**SOFTWARE DEVELOPMENT AGREEMENT AGREEMENT**

**DATED 20\_\_**

**-BETWEEN-**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

AND

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Drawn By:-

**CM Advocates LLP**

I & M Building, 7th Floor,

2nd Ngong Avenue

P.O. Box 22588 - 00505

**Nairobi.**

[www.cmadvocates.com](http://www.cmadvocates.com)

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**SOFTWARE DEVELOPMENT AGREEMENT**

This Agreement is made and entered into on the…………. day of ………………. 202.. by and **BETWEEN**:

1. **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ LIMITED**, a limited liability company incorporated in Kenya under Certificate of Incorporation Number \_\_\_\_\_\_\_\_\_\_\_\_\_\_ and of P. O. Box \_\_\_\_\_\_ -00200, Nairobi, Kenya (hereinafter referred to as the **“Developer”** which expression shall, where the context so requires, include its successors in title and permitted assigns) of the one part; and
2. **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ LIMITED**, a limited liability company incorporated in Kenya under Certificate of Incorporation Number \_\_\_\_\_\_\_\_\_\_\_\_\_\_ and of P. O. Box \_\_\_\_\_\_ -00200, Nairobi, Kenya (hereinafter referred to as "**Client**" which expression shall, where the context so requires, include its successors in title and permitted assigns) of the other part.

**WHEREAS:**

1. The Company is engaged in the business of provision of software development services (as hereinafter defined).
2. The Client hereby engages the Developer and the Developer hereby agrees to be engaged by the Client to develop the Software in accordance with the specifications attached hereto as Exhibit A (the “Specifications”) and the terms and conditions of this Agreement.

**NOW THIS AGREEMENT WITNESSETH** as follows:-

# **Definitions and Interpretation**

* 1. In this Agreement:
     1. **“Agreement”** means any agreements entered into between the Parties to which these standard terms and conditions apply;
        1. **“Business Day” or day** means any day, other than a Saturday or Sunday and gazetted public holidays, on which banks are open for business in Kenya;
        2. “**Client’s Advocates**” means means \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Advocates, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Road, P. O. Box \_\_\_\_\_\_\_ – 00\_00 Nairobi;
        3. **“Commencement Date”** means the date set out in clause 3;
        4. **“Confidential Information”** means all information in whatever form including, without limitation, any information relating to suppliers, operations, plans, inventions, market opportunities, know-how, trade secrets and business affairs whether in writing, conveyed orally or by machine-readable medium;
        5. **“Developer’s Advocates”** means \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Advocates, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Road, P. O. Box \_\_\_\_\_\_\_ – 00\_00 Nairobi;
        6. **“Parties”** means the Company and the Client and **“Party”** shall be construed to refer to either of them as the context may require;
        7. “**Software**” means the means the computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, documentation or other materials required to be delivered by the Developer.
        8. **“Specifications”** means the detailed Software requirements set out in more detail in the Schedule to this Agreement.
  2. In this Agreement, unless the context otherwise requires, any reference to:
     + 1. the singular includes the plural and *vice versa* and reference to the masculine includes a reference to the feminine gender and neuter and vice versa and words importing the whole shall be treated as including a reference to any part thereof*;*
       2. a person includes reference to a natural person, body corporate, unincorporated body, state, state agency, governmental authority or firm;
       3. any written law includes that law as amended, extended or re-enacted from time to time provided that, as between the Parties, no such amendment, extension or re-enactment shall apply for the purposes of this Agreement to the extent that it would impose any new or extended obligation, liability or restriction on, or otherwise adversely affect the rights of, any Party;
       4. any agreement or other document includes that agreement or other document as varied or replaced from time to time;
       5. a clause is to the relevant clause of this Agreement;
       6. clause headings are inserted for convenience only and shall not affect the construction or interpretation of this Agreement.

# **Developer’s Obligations**

* 1. The Developer shall complete the development of the Software according to the milestones set out in the Specifications. In accordance with such milestones, the final product shall be delivered to the Client by [Final delivery date] (the “Delivery Date”).
  2. For a period of [Time frame] after delivery of the final Software product, the Developer shall provide the Client attention to answer any questions or assist solving any problems with regard to the operation of the Software up to [Number of hours] of hours free of charge and billed to the Client at a rate of [Rate] per hour for any assistance thereafter. The Developer agrees to respond to any reasonable request for assistance made by the Client regarding the Software within [Time frame] of the request.
  3. The Client may terminate this Software Development Contract at any time upon a material breach of the terms herein and failure to cure such a breach within [Time frame] of notification of such a breach.

# **Commencement and Term**

* + 1. This Agreement shall come into force on the date hereof (“Commencement Date”) and shall remain in force for a period of \_\_\_\_\_\_\_\_\_ (\_) months/years (hereinafter the “Term”) unless otherwise agreed between the Parties in writing.

# **Delivery**

* 1. The Software shall function in accordance with the Specifications on or before the Delivery Date.
  2. If the Software as delivered does not conform with the Specifications, the Client shall within [Time frame] of the Delivery Date notify the Developer in writing of the ways in which it does not conform with the Specifications. The Developer agrees that upon receiving such notice, it shall make reasonable efforts to correct any non-conformity.

# **Acceptance and Rejection**

The [Client] will have [Inspection Period] Business Days after [Developer] delivers the [Software] to inspect and test the [Software] to ensure it meets the Acceptance Criteria (the “Inspection Period”).

# **Training and Support Services**

* 1. *Training*

The [Developer] shall, at [Developer]’s expense, provide [Client]’s employees with the initial training services necessary and desirable to operate the Software at [Developer]’s offices and [on days and times the parties agree to in writing.]

* 1. *Support*

For the [12] month period beginning on the Effective Date, and at [Developer]’s own expense, [Developer] shall provide [Client] with telephone or electronic support during [Developer]’s normal business hours in order to help [Client] locate and correct problems with the Software, and internet-based support system generally available seven days a week, twenty-four hours a day.

# **Fees**

In consideration for the Service, the Client shall pay the Developer at the rate of [Rate] per hour (the “Hourly Rate”), with a maximum total fee for all work under this Agreement of [Maximum total fee]. Fees billed under the Hourly Rate shall be due and payable upon the Developer providing the Client with an invoice. Invoices will be provided for work completed by the Developer monthly.

# **Intellectual property rights in the software**

The Parties acknowledge and agree that the Client will hold all intellectual property rights in the Software including, but not limited to, copyright and trademark rights. The Developer agrees not to claim any such ownership in the Software’s intellectual property at any time prior to or after the completion and delivery of the Software to the Client.

# **Change in specifications**

The Client may request that reasonable changes be made to the Specifications and tasks associated with the implementation of the Specifications. If the Client requests such a change, the Developer will use its best efforts to implement the requested change at no additional expense to the Client and without delaying delivery of the Software. In the event that the proposed change will, in the sole discretion of the Developer, require a delay in the delivery of the Software or would result in additional expense to the Client, then the Client and the Developer shall confer and the Client may either withdraw the proposed change or require the Developer to deliver the Software with the proposed change and subject to the delay and/or additional expense. The Client agrees and acknowledges that the judgment as to if there will be any delay or additional expense shall be made solely by the Developer.

# **Limitation of Liability**

* + 1. Nothing in this agreement shall limit or exclude the Developer's liability for:
       1. death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors (as applicable);
       2. fraud or fraudulent misrepresentation; or
       3. any matter in respect of which it would be unlawful for the Developer to exclude or restrict liability.

# **Termination**

* 1. Without limiting its other rights or remedies, the Client may terminate the agreement with immediate effect by giving written notice to the Developer if:
     + 1. the Developer commits a material breach of any term of the agreement and (if such a breach is remediable) fails to remedy that breach within [NUMBER] days of that party being notified in writing to do so;
       2. [the Developer takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), obtaining a moratorium, being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing to carry on business [or, if the step or action is taken in another jurisdiction, in connection with any analogous procedure in the relevant jurisdiction];
       3. the Developer suspends, or threatens to suspend, or ceases or threatens to cease to carry on all or a substantial part of its business; or
       4. the Developer's financial position deteriorates to such an extent that in the Client's opinion the Developer's capability to adequately fulfil its obligations under the agreement has been placed in jeopardy.
  2. Termination of the agreement, however arising, shall not affect any of the parties' rights and remedies that have accrued as at termination, including the right to claim damages in respect of any breach of this agreement which existed at or before the date of termination.
  3. Any provision of the agreement that expressly or by implication is intended to come into or continue in force on or after termination shall remain in full force and effect.

# **Force Majeure**

* 1. Definition of Force Majeure

For the purposes of this Deed, “Force Majeure” means an event which could not reasonably have been avoided by the parties in the circumstances, which is beyond the reasonable control of a party and which makes a party’s performance of its responsibilities hereunder impossible or so impractical as reasonably to be considered impossible in the circumstances and includes, but is not limited to, war, riots, civil disorder, earthquake, storm, flood or adverse weather conditions, strikes, lockouts or other industrial action, terrorist acts, confiscation, plague, epidemic, pandemic, outbreaks of infectious disease or any other public health crisis, including quarantine or other employee restrictions, act of authority whether lawful or unlawful, compliance with any law or governmental order, rules, regulations or directions, curfew restrictions, expropriations, compulsory acquisition, seizure of works, requisition, nationalization, Act of God or natural disaster such as but not limited to violent storms, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage, or destruction by lighting, drought, explosion, fire, destruction of machines, equipments, factories and of any kind of installation, prolonged break down of transport, telecommunication or electric current, general labour disturbance, such as but not limited to boycott, strike and lockout, go-slow, occupation of premises and factories, storage or inability to obtain critical material or supplies to the extent not subject to the reasonable control of the subject party or any other action by government agencies.

* + - 1. Force Majeure shall not include any event which is caused by the negligence or intentional action of a Party or such Party’s subcontractors or agents or employees, or by a failure to observe good professional practice.
      2. The failure of a Party to fulfil any of its obligations hereunder shall not be considered to be a breach of, or default under, this Deed insofar as such inability arises from an event of Force Majeure, provided that the Party affected by such an event has taken all reasonable precautions, due care and reasonable alternative measures, all with the objective of carrying out the terms of this Deed.
      3. A Party affected by an event of Force Majeure shall take all reasonable measures to remove such Party’s inability to fulfil its obligations hereunder with a minimum of delay. The Parties shall take all reasonable measures to minimise the consequence of any event of Force Majeure.
      4. A Party affected by an event of Force Majeure shall notify in writing the other Party of such event as soon as possible, and in any event not later than five (5) days following the occurrence of such event, providing evidence of the nature and cause of such event, and shall similarly give notice of the restoration of normal conditions as soon as possible.
  1. Not later than fourteen (14) days after a Party, as a result of an event of Force Majeure, has become unable to discharge a material portion of its obligations, the Parties shall consult with each other with a view to agreeing on appropriate measures to be taken in the circumstances.

# **Confidentiality**

* 1. Save as set out in Clause 13.2 below, the Developer shall not: (i) disclose to any third party the business of the Client, details regarding the Software, including, without limitation any information regarding the Software’s code, the Specifications, or the Client’s business (the “Confidential Information”), (ii) make copies of any Confidential Information or any content based on the concepts contained within the Confidential Information for personal use or for distribution unless requested to do so by the Client, or (iii) use Confidential Information other than solely for the benefit of the Client.
  2. Each party may disclose the other party's confidential information:
     + 1. to its employees, officers, representatives or advisers who need to know such information for the purposes of exercising the party's rights or carrying out its obligations under or in connection with this agreement. Each party shall ensure that its employees, officers, representatives or advisers to whom it discloses the other party's confidential information comply with this clause 14; and
       2. as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.
       3. No party shall use any other party's confidential information for any purpose other than to perform its obligations under this agreement.]

# **Developer warranties**

The Developer represents and warrants to the Client the following:

* 1. The development and delivery of the Software under this Contract are not in violation of any other agreement that the Developer has with another party.
  2. The Software will not violate the intellectual property rights of any other party.
  3. For a period of [Time frame] after the Delivery Date, the Software shall operate according to the Specifications. If the Software malfunctions or in any way does not operate according to the Specifications within that time, then the Developer shall take any reasonably necessary steps to fix the issue and ensure the Software operates according to the Specifications.

# **Indemnification**

The [Developer] [(as an indemnifying party)] shall indemnify [Client] [(as an indemnified party)] against all losses and expenses arising in relation to the Services out of any proceeding:

* brought by either a third party, and
* arising out of a claim that the [deliverable] infringes the third party’s intellectual property rights.

# **Waiver**

* + 1. The failure to exercise or delay in exercising a right or remedy provided by this Agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. No single or partial exercise of a right or remedy provided by this Agreement or by law prevents the further exercise of the right or remedy or the exercise of another right or remedy.

# **Legal Costs and Expenses**

* + 1. Each party shall bear its own costs and expenses relating to the preparation negotiation and execution of this Agreement.

# **Notices**

* + 1. Any notice or communication under or in connection with this Agreement shall be in writing shall be delivered by hand or sent by post or fax to the addresses aforesaid (for the both parties) or in case of the Company delivered by hand or sent by registered post, telex or fax to the registered office of the Company or at the principal place of business of the Company in Kenya or upon the directors or Company Secretary of the Company or at such other address as the recipient may have notified to the other parties in writing. In the absence of evidence of earlier receipt, any notice or communication shall be deemed to have been received, if delivered by hand, at the time of delivery or, if sent by post, seven days after posting or, if sent by fax, on the completion of transmission**.**

# **Dispute Resolution**

* 1. Good Faith Negotiations

In case of any dispute arising out of this Agreement including any question regarding its interpretation, existence, validity or termination, each party will use its best efforts to resolve the dispute by good faith negotiation within a period of Thirty (30) Business Days following notification of the dispute.

* 1. Mediation
     + 1. If the dispute has not been settled pursuant to the Good Faith Negotiations under clause 19.1 within (30) Business Days from when the settlement discussions were instituted, any party may elect to refer the dispute to mediation. The mediation shall take place in in accordance with the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.
       2. The mediator shall be appointed by mutual agreement between the Parties or in default of such agreement within five (5) days of the notification of a dispute, upon the application of either Party, by the Registrar of the Nairobi Centre for International Arbitration in accordance with the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.
       3. The mediation shall take place in Nairobi and shall be conducted in accordance with the Nairobi Centre for International Arbitration (Mediation) Rules, 2015.
       4. Unless otherwise agreed, the mediation will start not later than Fourteen (14) Business Days from the date of notification of the dispute. No party may commence any court proceedings or arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and the mediation has terminated.
       5. Nothing in this Agreement shall prevent or delay a Party seeking urgent injunctive or interlocutory relief in a court having jurisdiction.
  2. Arbitration
     + 1. If the dispute has not been settled pursuant to Good Faith Negotiations under Clause 19.1 or under Mediation under clause 19.2 above within thirty (30) Business Days (or such longer period as may be agreed upon between the parties) from when the settlement discussions were instituted, any party may elect to commence arbitration. Such arbitration shall be referred to arbitration by a single arbitrator to be appointed by agreement between the Parties or in default of such agreement within fourteen (14) days of the notification of a dispute, upon the application of either Party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitration of the United Kingdom.
       2. Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act 1995.
       3. To the extent permissible by Law, the determination of the Arbitrator shall be final, conclusive and binding upon the Parties hereto.
       4. Pending final settlement or determination of a dispute, the Parties shall continue to perform their subsisting obligations hereunder.
       5. Nothing in this Agreement shall prevent or delay a Party seeking urgent injunctive or interlocutory relief in a court having jurisdiction.

# **General**

* 1. No failure or delay to exercise any power, right or remedy by the Company shall operate as a waiver of that right, power or remedy and no single or partial exercise by that party of any right, power or remedy shall preclude its further exercise or the exercise of any other right, power or remedy.
  2. The rights and remedies of the Company provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law.
  3. The Parties intend that the contents of this Agreement shall be legally binding and enforceable.
  4. Each of the provisions of this Agreement is severable and distinct from the others and, if at any time one or more of these provisions is or becomes invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired.
  5. No amendment or variation to this Agreement shall be effectual or binding on the parties hereto unless it is in writing and duly executed by or on behalf of the parties hereto.
  6. This Agreement may be executed in several counterparts, each of which shall be an original but all of which shall together constitute one and the same instrument.
  7. This Agreement constitutes the whole Agreement between the parties hereto in relation to the subject matter of this Agreement and no variations thereof shall be effective unless made in writing and signed by all the parties. This Agreement supersedes and replaces any Agreement whatsoever that may have subsisted between the parties hereto in any way relating to the subject matter.
  8. The construction, validity and performance of this Agreement shall be governed by and construed in accordance with the laws of Kenya and the parties hereby agree to submit to the jurisdiction of the Kenyan courts.
  9. Each of the parties hereby agrees and confirms for the purposes of the Law of Contract Act (Chapter 23, Laws of Kenya) and the Companies Act that it has executed this Agreement with the intention to bind itself to the contents hereof.

**IN WITNESS** **WHEREOF** this Agreement has been duly executed the year and date first hereinabove written:

**SIGNED** on behalf of **\_\_\_\_\_\_\_\_\_\_\_** ]

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ LIMITED** ]

by: ]

]

Director ] ……………………..

]

**In the presence of** ]

]

**Witness** ] Signature: ……………………………..

] Name: ……………………………..

] Date: ……………………………..

**SIGNED** on behalf of **\_\_\_\_\_\_\_\_\_\_\_** ]

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ LIMITED** ]

by: ]

]

Director ] ……………………..

]

**In the presence of** ]

]

**Witness** ] Signature: ……………………………..

] Name: ……………………………..

] Date: ……………………………..

**Drawn By:-**

**CM Advocates LLP**

I & M Bank House, 7th Floor

2nd Ngong Avenue

P.O. Box 22588 - 00505

**Nairobi.**

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**EXHIBIT**

**SOFTWARE SPECIFICATIONS**