court by the external lawyers without instructions thereby exposing the Council/County into huge financial loss. However, where an advocate's authority to act is not limited to the instructions of the client, lawyer can act in what according to his professional judgement is in the best interest of the client as observed in *Gichiri v Republic*[1987] KLR 1 quoted *Halsbury's Law of England 3rd Edition*:

“The client’s consent is not needed for a matter which is within the ordinary authority of counsel. Thus if, in court, in the absence of the client, compromise or settlement is entered into by counsel whose authority has not been expressly limited, the client is bound.”

A lawyer who acts without express authority must not do so if his/her actions will go against the client’s general instructions. The lawyer must act in good faith or else he/she may find him/herself facing disciplinary action.

In some instance, the Task Force was informed that In-House lawyers encouraged a lawyer acting for the NCC in **High Court Misc. Application No. 247 of 2011 Munikah & Company Advocates -v- City Council of Nairobi** to tax their costs as a swift way to obtain and recover their fees from the NCCG.

2.3. Lack of Policy on Communication/Instructions to External Counsel

The Task-Force established that communication within the Legal Department and between the legal department and with other departments in the entire Nairobi City County is not guided by any clear policy. There is no procedure on who should and how instructions are given to external lawyers and/or law firms. There were several cases of advocates entering appearance in court on behalf of the County Government without instruction documents or explanation of how they became seized of the matter. The legal department only becomes aware of such matters once the receive fee/demand notes from external law firm.

In certain instances through action or inactions of County Officials cases which would ordinarily be avoidable are triggered against the County Government. These cases are predominant in the Housing, Lands and Planning Departments.

The same case applies to the legal department where the Task Force found that there was lack of proper care and attention in record keeping and in the coordination of instructions to external lawyers. The result of this lack of proper care, attention and coordination is that the external advocates do not get support in having flimsy cases dismissed right from the begging thus the avoidance of hefty fee notes. The Task Force established from interviewing some of the external lawyers that a number of them took diligent steps to follow up instructions, statements and supporting documents from the departments wherein the suit had been generated.

The external lawyers complained of lack of communication and any further instructions after the initial instructions. This led to numerous cases pending before the courts as the instructed lawyers could not prosecute or defend them timeously. The relevant county officials required to render evidence flagrantly refuse to provide the evidence or appear in court. The County investigations department does not support the legal department and many cases are lost due to lack of witnesses or proper filing of reports.

2.4. Assessment and payment of Legal Fees

In many cases, the calculation of legal fees for external lawyers is not based on the Advocates' Remuneration Order which sets out the scale for payment of legal fees. Where attempts were made to assess the fees in a number of cases, no attempt was made to analyse the nature of the case so that the proper scale is applied. As a result, fee notes are highly inflated even where an analysis of the case filed would show that it was frivolous. The Task Force found very little evidence of engagement between the legal department and external lawyers attempting to negotiate or review the fee. On the contrary, the Task Force found that an advocate's fee note was unilaterally and fraudulently revised upwards with no explanation by one of the advocates in the legal department.

A report submitted to the Task Force by the Legal Department on Calculation of Legal Fees revealed that there is no official policy governing determination of legal fees hence giving room to unethical conduct in the determination of fees payable to the detriment of the county.

The total pending claims for legal fees and decretal amounts are now estimated to be in excess of **Kshs. 5 billion**.

A sample of the cases reviewed by the Task Force which revealed anomalies include the following:

- a) The case of **High Court Elc No.215 of 2010 Greyston Construction Company Limited Versus City Council of Nairobi & 4 Others** where lawyers demanded Kshs. 23 million from the City Council based on unclear value of property.
- b) **HCCC 134 of 2009 Ruchika Bedi Versus City Council of Nairobi and Another** where the lawyer initially raised a fee note of Kshs. 5,460,550 which was subsequently inflated to Kshs. 6,075,640 in unclear circumstances.
- c) **ELC No 585 of 2011 Dupoto Group Limited Versus Kenya Airports Authority and the City Council of Nairobi** where lawyers demanded Kshs. 110,475, 640 to defend an injunction.
- d) **High Court Misc. Application No. 247 of 2011 Munikah & Company Advocates -v- City Council of Nairobi** in which the lawyers represented the Council to recover billions owed by the national government taxed fees against the Council in the sum of Kshs. 498,812,246 notwithstanding the fact that they were still on record for the Council and the fact that the Council's claim has not be prosecuted. The taxation against the Council was improper and can be successfully contested.

In the same case, a law firm acting for NCC drew a Fee Note demanding from the Council the payment of Kshs.164, 706,221.00 for opposing the said Bill of Costs and the

Council proposed to pay the sum of Kshs 10, 884,671.14 as legal fees on the ground that the same had been verified in accordance with the Advocates Remuneration Order 2009. The lawyer acting for the NCC was absent in court when the matter came up for taxation.

- e) In HCCC Petition No. 63 Of 2012 John K. Kamau And & Another (Suing On Behalf Of Mutindwa Market Self Help Group) V. City Council Of Nairobi & 7 Others, two law firms **Moronge and Co. Advocates** and **Momanyi and Associates Advocates**, each received different letters of instructions dated 19th July 2012 and 8th March 2013 respectively to act on the same matter on behalf the City Council. Both firms raised significant fee notes.

In HCCC No. 1874 of 1988 George Gikubu Mbuthia Vs City Council Of Nairobi a letter in the file from E.N. Omotii & Company Advocates dated 24th November 2011 presupposes that he is on record on behalf of the City Council while another letter from D.B Wati Advocates dated 6th June 2013 presupposes that the firm is also on record on behalf of the City Council. On 25th June 2013, Prof. Tom Ojienda and Associates Advocates was instructed by the City County to take over the conduct of case numbers HC Misc No. 1033 of 1988 (for orders of Mandamus to compel the County to satisfy the decretal sum), HCCC No. 88 of 1998, HC. Misc. Application No. 640 and HCCC No. 1874 of 1999, and HCCC No. 15 Of 2003. There are no records on what was the outcome of the cases and the money that was paid to Prof. Tom Ojienda & Associates Advocates.

- f) Nairobi High Court of Kenya ELC No.45 of 2012 Stephen Mburu & 4 Others Versus Comat Merchant Limited & Nairobi City Council, an advocate draw a fee note of Kshs. 675,840 even though no progress was ever made in a case where the plaintiffs did not hold any documents of title in a property belonging to the 1st Defendant who is the registered owner.
- g) In High Court Petition No. 164 of 2012 John Kasova Iliona & 136 Others Vs. Commissioner of Lands & NCC a law firm raised a fee note of Kshs. 87,275,640 after a claiming of Ksh 3 billion against NCC dismissed. In another case handled by the same law firm HCCC No. 103 of 2010 Nairobi National Housing Corporation Vs. NCC, the lawyers raised a fee note of Ksh 30 million in a suit seeking orders for prohibition and certiorari where the value of land and project was estimated to be around 1.7 billion. Yet in another a suit handled by the same law firm, Misc. Application No. 9 of 2011 Peter Malonza & 24 Others Vs. NCC for a claim for prohibition and certiorari orders

for plots with a value of around Ksh 700 million, the lawyer raised a fee note of Ksh 20 million.

- h) In Civil Suit No. 875 of 2010 - Kyavee Holdings Ltd Versus the City Council of Nairobi, lawyers demanded Kshs. 131, 754, 383 in a case concerning allegation of double allocation of a parcel of land by the City Council of Nairobi. There is no evidence indicating whether a Notice to withdraw an application was argued and whether the suit was actually withdrawn. There was no independent valuation of the property neither was the value of the business in the suit premises verified. There is no basis in which the lawyer determined the legal fees demanded.
- i) Nairobi ELC No 355 of 2012 where there is a claim for legal fees of Kshs. 27, 134,672 without any clear indication of how the fees was arrived at and also considering there was a misjoinder of the City Council in the suit.
- j) In the Industrial Court Case No.823/12 NUWSE & 3 Others -VS Nairobi City Water Sewerage Co., KLGWU & City Council of Nairobi the National Union of Water and Sewerage Employees have sued the Council together with the Nairobi Water Company claiming Kshs.2,036,333, 346.11, an alleged amount due to former employees and members of the Union who were retrenched by the Council and others re-deployed to the Nairobi Water Company. A law firm revised their fee note from Kshs. 15 million to Kshs. 70 million within a period of two months without showing any evidence of extra instructions from the City Council. The City Council later offered Kshs. 59, 319, 307 in the same matter which could have been handled internally.
- k) In Civil Case No. No. 1885 of 1992 Mwangi Stephen Murithi -V- City Council of Nairobi O.N Ojwang and Co. Advocates were paid Kshs. 9,400,000 and no basis was established for such payment. The more intriguing fact is that their invoice was Kshs. 9,055,000 hence they were overpaid by Kshs. 345,000 in unclear circumstances after the plaintiff had agreed to settle out of court for a sum of Ksh. 643, 954, 025 including profits he would have realized had he developed the disputed land. The matter is still in court.
- l) There were also many cases of inflated fees with minimal investigation or probing by the legal department. In many other cases, lawyers forwarded their claims before the conclusion of the matters they were handling.

These and many other cases demonstrate an unsatisfactory state of affairs in the calculation of legal fees billed against the defunct City Council of Nairobi and the County Government. Generally, the lawyers who appeared before the Task Force agreed to negotiate their fees for reasonable final settlement as it was in their opinion to maintain a good working and mutual relationship with NCCG.

2.5 Lack of Payment Policy for Legal Services

There is lack of a payment policy leading to rampant irregularity in paying lawyers. In many instances lawyers deal directly with the City Treasury and are paid depending on arrangements made with finance officials.

There is also an irregular practice by the County of paying full or substantial fees upon instructions with the effect that and once the external lawyer receives the fee, they do not take any further interest in the matter. Such practice is not only improper and possibly fraudulent but also leads to the rendering of inadequate legal services and huge financial losses to the county. It is difficult to quantify such loss due to lack of records and/or poor records keeping in the legal department.

In total violation of laid down financial procedures, cheques in favour of the external lawyers are released without forwarding letters and in many cases, no receipts are issued by the lawyers acknowledging payment for the same thereby making it impossible for the legal department to keep track of the payments made. This poses a grave risk for multiple payments of legal fees to law firms in respect of the same matters.

On 30th September 2013 and in order to enable a proper audit and interrogation of outstanding legal fees, the Task Force directed a freeze of any further payments to Lawyers. It is granted that the completion of the work was delayed for reasons beyond the control of the Task Force but in the course of completing this report, the Task Force was informed that some payments in excess of Kenya Shillings Seven Hundred and fifty million (Kshs.750,000,000) had been made to external Lawyers between the months of January 2014 and June 2015. The Task Force was neither made aware of nor authorized the said payments and despite various requests, both the Legal and the Finance Departments failed to provide the details of the payments including the firms to which the payments were made. Consequently, the Task Force was unable to verify the payments and the grounds upon which the payments were made and the appointing Authority was made aware of the Task Force's frustration in this regard.

The Task Force recommends a proper and complete investigation/audit of the payments to verify their veracity and the circumstances under which they were paid despite the directions of the Task Force to free payments.

2.6 Lack of an Out-of-Court Settlement Policy

The County does not have an out-of-court settlement policy. Lawyers do not explore alternative dispute resolution mechanisms as a means of mitigating costs on contentious matters. In obvious cases where alternative dispute resolution would be effective, the lawyers still resort to filing court cases.

In a few instances where matters are settled by mutual consent, agreements are reached to settle such claims out of court for the total claim against the County but in some cases the council officers for unknown reason opt not to defend the cases in court, resulting to the court ruling in favour of the plaintiffs. The most glaring is where millions of shillings are claimed for destruction of informal structures whose cost of construction and stock could not match the demanded amounts.

The Task-Force also established that most of the cases filed against the County emanate from omission and commission of county officers including:

- Double allotment of land by the County;
- Goods or services supplied and not paid for timeously;
- Illegal evictions and demolitions

2.7. Failure to implement past reports on delivery of legal services

The Task Force observed that almost none of the recommendation of past reports on delivery of legal services to the defunct NCC had been implemented. These reports include:

- The Extra-Ordinary Inspection Team Detailing Corruption and Financial mismanagement at Nairobi City Council [Rweria Report (2004)]
- The Kenya Anti-Corruption Commission (2007): Examination Report on the Systems, Policies, Procedures, and Practices of the City Council of Nairobi. Specifically, the KACC Report which identified anomalies as follows:
 - a) Prosecutions which were poorly handled
 - b) Lack of Criteria in awarding briefs to external lawyers
 - c) Negligence of City Hall officers in addressing court issues
 - d) Corruption
 - e) Leaving important decisions to legal clerks
- The Kenya National Audit Office Review (September 2013): Preliminary Review of the Nairobi City County Legal Department that recommended which advised the County Government to run adverts requiring lawyers with claims against the County Government to present their statements within a specific period while the Budget office continues to verify the already paid claims.

2.8. Poor record keeping

When the Task Force commenced its work, it was not exactly clear how much NCC's legal debt was. Initial reports from the Legal Department indicated that the legal debt ranged from Kshs. 1.1 Billion to 1.8 Billion. As the task-force embarked on the task and after consultations with various external lawyers acting for NCCG, it emerged that the total liability/claims could be as high as Kshs. 5 Billion. The difficulty of determining the exact amount of legal debt is

due to poor record keeping within the legal department and confusion caused by the processing of all payments through the office of the City Treasurer without reference to the Legal Department.

The poor record-keeping is also reflected in the filing system within the department. It was difficult for the Task Force to establish the exact number of court cases filed for or against the County Government. The lack of record-keeping systems is a key cause of malpractice in the Legal Department. Many files were missing key documents such as; record of judgment, defense, fee notes, payments made, instruction letters, and case status among others.

2.9 Non compliance by the In-house lawyers

Like all other professionals, advocates in the employ of the NCC are required to comply with the requirements for the practice of their trade. Section 10(c) of the Advocates Act states that any person holding office in a local authority established under the now repealed Local Government Act Cap 265 is entitled in connection with the duties of his office to act as an advocate, and shall not to that extent be deemed to be an unqualified person.

However section 134 of the County Government Act No. 17 of 2012 provides that the Local Government Act Cap 265 is repealed upon the final announcement of all the results of the first elections held under the Constitution of Kenya 2010. The final announcement of the results of the first elections was made in March 2013.

The upshot of the above is that all Advocates in the employ of the County Government ought to have taken out a practicing certificate in the year 2013 immediately after the repeal of the Local Government Act. This has not been the case but has since been rectified.

CHAPTER 3

RECOMMENDATIONS

Building on the information gathered, the Task Force wishes to propose a framework for actions that will appropriately improve the delivery of legal services at the Nairobi City County. This framework can reposition the legal services to reflect the current needs of the County Government and its focus on the delivery of services to Nairobi residents. As the volume of litigation remains persistent, so must be the innovativeness of the County Government in dealing with the huge number of cases.

The Task Force is of the view that the huge number of cases is a self-inflicted burden by employees who lack the sense of ownership of the vision of their employer. Consequently, any successful implementation of reforms with the legal department of the Nairobi City County must therefore be driven by a brave and radical approach with decisiveness. A Business-as-Usual approach will hardly reform the crucial department hence the need for hard and firm decisions to be made.

The Task Force makes the following recommendations:

3.1 Restructure the Legal Department

The Task-Force recommends the establishment of the Office of the County Attorney with the holder directly reporting to the Governor.

The County Attorney's office should be independent in order to diligently render competent legal services ethically and honorably as advisor to the Governor and to the various county entities and especially those such as Planning and Housing that needlessly generate the large amount of litigation.

Some of the objectives of the County Attorney's office would be:

- a) Provide such continuing legal advice to the County Government and all its sectors, Departments, Boards and Semi-autonomous Agencies, keeping them current on changes in the law which affects the efficient and fair discharge of the duties of the County to its citizens.
- b) To provide legal services professionally, effectively and efficiently.
- c) Assess all claims filed against the county, efficiently process those which the office determines to be valid and defend against all others.
- d) Produce and review all documents generated for the purpose of facilitating the delivery of governmental services by the Nairobi City County to its citizens.

A draft Bill for the County Attorney's office has been prepared by the Task-Force and is annexed to this report for possible tabling in the county assembly. See Appendix 3.

3.2. Establish proper and secure record-keeping system in the Legal Department

Establishment of a proper and secure record-keeping system in the legal department should be undertaken as a matter of urgency. There is need for an overhaul in the record keeping system and practices in the County Departments and agencies. The Legal Department must begin to manage their records in both hard and electron copy.

A qualified officer must be designated to oversee legal records management. Records are the foundation of open government, supporting the principles of transparency, participation and collaboration.

A directive should be issued by the Governor's office to specifically require that:

- The Legal and other County Departments must create an electronic data base for all files before the end of 2014.
- The Legal and other County Departments must have records management training in place for all staff.
- The legal department must designate an officer to oversee its records management program. The officer should have regular meetings of all staff to review filing and record-keeping within the department.

The Legal Department should embrace an electronic database an up-to-date status of the county legal liabilities, assets, and a dynamic plan of how the county is handling both. Currently it is very difficult to determine what the county owes or what it is owed from cases.

3.3 Compliance by the Advocates in the Legal Department

In order to shield and mitigate the potential of exposing the County Government to further litigation and financial burden from the documents and cases handled by the In House lawyers, the County Government must ensure that it makes budgetary allocation for practicing certificates and put in measure to ensure that all Advocates in its employ comply with the requisite statutory requirements of the legal profession.

The advocates in the Legal Department to undergo suitability test to determine the skill fit for redeployment or retirement.

3.4. Restructure the Case-Assignment and Management System

Given the current irregularities caused by how cases are assigned to external lawyers, there is need to restructure how cases are instructions are given to lawyers. A special team or panel should be created to specifically analyze and recommend how cases should be handled. There is no need of some cases being handled externally. NCC should designate internal officers to deal with some matters before considering the option of engaging external advocates. Any cases that must go to external lawyers must be properly analyzed, justified, documented, and

approved by the special panel. The approval authority must ensure any firm retained is properly evaluated for proper expertise in any area allocated to it.

Some cases are needlessly generated by busybodies knowing very well that such cases have no chances of success. It should be clear as a matter of policy the offices/officers who are given the mandate to give instructions on behalf of NCC. There is need for relevant departments giving instructions in each case to do a report (to be in the case file) as this will inform the direction to take in pursuing a case. Non-cooperative attitude identified in various departments in giving instructions to the legal department need to attract some disciplinary measures.

There is need to remove some advocates from the list of pre-qualified legal service providers as they have failed in discharging their obligations. Similarly, a regular review of all lawyers on the county panel should be done to avoid the situation where county litigation lay in the hands of lawyers or firms that were no longer capable of defending the county. The County selection panel should also be chaired by the head of the legal department or his appointee.

The county legal department should also develop a case restructuring and retirement plan to be in charge of identifying cases that must be retired and also negotiate with parties involved to conclude dormant cases.

3.5. Introduce Checks and Balances in Calculation of Legal Fees

The legal department needs to have a policy where legal fees is agreed in advance to avoid the revision of fees irregularly. An analysis of the subject matter *vis-à-vis* the fees proposed must be done and fees preferable assessed internally and in advance. Lawyers have abused the process of being allowed to assess their fees after their service and this needs to stop to save the Nairobi County Government money. Checks and balances are necessary in the fee assessment process.

3.6. Alternative Dispute Resolution

The Task-Force established that there heavy litigation against the former City Council and now Nairobi City County is also caused the “trigger-happy” mentality of rushing to court without even attempting to seek alternative dispute resolution channels. This not only creates heavy costs for the County Government, but also creates a heavy workload for the lean county legal staff.

The task-force recommends that an out-of-court system be designed to ensure that only the most deserving of cases go to court. A special arbitration unit could be formed to explore any existing alternative dispute resolution. Such a Unit should comprise of a mix of legal, land, planning, and housing experts with the sole mission of reducing the number of cases that go to court. The unit could operate from a center with the selected experts agreeing on

comprehensive terms of reference that would agree on the threshold of cases to be arbitrated, for how long and the types of awards that the unit could recommend.

3.7. Investigations Department

The Task-Force established that the investigations department does not timely and effectively support the legal department. The department should be restructured so as to play a more direct role in gathering evidence and preparing witnesses, filing timely reports and completing assignments. During the Task-Force sittings, the investigation department was unable to complete a report on Kimathi Estate as requested despite several pleas from the Task-Force demonstrating how ineffective the department is.

3.8. Personal Responsibility by County Officers

The County Government should inform county officers of their personal responsibilities for their action and/or inaction that result in court cases against the County Government. Any employee responsible must be held to account in accordance with the law and scheme of service.

3.9. Rates Collection

The Nairobi City County should seek other methods of collecting rates instead of using law firms or going to court. The County Government should explore the use of reputable debt collectors who might recover their claims from the collected rates instead law firms charging higher fees even where rate payers responded to waiver adverts. The Task Force notes that there is in the pipeline a Bill to address the matter of rates.

3.10. A Formula to Deal with Big Claims and Awards

The County should establish a special secretariat to oversee the implementation of the Task-Force report and especially negotiate with law firms that have huge fees claims against the County Government. For instance:

- Munikah and Company advocates claim of Kshs. 573,365,943. The Task Force takes the view that the taxation of the costs against the defunct City Council was irregular and improper and the certificate of taxation ought to be struck out. The Task Force held meetings with the lawyer appearing for the County and expressed its view as well as advising him to apply to have the certificate of costs struck out. Such advice however may have been frustrated by the evident substantial payments made to Munikah from time to time. It is also noteworthy that the court award of over Kshs, 350,000,000 against which Munikah benchmarked his fees have never been pursued for the reason that the

High Court dismissed attempts by Munikah to pursue the same. There is therefore no reason against which the sum being claimed can be based on the Party and party costs awarded against the Attorney General.

The office of the County Attorney should immediately begin negotiations with all firms claiming fees of over Kenya Shillings 5,000,000. A number of law firms interviewed by the Task Force are more than ready to negotiate fees. Currently the NCCG owes various legal firms approximately Kenya Shillings 2,943,562,324.40.

3.11 Decretal Amounts and Recovery of funds irregularly paid

The County should work with the relevant government agencies including the Ethics and Anti-Corruption Commission, Kenya Revenue Authority and the Law Society of Kenya to recover all the funds that are irregularly paid to any lawyers and to ensure tax compliance. The implementation secretariat should seek a waiver of all interest on decretal amounts as one way of lowering the legal fees liability on the County Government. Such negotiations must be backed by a firm commitment from the County Government to pay.

3.12. Case Against Department of Defense and Attorney General

The implementation secretariat should also pursue negotiations in the case NRB ELC No. 282 of 2012 (City Council of Nairobi versus Attorney General Minister for State in Charge of Defense and Kenya Defense forces). The case is holding up NCC land valued at Kshs. 61.5 billion. Settlement of this case may help the NCC bolster her resource-base and help meet the many liabilities.

3.13. Service Level Agreements with Legal Service Providers

That NCC should consider signing Service Level Agreements with legal service providers. The Service Level Agreements will set out the terms of engagement between the legal service providers and NCC, serve as a balanced scored for purposes of evaluating performance (tracking progress) of legal service providers, and encourage feedback. That NCC should ensure that legal service providers file quarterly reports on progress for feedback.

3.14. Consultative forum with legal services provider

That Legal Department should make it a practice to have periodic consultative forum with legal service providers to exchange experiences, challenges, best practices, and identifying areas of improvement.

3.15. Information of Payments

The legal department should be informed when payments are done by the finance department and a record of the same should be kept by the legal department. This would avoid cases of the legal department generating invoices twice for the same claim and uncertainty in the department as to which claims are pending and which have been paid.

3.16. Supervision of Advocates

In the interim, before the recruitment of counsel is done, the County Attorney should be allowed to continue outsourcing legal services and the County Attorney must devise mechanisms of monitoring these cases and closely supervising the external advocates. The internal advocates must be closely involved in the instructions from departments to external advocates.

3.17. Finalisation of Pending Cases and Investigation of Payments made before Finalization of Task-Force Report

All efforts must be put in place to finalise the pending huge caseloads against the county Government by applying for dismissal for want of prosecution in cases where the matter has been dormant for a long time.

The Task Force recommends a proper and complete investigation/audit of the payments to verify their veracity and the circumstances under which they were paid despite the directions of the Task Force to free payments. **(see item 2.5 on page 12).**

3.18 Terms and condition of service

To address the general apathy in the legal departments due to human resource issues such as remuneration and staff welfare, the County Government should review the terms and conditions of service of the staff.