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Legal Framework for Reversing the Waning Sustainability of SMEs in the Construction Industry Due to Payment Paralysis in Malawi and Kenya

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Abstract

Introduction; Structural Adjustment Programs (SAPs) were introduced to the developing countries by the World Bank from 1980 to 2000, following a collective inability to service their loans. SAPs encouraged Governments to privatise non-strategic commercial activities, leading to emergence of Small and Medium Enterprise (SME) sector, taking 95% of trading entities; employing 40% of workforce in Sub-Saharan Africa. Unfortunately, many start-up SMEs in Africa fail within five years, inhibiting growth to compete with International SMEs particularly in the construction industry. This research was to identify the leading factor in causing failure of SMEs in construction Industry in Africa; case of Malawi and Kenya and develop a strategic framework to enhance sustainability of local SMEs. **Methodology**; Literature revealed twelve factors with negative impact on sustainability of SMEs. A questionnaire survey on 800 SMEs analysed with SPSS found that "payment paralysis" was the leading cause of bankruptcy to SMEs. Non structured interviews with 20No. failure cases and 5No. Policy/opinion leaders, to identify the major drivers of payment paralysis. **Results;** Delayed payments triggered "payment paralysis" which led the affected SME to bankruptcy. The study found major drivers of payment paralysis are Corruption, Weak Contract laws, Contract models permitting PEs to skew risks against the SMEs and high bank interest rates. **Conclusion**; A robust legal framework to bring order and fiscal discipline in construction industry involving enactment of laws which enhance sustainability of SMEs is urgently required. The research findings were shared in awareness presentations in Malawi, Zambia and Kenya. Positive results are manifest with "The Prompt Payment Bill 2020' and others already prepared in Kenya.

Key words: SMEs; Construction; corruption; sustainability; contract; Payment paralysis.

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1. Introduction and Background

The economies of the majority of the countries in the developing countries suffered a severe economic downturn in the 1970s approaching stagnation in the 80s and were generally unable to repay their loans.[1] The World Bank and the IMF with the singular object of reducing expenditure and increasing productivity in these countries initiated The Structural Adjustment Program (SAPs) in 1980 to 2000. SAPs was introduced in the Developing Countries which included those in the 2013 World Bank list of 55 Least Developed Countries (LDCs), among the 193 countries in the world, of which 32 (58%) are in Africa [2, 3].

SAPs encouraged governments of developing countries to privitise non strategic commercial activities and review their management structures with a view to reducing their bloated workforce due to prevalent weak management of the public sector in the developing countries [2].

SAPs would soon be associated with weakening governments and promoting poverty due to the loss of jobs for many heads of families and as it denied the powerful personalities in the Government the power and authority to offer employment at will. This led to the 14th December "Dakar 2000 Declaration which called for the cancellation of Third World debt and cessation of the SAPs [4].

2. Emergence of SMEs as the Economic Driver

SAPs came to an end in 2000 and to many of the subject countries, it was a nightmare as the resultant reduction in government spending in social services had devastating effects on vital services such as health and education [5] and also had disastrous effects on employment as many government employees were laid off in the restructuring process [4].

The author in [6] finds it difficult to state whether SAPs had positive or negative results on the subject countries but, the author in [7] posits that SAPs assisted development and that it had a wider scope beyond economic policy and it caused profitable trends in political stability of some countries and changed the economies from "inefficient highly government regulated" to "diverse, competitive and private markets" and therefore adequately responded to the need as defined by Adebayo Adedeji that "Africa has to Adjust"[7].

Literature reviewed led this author to the conclusion that while SAPs did not progress to its planned conclusion and therefore achieve its goals and objectives as envisioned by its sponsors, the World Bank and the IMF, the initial stages of its application involving privatization of majority of the nonstrategic commercial entities and restructuring of the government had progressed to an irreversible state and as SAPs was abandoned midstream in 2000, the Adebayo Adedeji catchphrase "Africa has to Adjust" came to pass. Africa changed; but in a manner that the SAPs proponents may have not foreseen; the Small and Medium Entrepreneurships emerged and dominated the business space in Africa and other developing countries. .

The author in [7] found that SAPs changed the economic and political terrain to an irreversible state. Many experts trained and experienced in various trades were released into the market environment as lay-offs by governments, and the researcher concurs with the author in [7]because in the process SAPs achieved a hugely positive outcome as the laid-off experts used their knowledge to create entrepreneurship opportunities and thus the private sector emerged to fill the space that the governments ceded as they withdrew from nonstrategic activities such as transport, Construction, manufacturing, Power generation, Agriculture, and allowed private participation in education, health and research. This development created a suitable environment for the emergence of many Micro, Small and Medium Enterprises (MSMEs) which was also the case in the construction industry as confirmed by the authors in [8].

The Contribution of SMEs to the GDP and National Employment was 11.5% and 41.7% respectively in Malawi [9] and 45% and 80% respectively. In Kenya OECD 1996 [10] and the authors in [11] confirm that SMEs created 80% and 85% of the jobs created in Kenya in 1996 and 2018 respectively. The author in[12] found that SMEs constituted 99% of all the businesses in the Developing countries and contributed upto 50% of the GDP.

SMEs in the construction industry are of great importance in developing countries because they generate employment and favour the youth and other untrained individuals who benefit from the "training on the job" opportunities in the sector which are considered more cost effective than employing trained professional workers [13] In a study conducted in Kenya, National Construction Authority (2015) [14] established that 18% of the construction workers were formally trained while 81% acquired their skills by in-house training.

3. Disappointment in High Frequency of SMEs failure

Unfortunately just as there are many SMEs entering the market so are many failing. The author in [15] pessimistically concluded that *"the chance of a newcomer becoming an established member of the business community is sadly slight. The SME owner carries on until his funds are exhausted and then disappears from the scene. His place is taken by another hopeful, certain that he has the abilities which will permit him to succeed where his predecessor has failed. ... Unaware of the odds against them, and largely ignorant of the weapons of trade, prospective proprietors march stolidly to the ambush".*

The author in [15] was found by this researcher to have contributed significantly in clarifying the research question by providing the three definitions of SME failure as viewed from the practical, economic and the legal perspective which are copied here below.

a) Failure is reflected by the exit rate of an SME from the business sector.
b) In economic terms, failure occurs when a firm has a rate of return on investment which is insufficient to cover its opportunity cost.
c) In legal terms, when a small firm is formally liquidated or in the case of an unincorporated enterprise the owner becomes bankrupt for business reasons.

The table 1 below summarises the high incidence of SME failure (un-sustainability) in some countries in Africa.

Table 1: Incidence of SME failure (un-sustainability) in Africa.

Item	Country	Proportion (%)				Reference
		Year 2	Year 5	Year 10	total	
1	Kenya	60*	70	-	70	(Kamunge, S.M and his colleagues 2014) [16] Kenya Bureau Statistics 2007[17] Bowen M, Morara, M.and Murithi S(2009)[18], Jacqueline Douglas and his colleagues (2017)[19]
2	Malawi	60	20	10	90	Bowler, Dawood & Page (2006) cited by ML Van Scheers (2011) [20], Bryson B. Majanga (2015) [21],
3	Botswana		52	28	80	OECD (1996) [10] J. Haltiwanger and his colleagues [22]
4	Swaziland	50	30	15	95	Dr .Patricia Joubert
5	S. Africa				75	Adeniran and Johnston, 2011[23]
6	Nigeria	-	70	-	80	(Muhammad M. Ma'aji, 2019) [24] Hashimu, S.N and Bakar, M.S. [25]

Prof. Michael Cant (2012) [26] confirms Dawood and Page (2006) and Phakisa (2009) estimate that 40% of new business ventures fail in their first year, 60% in their second year, and 90% in their first 10 years of existence.

Jacqueline Douglas and his colleagues (2017) [19] found that "70% of Small-to-Medium sized enterprises (SMEs) in Kenya fail within their first three years of existence which is confirmed by the Kenya National Bureau of Statistics (2017) who recorded that approximately 400,000 micro, small and medium enterprises do not celebrate their second birthday

In Malawi it was found that 60% of the SMEs failed within the first year of entry into the business.

4. The Methodology

The Research problem is based on a general observation that local SMEs in the construction industry in Africa were not growing in a sustainable manner and were unable to build capacity in human resource and capital to qualify in the International Competitive Bidding (ICB) which would lead to their engagement in donor funded construction projects. Africa would then be less dependence on international contractors which would improve retention of the donor funding inflows within the borrowing country. The research design included exploratory literature review and archival research which offered the available information and revealed a number of possibilities of the main cause of the problem as published by other scholars and providing the variables for the research. The second phase of the study was a survey. A Questionnaire was developed to include all the important aspects of SME particularly in regard to the management, market environment, performance, profitability and sustainability of SMEs. The mixed method provided quantitative data to highlight the population of SMEs involved and therefore the significance of the industry and the net effect of the negative factors impacting the SMEs in the construction industry, and qualitative data to establish the factors affecting the sustainability of SMEs in the construction industry. A Survey was then carried out to establish the single most devastating of the negative factors in the market environment. The survey was conducted in Malawi where the questionnaire was administered to a representative sample picked at random in accordance to recommended sampling procedures and possesses [27]. The population of SMEs in the construction industry in Malawi in the year 2015 was obtained from the records of the subscriptions and registrations with the NCIC as 5,000 and a random sample of 800 was taken spread over the three administrative regions of Malawi; Northern, Central and the Southern Regions. There were 750 respondents and their results were data coded into the IBM 20 Statistical Package for the Social Sciences (SPSS) for analysis. Payment Paralysis was found to be the leading factor in waning sustainability of SMEs in the construction industry in Malawi.

The research then reached out to 20No. SMEs that had failed and had unstructured interviews to record their individual experiences particularly in reference to Payment Paralysis and suggestions for incorporation in a strategic framework to reduce the incidence and the effects of payment paralysis.

Non-structured interviews were then conducted with five senior managers in the Ministry of Transport, Roads Authority, MABCATA and NCIC who play a major role in the employment, registration and regulation of SMEs in the Construction Industry in Malawi.

5. Results of Literature Review

Literature reviewed revealed 13 negative factors listed in table2 here below, which had been identified by other

Table 2: Challenges facing the SMEs in the Construction Industry

No	**Factor affecting sustainability**	**No.**	**Factor affecting sustainability**
1	Industrial Polarization	2	Obstructive Business Environment to SMEs
3	Delayed Payment	4	Limited Access To Investment
5	Poor Leadership In Management	6	Access To Credit And Financing
7	High Lending Rates	8	Outdated Policy, Legal and Regulatory Framework
9	Unreliable and Costly Economic Infrastructure	10	Seasonality
11	Limited Work Opportunity	12	Corruption
13	Limited work opportunity	14	

researchers as causes of negative impact to SMEs generally.

These factors were used in the preparation of the survey questionnaire and the respondents asked to measure each in terms of frequency and severity and rank the three most damaging factors in their experience,

The Results based on the SPSS analysis of the 750 questionnaires were as in table 3 below

The ranking of the three most frequent challenges can be recognized from Tables 2 shows the SMEs views and experiences in regard to the severity of the negative effects of each of the factors identified. In Table 3, 307 respondents, 40.9% of the sample, indicated that delayed payments is the leading factor that has had the most devastating negative impact on SMEs in the construction industry.

Table 3: The first most devastating Challenges to SMEs in construction Industry

Description of negative factor	**Frequency**	**Percent**	**Valid %**	**Cumulative %**
Obstructive business environment to SMEs	0	0	0	0
Industrial polarization	6	.8	.8	7.1
Poor leadership in management	61	7.9	8.1	15.2
Delayed payment	307	39.6	40.9	56.1
Limited access to investment	39	5.0	5.2	61.3
Access to credit and financing	88	11.3	11.7	73.1
High lending rates	10	1.3	1.3	74.4
Outdated policy, legal and regulatory framework	3	.4	.4	74.8
Unreliable and costly economic infrastructure	47	6.1	6.3	81.1
Seasonality	20	2.6	2.7	83.7
Corruption	12	1.5	1.6	85.3
Limited work opportunity	110	14.2	14.7	100.0
Total	750	96.6	100.0	

6. The Research Findings

The leading cause of waning sustainability of SMEs in the construction Industry in Africa; case of Malawi and Kenya is payment paralysis which is triggered by delayed payments.

The five leading drivers of delayed payments are:

a) Arbitrary Transfer of Risks to SMEs by the Procuring Entities (PEs)
b) Incorrect Interpretation and Application of World Bank Procurement Model
c) Corruption and Political Rivalry

d) Bank Lending Interest Rate in Africa is generally higher than those in the Countries of Origin of the competing Foreign Contractors
e) Influence of market environment on bidding.
f) Influence of market environment on bidding.

6.1 Discussion of Findings

6.1.1 Arbitrary Transfer of Risks by the Procuring Entities (PEs)

In Malawi and Kenya, there is no law regulating either the limiting period of such delays in payments or the compensation that the affected SMEs may claim. The situation is made worse because the contract documents are prepared by consultants hired by the contracting authorities and therefore tend to reduce risks that may affect the Client rather than focusing on fairness to both the Employer and the SMEs who will be contracted to carry out the works contract.

Gerald Mabveka (2014) [28]observes that it is common to find Procurement Entities (PEs) include payment terms that are unfair to the SMEs. The SMEs are forced to accept these terms because during the years, with the diminished volume of construction work, SMEs are under pressure and at times engage in risky ‘suicide’ bids with little or non-existent profit margins just to sustain the flow of work and stay in business [29, 30].

The Conditions of Contract allow the Procuring Entity (PE) to make insertions in the Special Conditions with a view to transferring some risks to the SMEs and the SMEs are not given an opportunity to challenge the transfer of risks and are left with no option but to accept.

SCC 31.1 Payment shall be made by the Procuring Entity within ----days of receipt of the request for payment and within ----days in the case of the final payment.

SCC 31.4 Interest shall be paid on late payments at the rate of: --- percent above the base lending rate of the Reserve Bank of Malawi

SCC 32.1 Prices charged by the Supplier shall/ not vary from the prices quoted in the Contract. (Extract from Office of Director of Public Procurement of Malawi).

6.1.2 Incorrect Interpretation and Application of World Bank Procurement Model

Kenya, Malawi and other countries benefitted from the joint World Bank/OECD Development Assistance Committee (DAC) Procurement Round Table Initiative established in 2002 where developing countries and donors worked together from 2003 – 2004 to develop tools and standards comparable to the International Standards for improvement of procurement systems which resulted in the adoption of the Quality- and Cost-Based Selection (“QCBS”). This method requires the Works and Services SMEs in the construction industry to submit bids which demonstrate their competence and capacity to carry out the bidder offering the “Least Cost evaluated” is awarded the contract. The Term “Least Cost evaluated” means when the evaluation committee compares the sum of the “Cost of the product” of the Quality likely to be delivered by applying the experience and capacity described in the bid and the "Cost of production" as in the Bid (BoQ or Financial Proposal)

The World Bank Procurement Model has been widely adopted and is being used with minor project specific alterations for both locally financed and donor funded Projects. However, the "Q" in ("QCBS") has increasingly diminished as has the use of the "Confidential Engineers Cost Estimate". This has led to a situation where the "Production cost" has increasingly become the ruling evaluation criterion and at times contracts have been awarded at prices below the Engineers estimate to Bidders with uncertain experience and capacity thus abusing the recommended Quality and Cost Based Selection ("QCBS").

6.1.3 Corruption and Political Rivalry

The corruption levels in Malawi were underlined by the Nyasa Times Newspaper on July 13, 2013 when it attributed a statement to the then Director of Malawi Anti-corruption Bureau(ACB), Justice Rezine Mzikamanda as having said that 30% of the Government budget disappears in the corruption abyss [31]. In the Amnesty International Corruption Perceptions Index 2020 [32] Malawi was Ranked 129 out of 180.

Malawi is not alone; in Kenya where the findings of this research were also disseminated and practically applied. On 23rd Nov, 2015, the President of the Republic of Kenya declared corruption a national security threat and he presented a raft of measures to fight the graft that is endemic in East Africa's largest economy [33]. Reuters reported that Kenya was losing a third of its state budget, the equivalent of about $6 billion, to corruption every year. On 18th January 2021 the President of the Republic of Kenya reiterated that the country was losing Sh2 billion a day to corruption (USD 7.30 Billion p.a.) [34].

The EU Special Report 14/2020, recognized the perception of widespread corruption in Kenya (p5) and underlines that Kenya is in the bottom 21 % of countries ranked in the Transparency (p16) and that the EU's support for the fight against corruption was limited. The Report recommended that the EU prioritise sectors in Kenya with the potential to fight against corruption (p5).

6.1.4 Lending Rates in Africa higher than those levied to Foreign Contractors

The opinion leaders interviewed, and literature reviewed confirmed that there exists an astronomical disparity in the prevailing bank lending interest rate in Africa and particularly in Malawi, compared to those of the home countries of the competing foreign SMEs. This disparity gives the foreign SMEs an advantage over the local SMEs in Malawi since their cost of resources is much lower than those incurred by the local SMEs. Data collected on interest rates over the last 16 years (2000 to 2015) in the tables here below indicate the local the average lending interest rate is 2.79% in the United Kingdom, 2.14 in the European Union, 2.61 in the United States of America and 33.85% in Malawi. This single factor leads to the loss of competitive advantage of local SMEs by a margin of over 30% on the financial aspects of the bids.

Table 4: Bank lending interest rate Malawi (% p.a)

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
53.1	**56.2**	**50.5**	**48.9**	**36.8**	**33.1**	**28.3**	**21.7**	**19.3**	**19.3**	**18.6**	**17.8**	**25.7**	**38.5**	**36.8**	**37.1**

Source: Reserve Bank of Malawi. Kaggiah, G.M.B., (2018)

Table 5: Bank lending interest rate in the European Union (EU) (% p.a.)

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
4.3	3.8	2.8	2.5	2.0	2.3	3.3	4.0	3.8	2.0	1.0	1.3	0.8	0.2	0.1	0.05

Data Source: European Central Bank Link to ECB: www.ecb.int No responsibility is taken for them correctness of this information. Kaggiah, G.M.B., (2018)

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6.1.5 Influence of market environment on bidding

In this research it was found that in each financial year, more that 75% of the licensed construction SMEs in Malawi were not awarded any contract. These observations lead to the conclusion that the market environment is very competitive, and a high number of SMEs missed an opportunity to work for a whole year and had to wait until the following year for new bids to be floated for them to make another attempt. The environment is therefore so harsh for start-ups that it creates desperation, at the lower end of the construction services supply chain, which has driven several SMEs both in the both in the services and the Construction sector of the construction industry in Malawi to progressively lower their rates to such levels that their profit margins too low for them to invest in human, technical or financial capital development.

Bidding in such environment leads to SMEs offering such low rates that such a bids are referred to as "suicidal bidding" as it renders the SMEs vulnerable to risks and therefore compliments the negative effects of payment paralysis when it occurs and completely eliminates the possibility of survival of such SMEs in current market environment in Malawi.

7. Constraints \limitations of the study.

Start-up Small and Medium Entrepreneurships (SMEs) in Africa and indeed all Developing Countries are deeds of the brave and resolute individuals with strong personalities to repel dissenting opinion and with such a commitment as to sacrifice and accrue some savings in an environment of scarcity to facilitate investment in business in the face of perilous risks. The character of such individuals does not easily accept failure and they are in most cases devastated when the business collapses.

Discussion of the subject matter is therefore emotional as it touches on the personality of the individuals and discussion or sharing their experiences is very difficult and only a few are prepared to share their painful and humiliating experiences. It is also very difficult to trace and make contact with owners of entrepreneurships which failed.

SMEs facing difficulties are also hesitant to speak out for fear of being “black listed”.

Governments in Africa have committed to support SMEs in policy with some like South Africa enacting the Affirmative action to support SMEs. Despite all this apparent goodwill in support of SMEs, it appears like the governments’ efforts did not achieve the intended results. The authors in [35] emphasizes that the Broad Based Black Economic Empowerment (BBBEE) did not only fail to deliver the intended objective of spurring growth of the targeted SMEs but contributed towards economic strain and generally corruption in the tendering processes. These reasons make most senior officials within Government and government entities involved with SMEs reluctant to discuss and disclose information relating research studies such as this one.

8. Previous studies

Previous studies reviewed discuss SMEs in general with vey scanty coverage of the construction industry. The most frequent subjects studied are lack of financing for start-up SMEs, proportion of SMEs as a percentage of registered trading entities and frequency of failure of SMEs. Also studied is the Ease of Doing Business for SMEs in various countries. Previous studies provide enough data on the challenges that an SME in the various sectors of the economy are likely to encounter in different countries..

Majority of the Literature available has not focused on the actual cause of the challenges (or factors) recorded and none of the literature reviewed demonstrated an intention of finding out the most severe of the challenges discovered and therefore determine the most threatening and frequent cause of failure for SMEs with an objective of reducing or mitigating the effects of the factor causing failure. In fact only the author in [15] provides a clear definition of failure SME.

However, Sir Michael Latham (1994) report “Constructing The Team; Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry” [36], which was conducted with one of the objectives being increasing cash flow to SMEs in the construction industry has heavily influenced the study which informed this paper.

9. Sharing Research findings with Stakeholders and solicit support

Sustainability of the SMEs in the construction Industry in Malawi and Kenya can be improved by eradication or reduction of payment paralysis by stopping the five major drivers identified in this research, with a strategic legal framework with appropriate legislation(s) enacted in parliament. This paper focuses on the gains made in creating awareness in the five drivers of payment paralysis and achievements recorded towards reducing the incidence and the severity of Arbitrary Transfer of Risks to SMEs by the Procuring Entities (PEs) by an effective legal framework.

The author, engaged with stakeholders in the construction industry and created awareness of payment paralysis as the leading challenge affecting competitiveness and sustainability of local SMEs to solicit support, expertise and political goodwill to have appropriate Bills drafted and tabled in Parliament for enactment into legislation as part of the actionable strategic legal framework to protect and improve the market environment for the local SMEs. The author had been the team leader on several high profile projects in Kenya and Malawi and his passion in promotion of the Engineering profession, particularly by mentoring and training Graduate Engineers in 1998 to 2012 led to his election as Fellow No. F005,in the first lot of six Fellows of the Malawi Institution of Engineers in 2012.

The findings and recommendations of this research were shared with other engineers and particularly MABCATA, NCIC and senior Engineers at the Roads Authority and other organizations who were involved in the construction policy implementation. Consequently, policy changes are being made to improve sustainability of local SMEs in the construction industry in Malawi.

In Kenya, the author had a breakthrough when he received an invitation from the Roads and Civil Engineering Contractors Association; (RACECA) on October 30, 2015, to make a presentation of the research findings and the recommended proposals of improving sustainability of local SMEs in their meeting held on November 24, 2015. The invitation was circulated to all stakeholders in the construction industry in Kenya including all leading newspapers and the presentation was also circulated to all on the mailing list.

10. Finding Support and Sponsors for Legal Framework

This presentation provided the best possible forum for creating awareness and passing the findings and recommendations of the research to the entire construction industry in Kenya,(and beyond) as it was disseminated to over one hundred (150No.) recipients including, all members of RACECA, the National Government, The 47 Country Governments, the Council of Governors of the 47 counties in Kenya, the Parliament, all public procuring Entities, the promoters and the regulatory authorities of SMEs in the construction industry, the law Society of Kenya and the public at large as can be seen from the abridged mailing list below.

1. H.E. The Deputy President of the Republic of Kenya dp@deputypresident.go.ke
2. The Parliament of the Republic of Kenya csenate@parliament.go.ke
3. The Council of Governors of the 47 Counties of Kenya "info@cog.go.ke"
4. The Governor of Machakos County" governor@machakosgovernment.com
5. Public Procurement Regulatory Authority "info@ppoa.go.ke"
6. The Kenya Anti Corruption Commission (KACC) kacc@integrity.go.ke
7. National Construction Authority of Kenya (NCA) "info@nca.go.ke"
8. Roads and Civil Engineering Contractors Association raceca@swiftkenya.com
9. The Architectural Association of Kenya "aak@aak.or.ke"
10. Athi Water Works Development Agency info@awsboard.go.ke
11. The Permanent Secretary, Ministry of Water ps@water.go.ke

12. The Engineers Registration Board of Kenya (EBK) registrar@ebk.or.ke
13. The Institution of Engineers of Kenya (IEK) secretariat@iekenya.org
14. The Law Society of Kenya (LSK) lsk@lsk.or.ke
15. The Nation Newspapers editor@nation.co.ke>;
16. The Standard Newspapers "online@standardmedia.co.ke"
17. Public Procurement Oversight Authority "info@ppoa.go.ke"
18. Over 100 other important Stakeholders in the Construction Industry

After a successful presentation, on November 24, 2015 RACECA nominated the author on November 27, 2015 to a Three-Member RACECA Committee *"to propose an approach to the National Construction Authority, the Law Society of Kenya and the Public Procurement Oversight Authority to improve competitiveness of the local SMEs."*

This committee and individual members of RACECA reached out to opinion leaders and legislators to initiate draft Bills to be tabled in Parliament to form the foundation of a legal framework favouring and supporting improved sustainability of local SMEs in the construction industry.

To inform more stakeholders and get comments and the desired actions from a wider audience in the construction industry and peer review feedback, the 10-pages paper presented and circulated to RACECA in November 2015 and was published in The Kenya Engineer; Journal of the Institution of Engineers of Kenya Volume 39,No.5 : September/October 2018 Edition [37].

The active involvement of RACECA and the goodwill of the members of the groups mentioned above initiated and led to positive outcomes and Bills aimed at improving the sustainability of SMEs have been published and several significant Acts of Parliament are being processed, as in Table 5 below, and the vital inclusion of "the Prompt Payment Bill, 2020" as Bill No.1 of the 12No. Bills underpinning "The Constitution of Kenya (Amendment) Bill, 2020" proposed to amend the Constitution of Kenya, 2010, have been circulated to the public and shall be enacted into law by Parliament soon.

The measure and mark of success in the development of a strategic Legal Framework for Reversing the waning sustainability of SMEs in the construction industry is the inclusion of the "Prompt Payment Bill, 2020" in the "The Constitution of Kenya (Amendment) Bill, 2020".

The Prompt Payment is a product of Sir Latham's Report of 1996 which had several aims including improving cash flows in the construction Industry. In agreement with *the* famous pronouncement of Judge Lord Denning, who said *"Cash flow is the life blood of the building industry"*[38] in his Court of Appeal decision in 1971, *Sir Latham's Report* prohibited 'pay-when-paid' *Clauses and initiated the "Prompt Payment Act"*.

The Prompt Payment Legislation in the Construction Industry came *to effect in October 2011 in England and Wales and November 2011 in Scotland'* [39]and is in force in Europe, Australia, Canada and Malaysia.

The Prompt Payment Act outlaws delays in payments and The Government of the UK strengthened this position when further steps were taken to by enacting a legislation entitling suppliers of goods and services to charge interest of **at least 8%** above base rate on late payment as provided for in the Late Payment of Commercial Debts (Interest) Act 1998. In the UK, the maximum payment term is 60 days [40]

If a similar legal framework were put in place in Kenya and Malawi, the following would be the benefits to the SMEs which would, conversely, be punitive to defaulting PEs.

Table No.4: Calculating interest chargeable on Late payments based on the UK Act

Country	Current interest Base Rate (BR) (%)	Multiplier applied to BR to yield (M)	Compensatory Interest Rate (CIR) (%)	Total Interest Charged (I) (%)
UK	0.25	16	8.00	8.25
Malawi	12.00	16	192.00	204.00
Kenya	7.00	16	112.00	119.00

10.1 Emergence of Sponsors of Legislation to reduce Payment Paralysis.

Upon creating awareness of the effects of delayed payments, the resultant payment paralysis and the consequent failure of upcoming and even established SMEs, the Members of Parliament and the Senate in Kenya took up the challenge and five Bills were introduced in Parliament targeting the menace of Delayed payments as in Table 5 here below.

Table 5: Bills to improve SMEs sustainability Drafted and Presented to Parliament

No.	**Name and Sponsor Legislator(s)**	**Proposal**
1.	Hon. Moses Kuria Bill (May 2, 2019) The Public Procurement and Asset Disposal (Amendment) Act 2019	Payment within 90 (ninety) days from the date of receipt of invoices and certificates and that in the event payment is not made, the SME be issued with equivalent value of promissory note which shall be valid for a period not exceeding forty-eight months from the date of issue. The promissory notes are to protect the SMEs from lenders and auctioneers.
2.	Hon. Rigathi Gachagua Bill (May 13, 2019) The Public Procurement and Asset Disposal (Amendment) Act 2019;	Protect the interests and include local SMEs in International Competitive Bidding (ICB) processes have the minimum (ICB) raised to USD10.0Million, and the local SMEs to take 30% share of works awarded to international SMEs.
3.	The Prompt Payment Bill 2020 Senators Farhiya Haji and Johnson Sakaja	Payment within 90days of receipt of Invoice. This Bill seeks to improve sustainability of SMEs by reducing the incidence of Payment Paralysis by introducing the Prompt Payment Bill 2020

	(February 2020)	
4.	Hon Richard Tongi Bill; October 13, 2020 Public Procurement and Disposal (Amendment Act 2020)	This Bill focuses on transfer of expertise from foreign SMEs offering specialized expertise and skills which are not available in Kenya and to ensure that the period of such a transfer is defined and adhered to.
5.	The Prompt Payment Bill, 2021 March 12, 2021 A Bill for an Act of Parliament to provide for prompt payment for the supply of goods, works or services; and for connected purposes. The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report 2020	This Act shall apply to payment due for all goods, works, and services procured by the national government, county governments and private entities. (1) A procuring entity shall pay a supplier by the prescribed payment date. (2) A procuring entity who fails to pay a supplier by the prescribed date shall, pay an interest to the supplier in accordance with this section on the amount due for the supply of goods, works, or services. (3) A procuring entity shall pay an interest under this Act for the period beginning on the day after the prescribed payment date and ending on payment.

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