ORGANIZATION: **CM ADVOCATES LLP**

DEPARTMENT: **CORPORATE COMMERCIAL**

DOCUMENT**: SOFTWARE PURCHASE AND IMPLEMENTATION AGREEMENT**

LAST MODIFIED:

**Notes:**

1. This precedent is intended to act as a guide in drafting the Purchase and Implementation Agreement. It may be modified or amended as need may be.
2. This template is applicable in case of Rendering various purchase and implementation.

## SOFTWARE PURCHASE AND IMPLEMENTATION AGREEMENT

Dated 2021

**between**

**[PARTY 1]**

**(the “Supplier”)**

**and**

**PARTY 2**

**(the “Purchaser”)**

**-in respect of-**

**[ ]**

**Drawn By: -**



I&M Bank House, 7th Floor

2ndNgong Avenue

P.O. Box 22588-00505,

**Nairobi.**

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**SOFTWARE PURCHASE AND IMPLEMENTATION AGREEMENT**

This Software Purchase and Implementation Agreement is dated ………………………..day of …………………………20… by and **BETWEEN**:

**Parties**

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 **“Supplier”** which expression shall where the context so requires, include its successors in title and permitted assigns) of the one part;

AND

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 **“Purchaser”** which expression shall where the context so requires, include its successors in title and permitted assigns) of the one part.

As the context may require, “Purchaser” and “Supplier” and are hereinafter collectively referred to as “Parties” and individually as “Party”.

**WHEREAS**:

1. The Supplier is able to provide the Software Purchase and Implementation Service (herein after referred to as the “**Service**”) required by the Purchaser, and which service is to be rendered by the Supplier to the Purchaser as described herein.
2. The Purchaser desires to procure and the Supplier is prepared to provide the Service subject to the terms and conditions as set out in this agreement

**NOW THIS AGREEMENT WITNESSES AS FOLLOWS: -**

# Definitions and Interpretation

* 1. In this Agreement and the Appendices and/or Special Terms hereto, the words and terms defined in this section will have the meanings ascribed to them, unless inconsistent with or otherwise required by or indicated in the context”
     + 1. “**Agreement**” means the whole formed by these contractual provisions, complemented where applicable, by the Appendices and/or Special Terms, signed by both Parties, to the exclusion of any other document, notably those which may be issued by the Purchaser before or after the execution of the Agreement.
       2. “**Appendices and Special Terms**” means and includes all documents attached to this agreement and signed by the parties. These are deemed to be incorporated in and form an integral part of this Agreement.
       3. “**Business Application System**” means the software, which comprises a set/suite of pre-developed packaged software tools listed in Clause 3.1.1.
       4. “**Designated Sites**” means the Purchaser’s offices at [Address for the Purchaser] indicated to the Supplier by the Purchaser for the purpose of rendering the Service;
       5. “**Effective Date**” means the [the date of this agreement OR the date set out in Schedule 1].
       6. “**Parties**” means the Supplier and the Purchaser collectively and “**Party**” shall mean either one of the Parties;
       7. “**Purchaser**” means (Insert Company’s Name and address);
       8. “**Proprietary Information**” means and includes the policies, procedures, knowledge, processes, systems, financial and business information, methodologies, documentation or any other information reasonably identified as confidential and proprietary information to either the Supplier or the Purchaser.
       9. “**Project Steering Committee**” means a committee consisting of representatives from the Parties that would meet at pre-determined intervals to review the progress of the Project.
       10. “**Requirement Specification**” means a report to be produced by the Supplier following an initial analysis of the Purchaser’s business that summarises the Purchaser’s requirements from the business application system being implemented and the Supplier will configure the business application system to meet these documented requirements.
       11. “**Service**” means the technical support and/or consultancy services provided by the Supplier on Purchaser’s initiative, and under the Purchaser’s technical supervision and responsibility.
       12. “**Super User**” means an employee of the Purchaser who has a sound knowledge of a key area of the Purchaser’s business and its business applications as they are processed at present. The Super User is appointed to the project team and actively participates in the project so as to ensure that the requirements for the business area he/she is knowledgeable in are met by the new system.
       13. “**Supplier**” means (Insert Company’s name and address);
       14. “**System**” means the business application system configured and customized to meet the Purchaser’s requirements as set out in the Business Requirements Specification Report to be derived using reasonable standards.
  2. In this Agreement, unless the contrary is expressly stated or appears clearly from the context:
     + 1. The preamble forms part of this Agreement;
       2. The headings to the clauses are for ease of reference only and shall play no part in the interpretation thereof;
       3. The singular shall include the plural and *vice versa;*
       4. References to any gender shall include the other gender;
       5. Words and phrases defined in any clause will, for the purpose of that clause and in any other clause of the Agreement where appropriate, bear the meaning therein assigned to them;
       6. References to “clauses’ and “sub-clauses” will be to clauses and sub-clauses of this Agreement, unless otherwise indicated;
       7. This Agreement constitutes the entire Agreement between the Parties. No amendments, additions, deletions, substitutions or variations thereof shall be valid unless reduced to writing and signed by both Parties;

# Commencement and Duration

* + 1. This Agreement shall commence on the Effective Date referred to in Clause 1.4 and shall remain in force for an initial period of **(state the period and time it shall remain in force)** for Service implementation with subsequent annual renewals for maintenance Services as per the Service Level Agreement (SLA) to be agreed after Service implementation unless terminated in accordance with the terms and conditions as set out herein.

# Remuneration:

* 1. **The Purchase Price and Schedule of Business Application System Modules**
     + 1. The Purchaser shall pay the Supplier the amounts set out in the table below for the business application system modules being supplied, installed, tested, implemented, and commissioned by the Supplier. These amounts are inclusive of Value Added Tax at 16%.

|  |  |
| --- | --- |
| **Purchaser’s Company** | **Price (KES)** |
| **Description** |  |

Note: License fees include support for the first 12 months.

* + - 1. The total price of the business application system modules being supplied, installed and implemented (Kenya Shillings….) will be payable by the Purchaser on placing the order with the Supplier as set out in Clause 6.2.1 below.
      2. The software will allow implementation at the Supplier’s head office location as defined in Clause 1.3.
      3. The Enhancement Plan is compulsory in the first year and provides free upgrades media up to the first anniversary date of purchase. Thereafter it is optional, and its cost for subsequent terms of the Agreement will be computed as a percentage of the then ruling retail price of the software. The Supplier will only supply additional licences and modules to customers who are current on the Enhancement Plan.
  1. **Schedule of Prices for Implementation Services**
     + 1. The Purchaser shall pay the Supplier the amounts set out in the table below for the technical support and/or consultancy services provided by the Supplier during the implementation of the business application system modules supplied under Clause 3.1.1 above. These amounts will be subjected to Value Added Tax at the applicable rates at the time of invoicing under Clause 5.

|  |  |
| --- | --- |
| **SUPPLIER’S COMPANY NAME** | **Price (KES)** |
| **Description** |  |

* + - 1. The implementation service covers the following functional areas:
         1. HRMS – ---- employees
         2. Payroll Module
         3. Appraisal Module
         4. Leave Module
         5. Back office recruitment module

# Disbursements

* + 1. All reasonable and justifiable costs of disbursements incurred by the Supplier in providing the Service shall be paid by the Purchaser. These costs will include airfare, accommodation and local travel expenses as well as reasonable maintenance expenses for the Supplier’s project implementation team.

# Invoicing

* 1. The Supplier shall invoice the Purchaser in the following manner, and the Purchaser acknowledges that the Supplier's invoices are payable First in advance and the second payment within **(state the number of days**) after presentation and subject to proof of delivery.
  2. **System Modules Invoice:**
     1. On receipt of the Purchase Order or signing of the Contract, the Supplier shall invoice the Purchaser for the amounts set out in Clause 3.2.1 for the business application system modules being supplied, installed and implemented.
  3. **Mobilisation Fees:**
     1. The Supplier shall invoice a mobilisation fee of \_\_\_\_\_\_\_\_\_ Percent (\_\_%) of the license cost and Fifty percent (50%) of the Implementation Cost of the implementation and training services set out under Clause 3.2.1 above within fourteen (**state number of days**) days after the receipt of the purchase order or signing of the Contract. This will amount to **(KShs state the amount)** for License Cost and **(KShs state the amount)** for implementation totalling to **(KShs state the amount)**
  4. **System Completion and Handover Fees:**
     1. Upon system completion and handover, the Supplier shall invoice for **(a percentage as agreed upon by the parties**) of the License Amount (Excluding the latest addition of the Back Office Recruitment Module) and the Percentage of the Implementation Amount set out under Clause 3.2.1 above, and full cost of the Back Office Recruitment Module. This will amount to **(KShs state the amount** for the original License package, **(KShs state the amount** for the Implementation and **(KShs state the amount)** for the back office recruitment module. Totalling to **(KShs state the amount)**
  5. **Annual Enhancement Fees and Post Implementation Service Level Agreement**
     + 1. The Supplier will invoice the Purchaser for the annual software enhancement fee on the anniversary of the Effective Date annually in the future.
       2. The annual charges for the post implementation support services will be **(a percentage as agreed upon by the parties**) of the license fees i.e **(KShs state the amount)** The nature of the support services will be discussed and agreed towards the end of the implementation project and covered through a separate service level agreement.

# Obligations of the Purchaser

* + 1. In addition to and without in any way limiting its other obligations as stipulated in this Agreement, the Purchaser shall:
       1. Appoint a Project Manager from senior management to act as the project coordinator between the Parties. The Project Manager will be (in addition to the Purchaser’s management) be the person to be contacted by the Supplier for all information and authorisations required by the Supplier. The Purchaser hereby warrants that the Project Manager will have the authority to decide any and all the issues arising out of the Agreement. The Project Manager shall be responsible to ensure the utmost good state of co-operation between the Purchaser and the Supplier.
       2. Give the Project Manager the power to approve the system requirements so that there are no delays in obtaining sign-offs. The Project Manager’s sign-off shall be binding on the Purchaser so that there are no misunderstandings about the system requirements. Such sign-offs will be provided in a timely manner and where they are not obtained the rectification needed to obtain sign-off shall be clearly communicated to the Supplier in writing.
       3. Make available to the Supplier a core team of Super Users who are knowledgeable in all the key areas of the Purchaser’s business. These may need to be dedicated to the project on a full time basis during the implementation. This maximises knowledge transfer to Purchaser’s staff while ensuring that key Purchaser requirements are met by the new system.
       4. Consult with the Supplier’s Project Manager well in advance before deciding on proposed changes of its requirements or in the conduct of any work required from the Supplier in respect of the project, which decision shall be captured in writing and signed by both Parties.
       5. Make available to the Supplier, all the necessary hardware and software environment and in general all the means necessary for performance of the Agreement (including but not limited to offices, services and equipment). Any such means shall be made available to the Supplier under normal access conditions including the strict requirement of confidentiality.
       6. Make available to the Supplier all opening balances, master records, transaction data, required reports, file formats and analysis structures as they are required during the implementation. Any data purification or preparation required to transfer data to the new system as well as actual data input is the responsibility of the Purchaser. Amendments to the surrounding business procedures will be the responsibility of the Purchaser. The Supplier will, however, provide advice and guidance on such amendments as required by the Purchaser.
       7. Fully comply with the software contract and software licensing arrangements throughout the duration of this Agreement so that such software contract and software licensing arrangements remain in force throughout the period during which the Supplier is to provide the Service.
       8. Pay the Supplier for all software and Services supplied under the terms and conditions as set out in this Agreement.
       9. Provide the Supplier in due time with all documents, information and reports and generally all the means necessary for the Supplier to provide its Service.

# Additional Obligations of the Purchaser

* 1. The Purchaser is fully aware that computer services require its active and regular collaboration and undertakes to participate fully in this implementation.
  2. Whereas the Purchaser will enter into a proper licensing arrangements with such software development company as the Supplier agrees in writing with the Purchaser before execution of the Agreement and that the necessary software which is the subject of those licensing arrangements is purchased from the Supplier; it is expressly understood that it will be the sole responsibility of the Supplier to facilitate such procuring and the Purchaser getting into such licensing arrangements.
  3. The Supplier supplies the Business Application System set out in Clause 3.1.1 on the understanding that all restrictions and/or conditions imposed by the respective software development companies apply to the Purchaser. This includes, but is not restricted to the use, re-use, copying, copyright, alteration or tampering, disclosures or making available to third parties any documentation and/or software products.
  4. The Supplier supplies the release level of the software as advised by the respective software development companies. The upgrading of the software to new levels shall not be the responsibility of the Supplier unless agreed to in writing by both Parties under a separate agreement.
  5. The Purchaser will provide the Supplier’s staff on the assignment with office space without charge. This service will be used in a reasonable manner and solely for the purposes of and in connection with the provisions of Clause 6. Should the Supplier’s staff misuse the service, the Purchaser shall be entitled to deduct the loss accruing thereof from the fees payable to the Supplier under this Agreement.

# Obligations of the Supplier

* + 1. In addition to and without in any way limiting its other obligations as stipulated in this Agreement, the Supplier shall do the following work in terms of this AGREEMENT and guided by the approved Project Plan, which forms Appendix 1 of this Agreement.
       1. **Project Plan.** The Project Managers of the SUPPLIER and the PURCHASER will work together to produce a Project Plan before the commencement of the system implementation project. The Project Plan will detail the required system implementation tasks and outline the expected delivery time for each task. This Project Plan will be produced at the commencement of the Project and signed by the Project Managers representing both the Supplier and the Purchaser.
       2. **An initial requirement specification phase:** The Requirement Specification Report and the System Design Document agreed by the PURCHASER will serve as a configuration blueprint for the new system.
       3. **Installation of the business application system**: Following the requirement specification, the Supplier will install the business application system into the Purchaser’s Server Computer
       4. **Training for the Super Users** in the priority areas will follow thereafter. This training will be geared to providing them with the skills to help implement the new system. Training for Super Users in other areas will be done later in accordance with a training plan to be agreed.
       5. **System Configuration**. The business application system will be configured according to the specifications set out in the Requirements Specification Report to be agreed on by the Purchaser’s users and signed off by the Purchaser’s management team.
       6. **Unit Testing.** As the system configuration progresses, unit testing of the various modules will also be proceeding. This testing will ensure that the individual modules are working as required and formally accepted by the Purchaser.
       7. **System integration testing** will follow unit testing. This phase of testing will ensure that the different modules are working correctly together.
       8. **End-user Training.** After system integration testing and upon formal acceptance by the Purchaser is completed, the Super-Users assisted by the Supplier will embark on training of end-users. This is the final stage before going live.
       9. **Going Live Support.** Once the system has gone live, the Supplier will be on hand to assist in elimination of inevitable teething problems when any new system is first commissioned.
       10. **Warranty Period.** Once the system has gone live, the Supplier will offer free support as per the terms of the Support Contract for a period of Three (3) Months before the Annual Support Contract Agreement takes effect. For the purpose of this warranty period, the Supplier will not be required to be stationed at the Purchaser’s premises unless the circumstances require the physical presence of its staff BUT will as and when called upon by the Purchaser to provide the support promptly and diligently.

# Additional Obligations of the Supplier

* 1. The Supplier shall supply the Business Application System modules described in Clause 3.1.1 above.
  2. The Supplier undertakes to make available to the Purchaser the skills and resources required for technical support and/or consultancy as defined in this Agreement. The Supplier shall be entitled to sub-contract any part of the Services to a nominated sub-contractor as identified with prior written consent by the Purchaser.
  3. The Supplier shall appoint a Project Manager for the technical performance of the Agreement with the Purchaser.
  4. The Supplier shall determine the nature and the extent of the means required for the performance of the Agreement.
  5. The Supplier reserves the right to engage the Purchaser at any time in order to ensure that all the means required for the successful completion of the consultancy project are in place and at the disposal of the project team.
  6. The Services contemplated under this Agreement shall be carried out by the Supplier professionally and with all due dispatch, due care, accuracy and attention, and in compliance with the highest standard of relevant established current professional practice.
  7. The Supplier shall provide experienced personnel for the Service implementation.
  8. The Supplier shall observe and adhere to the Purchaser’s safety rules and regulations.
  9. The Supplier shall take out an adequate insurance cover for its personnel and equipment.

# Support Services

* + 1. The Service to be provided by the Supplier under this Agreement shall be confined to those in listed under Clause 6 above. If the Supplier is required to undertake any other support services for the Purchaser, such services will only be provided by the Supplier on terms set out in a separate Support Agreement to be entered into between the Supplier and the Purchaser.

# Intellectual Property Rights

* 1. The Supplier reserves copyright in any literary and artistic works and computer programs (the “**Works**”), which it has already produced through its own efforts prior to entering this Agreement or which it may produce or use in performing the Service pursuant to this Agreement. However, the Supplier hereby confirms that after full and complete payment of the Service, the Purchaser shall be entitled to make use of the system and the Works which result from the provision of the Service without hindrance or payment of any further fees or royalties PROVIDED THAT such use is confined strictly to use of the system or the Works for the exclusive purpose of the Purchaser’s business activities as disclosed by the Purchaser to the Supplier at the commencement of this Agreement. The Purchaser shall not be entitled to reproduce any of the Works or any part thereof in any material form without first seeking the written consent of the Supplier.
  2. The Supplier also reserves the right to use the knowledge and the know-how it has acquired during the performance of the Service entrusted to it.
  3. The Supplier is entitled to perform for itself or for third parties, services which are the same as the Service provided under this Agreement and to develop for itself or for third parties products which are identical, similar or competing with the products developed by its personnel for the Purchaser under this Agreement.
  4. If methods general or specific programs, software or software products, other tools in general, which the Supplier owns or in which the Supplier has been granted all necessary rights to perform the Service, are made available to the Purchaser, free of charge or otherwise, or are used to develop applications, they remain the Supplier’s or its licensor’s exclusive property. The Purchaser must take out a user licence for these programs in order to be able to use them lawfully.
  5. The Purchaser warrants and represents that it is the legitimate holder of all rights to use and modify and in general all intellectual property rights attached to the other software products and items it may make available to the Supplier. Should a claim be filed by a third party for infringement of any intellectual property rights, the Purchaser shall be personally responsible for and bear all consequences of such claim.
  6. The provisions of Clause 12 shall continue to bind the Parties notwithstanding any termination of this Agreement for whatever reason.

# Confidentiality

* 1. Each party undertakes that it shall not [at any time OR at any time during this agreement, and for a period of [five OR [NUMBER]] years after termination of this agreement,] disclose to any person any confidential information concerning the business, affairs, customers, clients or suppliers of the other party [or of any member of the group to which the other party belongs], except as permitted by clause 12.2(b). [For the purposes of this clause, group means, in relation to a party, that party, any subsidiary or holding company from time to time of that party, and any subsidiary from time to time of a holding company of that party.]
  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 12; 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.]

# No Efforts to Recruit Staff

* 1. Barring prior written agreement of the other Party, each Party shall refrain from making direct or indirect recruitment offers to any of the other party’s employees involved in providing the Service coming under the Agreement, or to hire such employee in any capacity whatsoever.
  2. This undertaking shall remain effective for the term of the Agreement plus twelve (12) months from its termination for whatever reason.
  3. In the event that one of the Parties does not comply with this obligation, it undertakes to indemnify the other Party by paying compensation equal to the total gross remuneration paid to the employee during the twelve (12) months preceding his departure.

# Force Majeure

* 1. For the purposes of this Deed, “Force Majeure” means an event which could not reasonably have been avoided by the Seller 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.
  2. 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.
  3. 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.
  4. 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.
  5. 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.
  6. 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.

# Termination of this Agreement

* 1. This Agreement may be terminated by either party giving to the other not less than one (1) calendar month written notice.
  2. This Agreement shall terminate upon the expiry of a notice given by either party in the circumstances described and otherwise in accordance with the provisions of clause 2.
  3. This Agreement shall terminate forthwith upon the written notice of either party to the other or upon such date as shall be specified therein in any of the following events: -
     + 1. that either party commits a breach of any provision of this Agreement and, where the breach is capable of remedy, fails to remedy the same within fourteen (14) days after receipt of a written notice giving full particulars of the breach and of the steps required to remedy it;
       2. an encumbrancer takes possession of or a receiver is appointed over any of the property or assets of that other party;
       3. that other party goes into liquidation (except for the purposes of amalgamation or reconstruction and in such manner that the Company resulting there from effectively agrees to be bound by or assumes the obligations imposed on that other party under this Agreement) or enters into a voluntary arrangement with its creditors;
       4. that other party ceases, or threatens to cease, to carry on business.
       5. The Purchaser will be entitled to terminate the contract forthwith if the Supplier’s licenses are withdrawn, cancelled or not renewed.
  4. The termination of this Agreement shall be without prejudice to any other right or remedy of either party in respect of the breach concerned (if any) or in respect of antecedent breaches.
  5. In the event of this Agreement being terminated or cancelled for whatever reason, the Supplier shall not be liable to refund any monies already paid to it by the Purchaser except for any advances given for uncompleted work.

# Applicable Law and Disputes

* + 1. This Agreement shall be governed by, and construed in accordance with the Laws of Kenya and all courts of competent jurisdiction shall be competent at judicators of any dispute arising herefrom

# Domicilia Citandi et Executandi

* 1. The PARTIES choose as their respective *domicilia citandi et executandi* the addresses stipulated in Clause 1.1.
  2. The said addresses are also chosen as their respective addresses for the purpose of any notice given in terms of this Agreement.
  3. Any Party is entitled, on written notice to the other, to substitute any other address for either of the addresses contemplated by Clauses 17.1 and 17.2, provided that in respect of the address contemplated by Clause 17.3, such substituted address is not a Post Office Box.

# Notices

* + 1. All notices in terms of this Agreement shall be:
       1. in writing;
       2. sent to the addressee at the address contemplated by Clause 18.1 for that
       3. posted by registered post or be delivered to such address by hand; and
       4. deemed to have reached the addressee:
          1. If posted, on the (State business date) after the date of mailing thereof; or
          2. If delivered, on the day of delivery, proof of the contrary resting on the addressee.
          3. In the case of notices sent by facsimile the same shall be deemed to have been received on the date of transmission, provided the transmission is verified by a transmission report from the sender’s fax machine confirming the “OK” transmission of the entire fax. In the case of notices sent by e-mail, the same shall be deemed to have been received on the date of receipt as confirmed to the sender by the recipient’s mail server.

# Cession, Novation and Indemnification

* 1. Both parties shall not, without the other’s consent in writing first being had and obtained, cede any of its rights or obligations in terms of this Agreement to any third party.
  2. No extension of time or any other indulgence granted by either Party to the other shall be construed to be a novation of any term or condition of this Agreement, or prejudice any rights of the Party granting such extension or indulgence.
  3. The Purchaser shall indemnify the Supplier for the amount of any judgment and costs, including the Supplier's costs as between attorney and own client occasioned thereby, in any and all actions that may be instituted against the Supplier for the infringement of any copyright or patent applicable to the System.
  4. The Supplier’s work will be carried out as directed by the Purchaser for specific purposes. The Supplier’s reports are prepared for and are confidential to the Purchaser. The Supplier cannot accept responsibility or liability to third parties who may be shown the Supplier’s reports or who on their own volition may decide to rely on them.
  5. All recommendations are made in good faith and on the basis of information available at the time. Their achievement depends to a degree on factors outside the Supplier’s control. In consequence, no statement in any report or letter is to be deemed to be in any circumstances a representation, undertaking, warranty or contractual term and no claim whatsoever will be against us if such statement proves inaccurate.
  6. The Supplier will be liable to the Purchaser for and shall indemnify the Purchaser for any damage, loss, expenses, costs, etc arising from or out of any negligent and/ or careless representation made by the Supplier and on which the Purchaser acts on in good faith to its detriment subject to Clause 9.
  7. The Supplier, its directors, employees and agents (hereinafter collectively referred to as Supplier) shall not be liable for any loss, damages, costs or expenses directly or indirectly incurred as a result of information supplied by, or misrepresentations, fraudulent acts or wilful default on the part of the Purchaser, its directors, employees or agents. The Purchaser indemnifies the Supplier and holds it harmless against it by any party whatsoever in respect of any such loss, damages, costs or expenses and against the actual costs incurred by the Supplier in defending such claims.
  8. The Supplier shall accept liability to pay damages for losses arising as a direct result of breach of contract or negligence on their part.
  9. The Supplier will not be liable to the Purchaser or any cessionary or third party claiming through or on behalf of the Purchaser for any punitive damages whatsoever or for any consequential or other loss or damages beyond the maximum liability specified.
  10. Any claims, howsoever arising, must be commenced formally by service of court summons or process initiating arbitration proceedings within the period stated by Kenyan Law after the party bringing the claim becomes aware (or ought reasonably to have become aware) of the facts which give rise to the claim.

# Representations

* + 1. The Parties place on record that no representations of whatever nature other than those contained herein were made by either of them to induce the other to enter into this Agreement.

# Access to Software and Data

* + 1. In the event that the Supplier, for whatever reason, ceases business, the Purchaser shall be entitled to receive, the software licenses of the Business Application System as well as the data therein.

# Divisibility

* + 1. Should any stipulation in this Agreement prove to be legally wrong, it shall not render the entire Agreement invalid, and the remainder remains enforceable between the parties.

# Assignment of Agreement

* + 1. Both parties shall not be entitled to assign, transfer or dispose of any of its rights or obligations herein to any person with the prior written consent of the other Party.

# No Agency or Partnership

* + 1. The Supplier is an independent contractor and nothing in this Agreement shall constitute or be deemed to constitute a partnership between the parties hereto or constitute the Supplier as an agent of the Purchaser for any purpose whatsoever and the Supplier shall have no authority or power to bind the Purchaser or contract in the name of and create a liability against the Purchaser in anyway or for any purpose.

# Waiver & Amendment

* + 1. No waiver, alteration, variation or addition to this Agreement shall be effective unless made expressly in writing on or after the date of execution of this Agreement by both parties and accepted by an authorized signatory of both parties.

# Status of Supplier’s Employees, Agents, etc

* + 1. The Supplier’s employees are the employees of the Supplier and at no given time whatsoever will they be treated as the Purchaser’s employees. Nothing in the Agreement shall establish the relation of master and servant as between the Purchaser and the Supplier’s employees.

# Liability

* 1. The Supplier warrants that the Service shall be performed in accordance with this Agreement. In the event that it is demonstrated that the Service given, have not been performed in accordance with this Agreement, then the Supplier’s sole liability for such non-performance shall be to rectify the non-performance by further work at its own cost. The Supplier shall not be liable to perform any further work pursuant to this warranty unless the Purchaser makes a written claim for non-performance within one (1) month after the performance of the Service by the Supplier.
     1. The Purchaser and the Supplier will mutually agree the extent of the non-performance within 7 days after the receipt of the written claim. Any work approved by sign-off by the Purchaser’s Authorised Representative cannot after be classified as non-performance.
  2. **Loss of Data**
     1. The Purchaser undertakes to provide the Supplier’s employees only with copies of its documents and data and therefore waives any right to claim liability on the Supplier part in case of loss, destruction or damage to such files, data or to any other document. Accordingly, it shall be the Purchaser’s responsibility to protect itself by any means at its discretion against any risks, which may be incurred thereby. Provided that the Supplier shall indemnify the Purchaser for any loss of the Purchaser’s data on its system arising from the Supplier’s negligence in the performance of the Services.
  3. **Limitation of Liability**
     1. The Supplier shall not be liable for any indirect damage, irrespective of the grounds, such as loss of income, commercial or financial loss or increased expenses, due to recourse by a third party, as well as any damage to persons or property outside the scope of this Agreement.

# Dispute Resolution

* 1. **Good Faith Negotiations**
     1. 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.
  2. **Mediation**
     + 1. If the dispute has not been settled pursuant to the Good Faith Negotiations under clause 28.1 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.
  3. **Arbitration**
     + 1. If the dispute has not been settled pursuant to Good Faith Negotiations under Clause 28.1 or under Mediation under clause 28.2 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 a Party 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 Parties 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**

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2nd Ngong Avenue

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