## **SALE AND PURCHASE OF GOODS AGREEMENT**

## SALE AND PURCHASE OF GOODS AGREEMENT

**DATED 2021**

**BETWEEN**

**[PARTY 1]**

**(THE “SELLER”)**

**AND**

**PARTY 2**

**(THE “BUYER”)**

**-IN RESPECT OF-**

**[ ]**

**Drawn By: -**



I&M Bank House, 7th Floor

2ndNgong Avenue

P.O. Box 22588-00505,

**Nairobi.**

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

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This Sale of Goods Agreement is dated ………………………..day of …………………………20…

Parties

1. [FULL COMPANY NAME] a limited liability company incorporated in the Republic of Kenya with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (Seller); and
2. [FULL COMPANY NAME] a limited liability company incorporated in the Republic of Kenya with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (Buyer).

Agreed terms

# Interpretation

* 1. **Definitions:**
     + 1. Business Day: a day other than a Saturday, Sunday or public holiday in Kenya, when Banks in Kenya are open for business.
       2. Delivery Date: [the date of this agreement **OR** the date set out in Schedule 1].
       3. Delivery Location: the address for delivery set out in Schedule 1.
       4. [Documentation: all documents [, plans] [, drawings] [, service documents] [, user manuals] [and operating manuals] relating to the Asset.]
       5. Goods means the goods listed in the First Schedule.
       6. Intellectual Property Rights: patents, utility models, rights to inventions, copyright related rights, trademarks and service marks, business names and domain names, rights in get-up, goodwill and the right to sue for passing off or unfair competition, rights in designs, rights in computer software, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets) and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.
       7. Interest Rate: the rate of 18% per annum.
       8. Payment Date[s]: the date of this agreement **OR** the date[s] for payment of the Price set out in Schedule 1.
       9. Price: the price for the Goods as set out in Schedule 1 **OR** the price is the aggregate of the amounts attributed to the Goods set out in Schedule 1.
       10. Specification: the specification for the Goods [including any related plans and drawings], set out in Schedule 2.
       11. VAT: value added tax or any equivalent tax chargeable in the Kenya.
  2. **Interpretation:** 
     + 1. a reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision;
       2. any phrase introduced by the terms **including**, **include**, **in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms; and
       3. a reference to **writing** or **written** includes [faxes and] emails.

# Sale and purchase

* + 1. The Seller sells and the Buyer buys the Goods [free from all liens, charges and encumbrances **OR** subject to those encumbrances listed in Schedule 3].

# The Goods

* 1. The Goods shall:
     + 1. correspond with their description [and the Specification];
       2. be of satisfactory quality;
       3. be fit for any purpose held out by the Seller or made known to the Seller by the Buyer expressly or by implication, and in this respect the Buyer relies on the Seller's skill and judgement;
       4. be free from defects in design, material and workmanship and remain so for [12 **OR** [NUMBER]] months after Delivery; [and]
       5. comply with all applicable statutory and regulatory requirements; [and]
       6. [[INSERT OTHER OBLIGATIONS].]
  2. The Seller shall ensure that at all times it has and maintains all the licences, permissions, authorisations, consents and permits that it needs to carry out its obligations under the agreement.

# Inspection and testing of the Goods

* 1. The Seller shall:
     + 1. carefully inspect and test the Goods before delivery to ensure that it complies with the requirements of the Specification for the Goods; and
       2. if so requested by the Buyer, give the Buyer reasonable advance notice of such tests, which the Buyer shall be entitled to attend.
  2. If, as a result of any inspection or test of the Goods, it is found that the Goods or any components comprised within it do not comply with the Specification, the Seller shall take such steps as are necessary to ensure compliance.
  3. The Buyer may conduct further inspections and tests after the Seller has carried out its remedial actions.

# Price and payment

* 1. The Buyer shall pay the Price in [INSERT THE CURRENCY] in accordance with this clause 5. Payment shall be made to the bank account nominated in writing by the Seller.
  2. The Price:
     + 1. excludes amounts in respect of VAT, which the Buyer shall additionally be liable to pay the Seller at the prevailing rate, subject to the receipt of a valid VAT invoice; and
       2. includes all costs of packaging, delivery, carriage, out-of-pocket expenses and insurance.
  3. No extra charges shall be effective unless agreed in writing and signed by the Buyer.
  4. The Seller may invoice the Buyer for the Price plus VAT at the prevailing rate (if applicable) on or at any time after the completion of delivery. The Seller shall ensure that the invoice includes the date of the sale, the invoice number, [the Buyer's order number,] the Seller's VAT registration number, and any supporting documentation that the Buyer may reasonably require.
  5. The Buyer shall pay the Price within [30 **OR** [NUMBER]] days of receipt of a correctly rendered invoice. Payment shall be made to the bank account nominated in writing by the Seller.
  6. The Buyer may at any time, without limiting any of its other rights or remedies, set off any liability of the Seller to the Buyer against any liability of the Buyer to the Seller.

# Delivery

* 1. The Seller shall deliver the Goods [and Documentation] to the Buyer at the Delivery Location on the Delivery Date.
  2. Time is of the essence as to the delivery of the Goods. If the Seller fails to deliver the Goods on the Delivery Date, the Buyer may, without prejudice to any other rights or remedies that it may have:
     + 1. terminate the Agreement without incurring any liability to the Seller and the Seller shall return any Price or part of the Price paid within five (5) Business Days from the date of termination of the Agreement; and
       2. hold the Seller accountable for and loss or additional costs incurred.
  3. Delivery is completed on the completion of [loading **OR** unloading] [[and assembly **OR** and installation]] of the Goods at the Delivery Location [and subject to completion of [standard] [installation] [and] [acceptance tests]].

# Title and risk

* + 1. The title and risk in the Goods shall pass to the Buyer on completion of delivery.

# Manufacturer's warranties

* 1. To the extent that the benefit of any warranties made by the manufacturer of the Goods to the Seller can be assigned to the Buyer, the Seller shall, if requested by the Buyer and at the cost of the Buyer, assign them to the Buyer.
  2. Until such assignment, the Seller will co-operate with the Buyer in any reasonable arrangements to provide the Buyer with the benefit of such warranties or like conditions including enforcement at the cost of and for the benefit of the Buyer.

# Buyer's remedies

* 1. If the Goods are not delivered on the Delivery Date, or if there is a breach of any of the provisions set out in clause 3, then, without limiting any of its other rights or remedies, and whether or not it has accepted the Goods, the Buyer may exercise any one or more of the following remedies:
     + 1. reject the Goods and return them to the Seller at the Seller's own risk and expense;
       2. require the Seller to repair or replace the Goods, and provide a full refund of the Price of the rejected Goods [(if paid)];
       3. recover from the Seller any costs incurred by the Buyer in obtaining substitute goods from a third party;
       4. claim damages for any other costs, loss or expenses incurred by the Buyer which are in any way attributable to the Seller's failure to carry out its obligations under the agreement; and
       5. terminate the agreement.
  2. If the Goods are not delivered on the Delivery Date, the Buyer may at its option claim or deduct [NUMBER]% of the Price of the Goods for each week's delay in delivery by way of liquidated damages, up to a maximum of [NUMBER]% of the Price. If the Buyer exercises its rights under this clause 9.2 it may not exercise any of the remedies set out in clause 9.1, in respect of the Asset's late delivery (but such remedies shall be available in respect of the Goods condition).
  3. The Buyer's rights and remedies under this clause 10 are in addition to its rights and remedies implied by statute and common law, and shall apply to any repaired or replacement Asset supplied by the Buyer.

# Indemnity

* 1. The Seller shall indemnify the Buyer against all liabilities, costs, expenses, damages and losses including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other [reasonable] professional costs and expenses suffered or incurred by the Buyer as a result of or in connection with any claim made against the Buyer:
     + 1. for actual or alleged infringement of a third party's Intellectual Property Rights arising out of or in connection with the supply of the Goods, to the extent that the claim is attributable to the acts or omissions of the Seller, its employees, agents or subcontractors;
       2. by a third party for death, personal injury or damage to property arising out of or in connection with defects in the Goods, to the extent that the defects in the Goods are attributable to the acts or omissions of the Seller, its employees, agents or subcontractors; and
       3. by a third party arising out of or in connection with the supply of the Asset, to the extent that such claim arises out of the breach, negligent performance or failure or delay in performance of the agreement by the Seller, its employees, agents or subcontractors.
  2. If any third party makes a claim, or notifies an intention to make a claim, against the Buyer that may reasonably be considered likely to give rise to a liability under this indemnity (Claim), the Buyer shall:
     + 1. as soon as reasonably practicable, give written notice of the Claim to the Seller, specifying the nature of the Claim in reasonable detail;
       2. not make any admission of liability, agreement or compromise in relation to the Claim without the prior written consent of the Seller;
       3. give the Seller and its professional advisers access at reasonable times (on reasonable prior notice) to its premises and its officers, directors, employees, agents, representatives or advisers, and to any relevant assets, accounts, documents and records within the power or control of the Buyer, to enable the Seller and its professional advisers to examine them and to take copies (at the Seller's expense) to assess the Claim; and
       4. be deemed to have given the Seller sole authority to avoid, dispute, compromise or defend the Claim.
  3. This clause 10 shall survive termination of the agreement.

# Buyer materials

* 1. The Seller acknowledges that all materials, equipment and tools, drawings, Specification, and data supplied by the Buyer to the Seller (Buyer Materials) and all rights in the Buyer Materials are and shall remain the exclusive property of the Buyer.
  2. The Seller shall keep the Buyer Materials in safe custody at its own risk, maintain them in good condition until returned to the Buyer, and not dispose of or use the same other than in accordance with the Buyer's written instructions or authorisation.

# Limitation of liability

* + 1. Nothing in this agreement shall limit or exclude the Seller'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;
       3. breach of the terms implied by section 12 of the Sale of Goods Act 1979;
       4. any matter in respect of which it would be unlawful for the Seller to exclude or restrict liability; or
       5. [OTHER].

# Termination

* 1. Without limiting its other rights or remedies, the Buyer may terminate the agreement with immediate effect by giving written notice to the Seller if:
     + 1. the Seller 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 Seller 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 Seller 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 Seller's financial position deteriorates to such an extent that in the Buyer's opinion the Seller'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**
     + 1. 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.
       2. Not later than fourteen (14) days after Manish, 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.

# Dispute Resolution

* 1. **Good Faith Negotiations**
     1. In case of any dispute arising out of this Deed 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 15.1 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 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 15.1 or under Mediation under clause 15.2 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.

# 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 14 (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 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.]

# Time of the Essence

* + 1. Time shall be of the essence in respect of all the obligations of the Buyer under this Agreement.

# Entire agreement

* 1. This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
  2. Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement. Each party agrees that it shall have no claim for innocent or negligent misrepresentation [or negligent misstatement] based on any statement in this agreement.

# Variation

* + 1. No variation of this agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

# Waiver

* + 1. No failure or delay by a party to exercise any right or remedy provided under this agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

# Severance

* 1. If any provision or part-provision of this agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this agreement.
  2. If any provision or part-provision of this agreement is deemed deleted under clause 17(a), the parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

# Further assurance

* + 1. Each party shall, and shall use all reasonable endeavours to procure that any necessary third party shall, promptly execute and deliver such documents and perform such acts as may be required for the purpose of giving full effect to this agreement.

# Notices

* 1. Any notice or other communication given to a party under or in connection with this agreement shall be in writing, addressed to that party at its registered office or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally, or sent by pre-paid first class post or other next working day delivery service, commercial courier, [fax] or email.
  2. A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to in clause 23(a); if sent by pre-paid first class post or other next working day delivery service, at [9.00 am on the second Business Day after posting; if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed; or, if sent by [fax or] email, one Business Day after transmission.
  3. The provisions of this clause do not apply to the service of any proceedings or other documents in any legal action.

# Third party rights.

* + 1. No one other than a party to this agreement shall have any right to enforce any of its terms.

# Assignment and other dealings

* 1. This agreement is personal to the Buyer and the Buyer shall not without the prior written consent of the Seller (which consent may be conditioned at the sole discretion of the Seller) assign, transfer, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any of its rights and obligations under this agreement.
  2. The Seller may assign, transfer, charge, declare a trust over or deal in any other manner with any of its rights and obligations under this agreement.

# Authority to Execute

* 1. The Parties warrant that the individuals executing this Agreement on behalf of each Party has been fully empowered to execute this Agreement on behalf of such Party and that all necessary corporate action to authorize the execution of this Agreement has been taken by such Party.
  2. The execution and delivery of this Agreement, and the performance by either party of its obligations under this Agreement, will not result in a breach of any provision of, or constitute a default under, any agreement or instrument to which it is a party or by which it is bound.

# No Agency or Partnership

* 1. Nothing in this Agreement shall create or be deemed to create a partnership or agency between the Parties and neither Party shall enter or have authority to enter into any agreement or make any representation or warranty on behalf of the other or pledge the credit of or otherwise bind the other Party.
  2. Each party confirms it is acting on its own behalf and not for the benefit of any other person.

# Survival

* + 1. Notwithstanding completion or termination of this Agreement, this Agreement shall remain in full force with regards to anything remaining to be done performed or observed hereunder.

# Non-exclusivity

* + 1. The rights and remedies provided by this Agreement are cumulative and not exclusive of any rights or remedies provided by law.

# Conclusive Evidence

* + 1. This Agreement shall be sufficient evidence of the matters specified herein and may be produced in court as evidence of the matters specified herein without the need to call for further or other evidence.

# Costs

* + 1. [The parties shall each bear their own legal costs in relation to the preparation, negotiation and enforcement of this Agreement.] OR [The Buyer shall bear and pay the costs of negotiating, drafting, preparing and implementing this Agreement. The Buyer shall bear the costs of stamping this Agreement.

# Counterparts

* 1. This agreement may be executed in any number of counterparts, each of which when executed [and delivered] shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.
  2. No counterpart shall be effective until each party has executed [and delivered] at least one counterpart.

# Governing law

* + 1. This Agreement shall be governed by and construed in accordance with the law of Kenya.

**IN WITNESS** whereof the Parties have executed this Agreement on the day and year first set forth above.

Schedule 1 Asset, price, payment and delivery

Goods

[DETAILS OF ASSET]

Related items

[DETAILS OF ANY RELATED ITEMS]

Price

[PRICE]

Payment Date [s]

[The date of this agreement

**OR**

[PAYMENT DATE]

**OR**

[AMOUNT] ([NUMBER]%) on signature of this agreement and [AMOUNT] ([NUMBER]%) on completion of [delivery **OR** acceptance] of the asset.]

Delivery Date

[DELIVERY DATE]

Delivery Location

[DELIVERY LOCATION]

Schedule 2 [Specification]

[INSERT SPECIFICATION]

Schedule 3 [Encumbrances]

|  |  |
| --- | --- |
| **Asset** | **Encumbrance** |
| [DETAILS OF ITEM] | [DETAILS OF ENCUMBRANCE] |