

SIKIKA 2 – INDEPENDENT HUMAN RIGHTS MECHANISM (IHRM)

STAKEHOLDERS' BRIEFING NOTE

1.0 INTRODUCTION

SIKIKA 2 is the second tier (Tier 2) of the Kakuzi company's Operational Grievance Mechanism (OGM), otherwise known as SIKIKA (to be heard). On the one hand, SIKIKA 1, the first tier (Tier 1) of the SIKIKA, is the internal component of the OGM meant to address operational impacts, health and safety or other grievances at the company level; on the other hand, SIKIKA 2 is the external component of the OGM, which is charged with both the responsibility and special mandate to undertake independent investigations into 'serious impacts on human rights violation that have been caused by, contributed to, or directly linked to Kakuzi and/or its (sub) contractors.'

Further, SIKIKA 2 is a non-judicial and Independent Human Rights Mechanism (IHRM) with its own procedures, supports and safe-guards to review complaints about serious impacts and provide remedy to victims of such impacts. The IHRM is supported, but **not controlled** by Kakuzi company

This Note is meant to give clarity, for avoidance of doubts, on the contextual background, the legal framework, the mandate and an operational overview of the IHRM.

2.0 CONTEXTUAL BACKGROUND

1. The SIKIKA OGM, derives its foundation and existence from three key sources namely, the United Nations Guiding Principles on Business and Human Rights (UNGPs), 2011, the Constitution of Kenya, 2010 and the National Action Plan on Business and Human Rights (2019). The Access to Information Act, 2016 enables the OGM's fact-finding initiatives.
2. In 2011, the United Nations Human Rights Council endorsed the United Nations Guiding Principles on Human Rights as the international **standard of business conduct** to ensure respect for human rights. The Principles are based on three pillars i.e. State Duty to Protect Human Rights, Corporate Responsibility to Respect Human Rights and Access to Remedy.
3. In 2019, Kenya as State-Party to the ratification of the UNGPs domesticated them through the development and adoption of the National Action Plan on Business and Human Rights, and in accordance with spirit of The Bill of Rights and Access to Information under the Constitution of Kenya, 2010.

4. In 2021, Kakuzi Plc, became the first company in Kenya to establish an OGM, initially with the internal component, and in 2022, the external and independent component (SIKIKI 2) which is overseen by the Independent Human Rights Advisory Committee (IHRAC) was formally launched.

3.0 LEGAL FRAMEWORK

The SIKIKI OGM is guided by an elaborate legal regime ranging from international to national Bill of Rights and human rights standards as summarised hereunder:

1. The UNGPs – The Principles are based on three pillars namely, *State Duty to Protect Human Rights; Corporate Responsibility to Respect Human Rights and Access to Remedy*. In particular, the following principles are key:
 - a. **Principle 28** – provides that the non-State-based grievance mechanisms include those administered by a business enterprise and which, though essentially non-judicial, may be adjudicative, dialogue based and rights-compatible.
 - b. **Principle 31** – provides effectiveness criteria for an OGM design, which includes legitimacy, accessibility, predictability, equitability, transparency, rights compatibility and a source of continuous learning.
2. The Constitution of Kenya, 2010 – The relevant provisions are as follows:
 - a. **Article 2** (5) and (6) – provides that the general rules of international law, and any treaty or convention ratified by Kenya, form part of the laws of Kenya.

Observation – Kenya is a State Party to the UNGPs as an international normative framework on Business and Human Rights.

- b. **Article 20** – provides that the Bill of Rights applies to all law and binds all State organs and all persons, who are defined in Article 260 as including a ‘*company, association or other body of persons whether incorporated or unincorporated.*’

Observation – This imposes human rights obligations on businesses, and presents victims of business-related human rights violations with an avenue to be heard and access remedy.

- c. **Article 35 (1)** - provides that every citizen has the right to access information held by the State or another person and required for the exercise or protection of any right or fundamental freedom.

Observation: Citizen includes any private entity that is controlled by one or more Kenyan citizen – section 2 of The Access to Information Act, 2016.

3. The Access to Information Act, 2016 – Section 4 re-affirms the right to information and that access to information *held* by a public entity, or private body shall be provided expeditiously and on the basis on a duty to disclose, but subject to limitation of right of access to information under Section 6.
4. The National Action Plan on Business and Human Rights, 2019 – sets out priority on two critical areas as follows:
 - a. Policy Action - the Government will in line with Article 159 of the Constitution and through State-based judicial and **non-judicial mechanisms** promote the use of Alternative Dispute Resolution (ADR) in dealing with disputes between businesses and those harmed by their operations.
 - b. Victims of corporate abuses should have access to **operational-level grievance mechanisms** established by business, where workers, local communities and civil society advocates acting on behalf of individuals and communities negatively impacted by businesses, may lodge their complaints and receive a just outcome such as compensation, guarantee of non-repetition by the offender, apology, restitution or rehabilitation.

Observation: Notwithstanding the fact that Article 159 of the Constitution of Kenya, 2010 provides for Judicial authority vested in courts and tribunals, the provisions under sub-article (2)(c) on alternative forms of dispute resolution including reconciliation, mediation and arbitration are relevant to non – judicial mechanisms too in facilitating formal avenues for access to remedy options.

4.0 IHRM MANDATE

- a. To facilitate access to remedy for bona fide grievances about severe human rights impacts that are caused by, or are directly linked with Kakuzi's operations and business relationships.

- b. To ensure that all safeguards and relevant supports will be provided to any complainant of severe human rights impacts that have been caused by, contributed to, or are directly linked with Kakuzi and/or its (sub) contractors.
- c. To **collect** and **compile** the **information** and **evidence** available related to grievances regarding allegations of severe human rights impacts in an impartial, thorough and rights-respecting manner.
- d. To **provide recommendation** to Kakuzi and the Independent Human Rights Advisory Committee for unresolved complaints and/or grievance prevention, and
- e. To **independently investigate** allegations of retaliation as a result of complaints lodged through either Tier 1 or Tier 2 of SIKIKA.

5.0 OPERATIONAL OVERVIEW

1. The IHRM is headed by a Senior Lawyer (retired Judge) and ably assisted by a team of experienced investigators and other lawyers. The team has both professional capability and capacity to undertake credible/in-depth fact-finding in the collection and compilation of relevant information and evidence related to complaints of severe human rights impact and to make appropriate recommendations to inform determination of the merit or demerit of each case on the available range of remedy options.
2. The team's operational processes are steered by a detailed Guidance Manual founded on international standards best practice in investigation of violations against human rights, as well as non-judicial principles on administration of justice. The processes are absolutely impartial, independent, confidential and rights-respecting.
3. In appreciating that many severe human rights impacts involve personal and physical injuries, the IHRM has taken deliberate steps to reach out to, and engage with the police or the medical facilities where victims of such injuries either reported, or were attended, or with independent experts, for verification and authentication of medical records, or impartial assessment of the cause, nature and extent of such injuries, and to offer needed interventions, such as Psycho-social counselling, as the case may be.

NB: All complainants or victims of human rights violations are keenly taken through the contents of **Informed Consent** and **Mutual Confidentiality**

Agreement that guide and bind their engagement with the IHRM before voluntarily signing the respective Forms, in the presence of an IHRM representative who also countersigns. The two formalities are to attest to the fact that the complainants or the victims are participating in the IHRM process voluntarily and on their own accord. Similarly, witnesses to the complaints have to sign a declaration to the same effect. Essentially, therefore, all engagements with State or non-State organs on complaints reported to the IHRM are made in strict compliance with, and in the spirit of those formalities.

4. Further, to mitigate against possible cases of mischief or professional misconduct, the need to ascertain credentials, certification and regulatory standing of medical officers and medical facilities involved cannot be gainsaid. To that extent, therefore, the IHRM has reached out to the relevant regulatory bodies, for verification purposes, as and when need arises. Such bodies include the Kenya Medical Practitioners & Dentists Council (KMPDC); the Nursing Council of Kenya; the Clinical Officers Council and the Kenya Pharmacy and Poisons Board. Without abdicating their respective regulatory obligations, or compromising on professional integrity, these bodies have facilitated the IHRM to not only verify genuine practitioners and institutions, but also to flag out issues of wanting credibility by some individuals and facilities within the medical space. In the process, they have become a component of the IHRM's stakeholders – who include the police among others, as vital players in the fact-finding outcomes.

CONCLUSION

The IHRM is a transparent and consensual fact-finding and adjudication process which is gradually and steadily gaining traction in the handling of alleged grievances on human rights breaches by businesses. To a large extent, the achievements of the IHRM are dependent on the cooperation, support and goodwill by all the players involved in its fact-finding verification processes. Hopefully, as more stakeholders/ players become well aware of the IHRM as a *bona fide* and professional entity, their support will be readily forthcoming and unreserved.