

KENYA ANTI-CORRUPTION COMMISSION

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KACC/ LEG 8/19

14th July 2011

U. S. A. Central Authority
Office of International Affairs
Criminal Division, Department of Justice
Washington, D. C. 20530
Telephone: (202) 647-5111

Dear 

RE: LETTER OF REQUEST – POSTAL CORPORATION OF KENYA INVESTIGATION

RECEIVED
OFFICE OF
INTERNATIONAL AFFAIRS
2011 SEP 26 PM 1:51
CRIMINAL DIVISION

The Director of Kenya Anti-Corruption Commission presents his compliments to the Central Authority of the United States of America and has the honor to inform them of the following facts and respectfully to submit this official request for judicial assistance pursuant to the United States Law on Mutual Legal Assistance in Criminal Matters.

The request is presented in relation to the investigation being carried out by the Kenya Anti-Corruption Commission in a case of suspected serious and complex fraud and procurement irregularities which, there are reasonable grounds to believe, have been committed in Kenya with some acts in the United States of America.

Kenya Anti-Corruption Commission is an independent statutory investigative authority which is empowered by statute to work with any international authority in furtherance of its investigations under section 12(3) of the Anti-Corruption and Economic Crimes Act of 2003 ("AC & ECA, 2003") a copy of which is attached and marked **Enclosure 1** Section 23(1) of AC & ECA, 2003 confers investigative

powers on the Director, KACC and empowers him therefore to request assistance from the United States of America.

Limitation on use

The Director requests the assistance set out below for the purposes of the aforesaid investigation and for use of the evidence gathered in any resulting prosecution and in any ancillary or related proceedings before a Court such as applications for restraint, confiscation or Compensation orders.

The evidence obtained under this Letter of Request shall not be used for any other purpose other than that specified in the letter without prior consultation with the USA Central Authority.

The Director further confirms that no document or other information obtained will be used other than in criminal prosecutions arising from the investigation set out in this Letter of Request, without the prior consent of the USA Central Authority.

Background

In November 2004, the Postal Corporation of Kenya (PCK) invited potential service providers to propose a technology-based solution for an EFT system to facilitate money transfer services locally and internationally (**Enclosure 2 – invitation**). In January 2006, PCK formally contracted Afripayments LLC (APL) as the service provider, who thereby implemented the Posta Pay EFT system ("Posta Pay" **Enclosure 3 – contract**). APL signed an agency agreement with Afripayments Kenya Ltd (AKL) to facilitate the local aspect of the EFT business (**Enclosure 4 – agency agreement**).

Allegations of impropriety

After the system was implemented and fully operational, several allegations of impropriety were escalated to the Ministry of Information and Communications. It was alleged that:

- PCK had no control over Posta Pay, and that the system was entirely controlled by Afripayments, and thus the financial information was susceptible to manipulation or fraud;
- Various frauds had been committed on Posta Pay and in particular a fraud involving a senior AKL employee;
- Various clauses in the contract between PCK and APL were not in the best interest of PCK, bringing into question whether public interest was protected; and
- PCK employees had undisclosed interests in APL and its associated companies.

Investigation by the Kenya Anti-Corruption Commission and Forensic Audit carried out by Deloitte Consulting Limited

The Kenya Anti-Corruption Commission was called to investigate the above allegations. Investigations by the Commission commenced on 25th June 2007. The Board of the Postal Corporation of Kenya for its part on 23 December 2008 appointed Deloitte Consulting Limited (DCL) to perform a forensic audit with a view to getting to the bottom of the above mentioned allegations of fraud and impropriety.

Some of the critical findings arising from the Commissions investigations and DCL forensic audit require additional procedures to be carried out in the USA. These have been summarized in the table below:

Aspect	Finding
1. Procurement	i) <u>Afripayments LLC profile</u> APL's Limited Liability Company Agreement (LLCA) was signed on 1 January 2007 amongst its shareholders, comprising the following companies and individuals (Enclosure 5 – Limited Liability Company)

Aspect	Finding
	<p>Agreement):</p> <ul style="list-style-type: none"> - Ligawits LLC.....143,500 shares - Lidevon LLC.....87,500 shares - Mescokol LLC.....52,500 shares - Lihoseka LLC.....52,500 shares - Dwayne Johnson.....7,000 shares - Mohamed Yousif.....7,000 shares <p>Total.....350,000 shares</p> <p>It is worthwhile to note that the above 4 companies own 336,000 of the 350,000 issued shares of APL, representing an effective ownership of 96%.</p> <p>We further note that the aforementioned companies all share the following common address:</p> <p>16192 Coastal Highway Lewes, DE 19958</p> <p>this is highly suspicious and there is a likelihood that the above and APL itself were shell companies or proxies at the time of entering into an agreement with PCK.</p> <p><u>Way forward</u></p> <p>Further forensic procedures should be carried out in the USA which will include lifting the corporate veil on the entities listed above as APL shareholders, with a view to establishing the identities of the ultimate beneficial owners (individuals) of APL. The signatories who endorsed the Limited Liability Company Agreement on behalf of the aforementioned companies are individuals of Kenyan extract.</p>
	<p>ii) <u>Due diligence</u></p> <p>A due diligence exercise was carried out on APL by PCK, prior to the signing of the Posta Pay contract. According to the report prepared</p>

Aspect	Finding
	<p>by PCK, the objectives of the due diligence were the following:</p> <ul style="list-style-type: none"> - confirming the physical location, incorporation, licensing and indemnity of APL; - assessing APL's implementation capacity; - assessing APL's proposed technology platform; and - other aspects - assessing the product's performance in similar environments; - understanding the potential implementation challenges; and - learning how various organizations manage electronic funds transfer businesses. <p>It is not clear exactly how or whether the implementation capacity of APL was assessed as no details of the process followed or the criteria used is provided in the due diligence report. As per best practice standards, this should have entailed assessing both the technical and financial capability of APL in order to ascertain its ability and suitability to successfully implement the project.</p> <p>It is also not clear how or whether the technology platform was evaluated as no details are provided in the due diligence report.</p> <p>In addition, no details were provided in the due diligence report on the performance of APL's product in similar environments.</p> <p>Furthermore, it should be noted that APL had only been in existence for one year by the time the due diligence was carried out and hence it is not likely that it had much of a track record in relation to implementation of similar projects.</p> <p>The scanty level of detail provided in relation to all aspects of the due diligence exercise is indicative that the due diligence exercise was likely to have been window-dressed.</p> <p>These adverse findings are not surprising in light of the previously highlighted suspicion that APL was a shell company at the time of the</p>

Aspect	Finding
	<p>due diligence exercise.</p> <p><u>Way forward</u></p> <p>The international leg of this forensic investigation, to be carried out in the USA, will seek to gather further evidence on these suspected irregularities with a view to prosecuting those who may be implicated in fraudulent misrepresentation.</p>
<p>2. Revenue assessment</p>	<p>i) <u>International Money Transfer (IMT) commission revenue</u></p> <p>Based on analysis of the information provided by PCK, the commission income earned from the IMT business only accounted for 3% of the total commission earnings from Posta Pay.</p> <p>Given that one of the objectives of launching Posta Pay was to harness and channel remittances from Kenyans in the Diaspora, it is highly unusual that the income from IMTs is currently only 3% of the total commission earnings.</p> <p>In addition, it is noteworthy that PCK management was not privy to the commission tariff structure agreed to between APL and the Money Transfer Operators (MTOs). This is highly unusual considering that PCK owns the Posta Pay product brand and hence should have been concerned with maximizing all potential sources of revenue.</p> <p>Furthermore, throughout the course of the forensic audit, AKL repeatedly declined to avail to us the agreements between APL and the MTOs, and the bank statements for the relevant account used to facilitate the IMT</p> <p>The above observations and occurrences are highly suspicious and are indicative of a collective effort to under-record and under-report the IMT commission income.</p>

Aspect	Finding
	<p><u>Way forward</u></p> <p>The international leg of this investigation will seek to obtain directly from the MTOs, pertinent transactional data relating to Posta Pay. Further analysis on such information will be carried out to establish the commission income due to PCK.</p>
<p>3. Potential conflict of interest</p>	<p>We received the following allegations relating to potential conflicts of interest:</p> <ul style="list-style-type: none"> - That Mr. Tom Ogutu (a former PCK executive) has a brother in law, Mr. Edwin Nyambeche, who is Vice President of APL; - That Mr. Ogutu is a secret director of APL/AKL; and that - That the former PCK chairman, Maj. Gen. Kariuki is a shareholder of a company associated with APL/AKL. <p><u>Way forward</u></p> <p>By establishing the beneficial owners of APL (as per Section 1 above), the investigation will have obtained critical information to either confirm or dispel these allegations.</p>

Way forward – Understanding the extent of fraud and parties involved

The following actions should be performed in order to understand the extent of fraud across all aspects of the Posta Pay venture and determine the parties involved:

- Conducting the international leg of the investigation and forensic audit, which will among other things seek to verify: the unanswered questions about the background and credibility of APL; and the completeness of the IMT commission revenue which is suspiciously low at 3% of total commission earnings; and

- Enlisting the assistance of investigative authorities in the USA. Their involvement will be critical in obtaining the documentation and information necessary to conclude on this forensic investigation.

Types of offences suspected to be involved

We suspect that the following crimes, under the Anti Corruption & Economic Crimes Act (Kenya) of 2003, were committed by the agents/principles of APL and AKL:

- 1) Abuse of office contrary to section 46 of the Anti-Corruption and Economic Crimes Act
- 2) Breach of trust – contrary to section 43 of the Anti-Corruption and Economic Crimes Act
- 3) Bid rigging – contrary to section 44 of the Anti-Corruption and Economic Crimes Act
- 4) Protection of public property and revenue contrary to section 45 of the Anti-Corruption and Economic Crimes Act
- 5) Deceiving principal contrary to section 41 of the Anti-Corruption and Economic Crimes Act
- 6) Conflict of interest contrary to section 42 of the Anti-Corruption and Economic Crimes Act
- 7) conspiracy to commit an economic crime contrary to section 47A of the Anti-Corruption and Economic Crimes Act

Reason for the request

We are seeking your assistance for the following reasons:

1. The contracting party (APL) is registered in Dover, Delaware, in the United States of America (USA);

2. The registered addresses of certain identified entities listed as shareholders of the contracting party (APL) are in Lewes, Delaware, in the USA;
3. The relevant records relating to the operations, management and ownership of APL, which were alleged to have been the subject of due diligence by the Postal Corporation of Kenya are said to be in the custody of the APL shareholders whose registered office is in Dover, Delaware, in the USA;
4. Certain Money Transfer Operators, who were contracted by APL to facilitate the International Money Transfer business, have their registered offices in the USA; and
5. The relevant records relating to the International Money Transfer business are said to be in the custody of APL and the Money Transfer Operators, whose registered offices are in the USA.

The nature of the assistance sought

We request assistance in relation to the following:

1. Logistical and technical support in locating, contacting and interviewing various relevant persons, who include but are not limited to:
 - i) Dwayne Johnson;
 - ii) Mohamed Yousif;
 - iii) Edwin Nyambeche; and
 - iv) Stanley Nyakundi
2. Locating of various corporate institutions, including but not limited to:
 - i) APL;
 - ii) Ligawits LLC;
 - iii) Lidevon LLC;
 - iv) Mescokol LLC; and
 - v) Lihoseka LLC
3. Authentication of official documents;
4. Service of documents;

5. Access to official records, including but not limited to:
 - i) Company registration documents;
 - ii) Bank records;
 - iii) Money transfer records;
6. Search and seizure of documents and records, including but not limited to:
 - i) Company registration;
 - ii) Bank and credit;
 - iii) Money transfer;
 - iv) Registration of persons;
 - v) Legal proceedings;

We believe that there is a high likelihood that reliable evidence exists which is in the custody of the aforementioned persons and corporations, and your assistance in securing this evidence will be invaluable;

7. Obtaining sworn statements, as appropriate, from the persons to be interviewed; and
8. Locating and securing proceeds of crime.

List of corporate institutions and individuals to be interviewed

1. Afripayments Limited
2. Afripayments Kenya Limited
3. Dwayne Johnson
4. Mohamed Yousif
5. Edwin Nyambeche
6. Stanley Nyakundi
7. Ligawits LLC
8. Lidevon LLC
9. Mescokol LLC
10. Lihoseka LLC
11. The various Money Transfer Operators that will be identified
12. Any other persons to be identified in the course of our investigations.

Outline of interrogatories

Interrogatories for APL:

1. Provide details of shareholders, directors, management and staff of APL, and their contacts;
2. Provide details of any relationship between the shareholders, directors, management and staff of APL and any directors, management or staff of Postal Corporation of Kenya;
3. Reasons for failure to provide records relating to Postapay transactions to Postal Corporation of Kenya;
4. Reasons for failure to remit transaction profits to Postal Corporation of Kenya;
5. Identities of the APL individuals involved in the development of the Posta Pay EFT system;
6. Explain the background and process leading up to the Postapay contract between APL and Postal Corporation of Kenya including:
 - a) Who was in the team that handled your pre-contract negotiations with Postal Corporation of Kenya?
 - b) What was your experience with regard to international money transfer before the Postapay venture?
 - c) What was your rationale and basis for expressing interest in the Postapay project?

Interrogatories for staff and management of APL:

1. Explanations of job descriptions; and
2. Explanations of functional and personal inter-relationships.

Interrogatories for shareholders of APL:

1. Corporate shareholders:
 - i) Provide a list of your shareholders, directors, management and staff both past and present, and their contacts;

- ii) Provide details on any relationship between your shareholders, directors, management and staff and any directors, management and staff of APL;
 - iii) Explain the process leading up to the incorporation of APL and AKL;
2. Individual shareholders:
- i) Provide details on any relationship with the shareholders, directors, management and staff of APL;
 - ii) Provide details on any relationship with the other shareholders of APL;
 - iii) Explain the background and process leading up to the incorporation of APL and AKL; and
 - iv) Provide details on any relationship with the directors, management or staff of Postal Corporation of Kenya.

Interrogatories for Money Transfer Operators:

- 1. Interrogatories for Money Transfer Operators:
 - i) Explain your business (and any other) relationship with APL;
 - ii) Provide records of all transactions relating to Postapay;
 - iii) Provide documented agreements with APL relating to Postapay, including details on the commission structure applied to transactions involving APL;
- 2. Interrogatories for management and staff of Money Transfer Operators:
 - i) Nature of any relationship with APL shareholders, directors, management or staff; and
 - ii) Nature of any relationship with PCK directors, management or staff.

List of documents to be obtained

From APL:

- 1. Bank account statements, agreements and all other records of money transfer transactions relating to Postapay;

2. Agreements and all other records relating to all Money Transfer Operators involved in handling or processing Postapay transactions;
3. Records relating to the due diligence carried out by Postal Corporation of Kenya on APL;
4. Corporate records relating to APL including Memorandum and Articles of Incorporation, Board Minutes, shareholder agreements, agency contracts, credit records, debt or debenture records and any other relevant corporate records;
5. Tender documents submitted to Postal Corporation of Kenya relating to the Postapay contract;
6. Statutory or regulatory returns, from inception; and
7. Details of all past and present shareholders, directors, management and staff of APL.

From any identified agents of APL and AKL:

1. Bank account statements, credit statements and all other financial records for all money transfer transactions relating to Postapay;
2. Letters of appointment, contracts and all agreements for money transfer transactions relating to Postapay;
3. Records relating to the allocation of revenue, costs and profits between the Money Transfer Operators and APL, with respect to Postapay; and
4. Listing of all past and present shareholders and directors.

From the Money Transfer Operators:

1. Records of all transactions relating to Postapay;
2. Documented agreements with APL relating to Postapay, including details on the commission structure applied to transactions involving APL

From the shareholders of APL and AKL:

1. Any shareholder agreements relating to APL or AKL; and
2. Statutory or regulatory returns.

Names of persons to be present when interviews and statements re taken in the US:

1. Henry Murithi Mwithia of Kenya Anti-Corruption Commission
2. Robert Nyamu – Senior Manager, Deloitte
3. Michael Masaki – Consultant, Deloitte

Reciprocity:

I confirm that the assistance requested in this letter could be obtained under powers provided for by the current laws of Kenya, if in a like case a request for such assistance were made to the authorities in Kenya.

If you have any enquiries regarding the contents of this request please contact the Director of Kenya Anti-Corruption Commission on Tel: 254 – 020 - 2717318

The Director takes the opportunity to reassure you of our highest regard.

Yours

Prof. PLO – Lunumba, Ph.D
DIRECTOR/CHIEF EXECUTIVE