The Speech Delivered by the Solicitor General of the Republic of Kenya, Kennedy Ogeto EBS, at the International Construction Research Conference and Exhibition held at the Kenyatta International Conference Centre On 7th November 2018

“Nurturing Fruitful Synergies in Enforcing Construction Laws in Kenya”

The Principal Secretary, State Department for Public Works,
The Executive Director, The National Construction Authority,
The Vice Chairperson, The National Construction Authority,
Distinguished Guests,
Ladies and Gentlemen,

It is such a great pleasure to be in your midst today. I am grateful for the opportunity to speak at this auspicious occasion – the International Construction Research Conference and Exhibition.

I must begin by lauding the organisers of this conference. This is an important and necessary activity as it provides a forum for discourse on matters touching on the
construction industry. I need not emphasize the need for such discourse in any sphere of human affairs.

We gather here at what I think is a very timely moment.

No one can deny that on average, the construction industry in Africa is going through a boom. That is certainly the case in Kenya. From highways to commercial buildings, and from stadia to residential units, there are ongoing construction works in almost every corner of our republic.

There are several reasons for this boom. First, there is rapid urbanisation and the resultant need for more housing in our towns and cities as the population grows.

Take Nairobi for instance. The population in the city proper as at the 2009 census was around 3.1 million people. As of 2018, the estimates vary at over 3.5 million people. That is generally the case across several towns and cities in Kenya. The second reason for the construction boom, our experts tell us, is the rising middle class. The growth of the middle class has meant two things as far as the construction industry is concerned: First, there is increased demand for quality and affordable housing; and second, there is increased investment in the construction industry by those in the middle class because of increased disposable income. To a considerable extent the boom in the
construction industry could also be attributed to regional integration. The East African Community countries for example, have initiated joint cross-border infrastructural projects that are geared towards realising and facilitating regional integration.

The foregoing reasons have meant that the Government of Kenya has itself invested substantially in the construction industry. As I have mentioned already, the sight of bulldozers, excavators, loaders and cement mixers on our roads is now a matter of daily routine. There are construction works going on on our roads in almost every part of the city. The second phase of the Standard Gauge Railway is also in the works. But it is not just in road and railway construction that the Government has invested. The President has identified as part of his development priorities, the provision of affordable housing to Kenyan citizens. A major pillar of the President’s Big Four Agenda in this regard is the provision of five hundred thousand (500,000) new affordable homes. This obviously means more investment in the construction industry. Another of the Big Four Agenda is enhancing manufacturing. The goal is to increase the contribution of our manufacturing sector to our Gross Domestic Product, from the current 9.2% to
between 15-20% by the year 2022. One of the priority areas in the enhancement of manufacturing is construction materials: here, the Government’s goal is three-pronged. First, the aim is to identify key housing components, and second, identify the manufacturers of these components. The end goal is to entrench a buy-Kenya policy for at least seventy percent (70%) of all housing materials.

These plans are part of the journey towards the Vision 2030 Economic Blueprint. They are borne out of the recognition of the pivotal role that the construction sector plays in our country’s economic growth. The construction sector contributed about seven percent (7%) of Kenya’s Gross Domestic Product in the first quarter of 2018. The construction industry helps not only to expand and modernise infrastructure and housing for the growing population, but it also creates employment opportunities and generates demand for goods and services from other sectors. It also enhances the mobility of commodities and labour. It is, in sum, a key economic driver.

At the global level, the construction industry is indispensable to Kenya’s, and indeed Africa’s, attainment of the Sustainable Development Goals.
The construction boom has also, however, come with certain costs. The costs have been both in terms of human lives and material property. In the recent past, we have had cases of buildings collapsing, resulting in deaths and destruction of property. Families have been rendered homeless. There have been cases of bridges and other infrastructural works collapsing, or otherwise giving way to the vagaries of the weather. According to the Architectural Association of Kenya, in the last 20 years alone, at least 20 buildings have collapsed across the country killing at least 200 people. In 2017, the National Building Inspectorate concluded, after an audit of 4,879 buildings in high risk towns countrywide, that a total of eight hundred and twenty-six (826) buildings were unsafe and structurally unsound.

Blame for this has been placed on poor workmanship and the use of substandard materials.

In the same vein, we have witnessed the demolition of spectacular structures that undoubtedly must have cost a fortune to put up. Some of these structures have been pulled down because they stood on illegally acquired public land. Others have been demolished because they occupied riparian land.
The sudden collapse of buildings and other infrastructural works, and the demolition by the Government of houses and other structures, have one thing in common: they both point to a failure in the enforcement of the available legal framework.

The fact is that there are pieces of legislation to govern construction in our country. The law addresses perhaps everything that may need to be addressed as far as the construction industry is concerned. The law tells us who may construct, how to construct, and even, where to construct. The material to be used in the construction, as well as the procedures that ought to be followed in ensuring that the construction processes are legally compliant, are also matters that the law articulates itself on.

The tragedies and challenges that we have faced therefore are not because of a legal lacuna. They are, by and large, because of non-enforcement and a lack of coordination between the relevant stakeholders.

This is why today, I find it befitting that my main task will be to review the law with a view to suggesting ways through which synergies may be nurtured amongst the various
stakeholders in the construction industry, in order that these tragedies and challenges are alleviated.

An important question may be: Who are these stakeholders in the construction industry? Of course, these would include the contractors; the owners of the structures under construction, which would include the Government; regulatory bodies; and even professional institutions. The law enforcement arms of Government, such as the police and the courts, may become stakeholders at certain stages. With the advent of devolution in our governance layout, County Governments have also become significant points of focus, as a considerable chunk of construction work is now done at their behest and supervision. At the legal advisory level, the Office of the Attorney General is by law, a crucial stakeholder. By Article 157 of the Constitution, the Attorney General is the principal adviser to the Government. In this role, the Office provides advice to Government Ministries and Departments, as well as to County Governments. Such advice has been, and will continue to be provided in construction and related matters.
If all these stakeholders were to work together, the synergies would result in a safer, legally-compliant construction industry.

In analysing the legal framework on construction in Kenya, I will do so in response to the questions that I have already said the law attempts to answer. These are, first, who may construct; and second; how and where may the construction be done. I think that these are the questions that lie at the foundation of the governance of the built environment sector in Kenya.

By the question who may construct, I mean, what qualifications one has to possess to take up various roles in the construction industry. I also mean, the public authorities that are bestowed with specific construction functionalities.

The quality of the work that is done is of course directly proportional to the qualifications of those who do the work. We live at a time when the nature of the works that are being undertaken continue to advance in sophistication and complexity, requiring, more than ever before, that the professionals undertaking such works are indeed competent.
As you of course all know, construction by its very nature is a process that has many phases. The different phases of the construction process in turn call for different forms of expertise and specialisation, and also for coordination across all the phases. An American court once likened a construction project to a battlefield. The court stated as follows:

[Except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project ... Even the most painstaking planning frequently turns out to be mere conjecture, and accommodation to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield.]

The different categories of specialisations that would often be involved in construction works include physical planners, land surveyors, engineers, interior designers, architects and contractors.
Our statutes provide for the regulation of all these types of expertise and specialisations. This is done in various pieces of legislation.

The *Physical Planners Registration Act*, for example, provides for the qualification and registration of physical planners. This law specifies the qualifications that one must possess to be registered as a physical planner, and the circumstances under which one may be removed from the register of physical planners. This statute also establishes the Physical Planners Registration Board, which is charged with, *inter alia*, a disciplinary mandate over registered physical planners.

The *Engineers Act*, which was enacted in 2011, plays a similar role in respect of engineers. This Act provides for the training, registration and licensing of engineers, and the regulation and development of the practice of engineers. The Act establishes the Engineers Board of Kenya, which, among other things, is responsible for the registration and licensing of engineers as well as for the enforcement of a code of ethics. The Engineers Board of Kenya is granted power to inspect construction sites for purposes of ascertaining that the construction work is being done by qualified and registered personnel, and to suspend any
construction work should it establish that the required standards have not been met.

A similar statutory scheme exists for architects and quantity surveyors. This is the Architects and Quantity Surveyors Act. This Act, like the others I have mentioned, specifies the requirements for registration as an architect or quantity surveyor in Kenya. It also establishes the Board of Registration of Architects and Quantity Surveyors, and confers upon it, among other duties, disciplinary power over the registered practitioners.

Contractors, unlike the foregoing, are not a professional category. Contractors are, simply put, business people that perform the construction function for gain. The National Construction Authority Act provides for the registration of contractors. The Act also establishes the National Construction Authority Board, which has disciplinary powers over registered contractors. The Board may inquire into allegations of professional misconduct by contractors and take appropriate punitive measures where appropriate.

One thing is clear from the foregoing pieces of legislation. This is that each one of them regulates a specific professional division in the construction industry. The
engineers have their Board, and so do architects and quantity surveyors, and physical planners.

It may be argued that having each of these professional divisions regulated differently appreciates the distinctions that characterise each of them. However, it may equally be the case that the existence of these different legal regimes for professionals involved in one industry may undermine the harmonisation of standards, at least as far as the construction industry is concerned. Each professional board would impose its own registration and licensing requirements, and separate disciplinary procedures. There is also, resultantly, a duplication of functions.

Perhaps, consolidating all these laws may just be what we need. If these laws were consolidated, there will be one Act of Parliament that governs the professionals in the built environment sector. There will be a uniformity in minimum standards, and the enforcement mechanisms will be harmonised. Coordination in enforcement will thus be easier. This, I think, will help alleviate the duplication of functions, as well as enhance accountability in the governance of the professions in the built environment sector. Take for example the functions of the National
Construction Authority, which is also established under the National Construction Authority Act. One of its functions is to promote and ensure quality assurance in the construction industry. Another function is to encourage the standardisation and improvement of construction techniques and materials. Yet another of its functions is to develop and publish a code of conduct for the construction industry. There is a clear overlap between these functions, and those of the other laws that I have already highlighted. There is therefore need for harmony to eliminate regulatory multiplicity, duplication and perhaps unintended confusion in what is otherwise a holistic endeavour.

This is what the draft Built Environment Practitioners Bill 2017 sought to achieve. The aim of the Bill was to achieve harmony in the regulation of professionals in the built environment sector. The Bill proposed to establish a single registration and licencing board called the Built Environment Practitioners Board, which will also be in charge of the discipline of registered practitioners.

The question of who may construct also implicates the public authorities that directly make decisions on the initiation of new constructions and the maintenance of
existing ones. In this regard, the Kenya Roads Act establishes the Kenya National Highways Authority, the Kenya Rural Roads Authority and the Kenya Urban Roads Authority. Each of these agencies is charged with, *inter alia*, the construction and rehabilitation of roads under its control. The agencies are required to ensure that the quality of road works is in accordance with prescribed standards. One way of ensuring that the quality of road works accords to prescribed standards, is by collaborating with the professional bodies and the National Construction Authority in ascertaining the qualifications and competence of those desirous of taking up road construction works. Adherence to procurement laws and regulations would also be one way of ensuring that those who are given an opportunity to undertake these public works are qualified and that they possess the capacity to undertake the works.

My second frame of analysis is about how and where construction should be done. What I mean by this question is, first, what is the legal position on the quality of materials to be used in construction and second, what is the law on prohibited geographical locations upon which construction should not be undertaken.
The question of how is about the quality of the materials used in construction. Substandard materials would undermine the structural integrity of the constructions, limit their longevity and also expose the occupants and other users of the constructions to danger. Architectural marvels in human history, like the Egyptian pyramids, achieved their longevity largely because of the quality of their construction.

There are many examples of substandard materials being blamed for the collapse of buildings, as well as for other incidents that have endangered human safety. In many instances when buildings have collapsed in Kenya, part of the blame has been placed on the use of substandard materials. This was the case even with the collapse of a building at Huruma Estate in Nairobi in 2016, that resulted in fifty-two (52) fatalities. Across our borders, the Grenfell Tower fire, which razed a residential building in London, causing 72 deaths and many injuries, has partly been attributed to the use of flammable exterior cladding.

We do not need further examples to demonstrate the dangers of lack of strict adherence to regulatory frameworks and set standards in our constructions.
The ambition to invest at the cheapest cost possible, and make the quickest and highest of returns, is partly to blame. What is forgotten in this haste is the literal truth in the idiom that Rome was not built in a day.

What is also to blame, however, is a laxity in the monitoring, supervision and enforcement systems. Our laws, legislative and subsidiary, prescribe the quality of materials to be used and charge specific entities and offices with the responsibility to ensure that these prescriptions are adhered to. With the advent of County Governments, there is scope, but also need, for greater synergies with National Government entities in the inspection and approval of constructions, whether they are of roads, buildings, or bridges.

One aspect in which the laxity and malfunction has perhaps been most conspicuous has been with regard to where constructions are done. The spectre of elegant buildings being brought down has been a direct consequence of this. Structures have been erected on prohibited land – by the fact of it being public land, or riparian land. There have been cases filed in court, often to the detriment of public projects, emanating from claims for irregularly alienated public land, or project approvals that
ought not to have been granted. These have often come at a great cost to taxpayers, in terms of compensation paid to contractors for the delays occasioned by court proceedings.

The malfunctions and laxity in this regard are partly, and perhaps largely so, due to a failure of institutional synergies. I know of cases in the past where land earmarked for road construction by one of the road construction authorities, has, for example, been alienated in favour of private hands, who have proceeded, with the approval of the relevant authorities, to put up structures on the road reserves. The same has been the case with land classed as riparian land, but in respect of which construction and other approvals have been granted to private developers by agencies of the same Government.

To put things in the language of our proverbs, these have been cases where the left hand does not know what the right hand is doing.

Because of the lack of institutional and inter-agency cooperation, corrupt individuals and entities are able to take advantage of the loopholes, to the detriment of the construction industry and the public at large.
Nurturing the appropriate inter-agency synergy is therefore direly required. At the same time, there is need to enhance compliance with the law through deterrence. It is necessary to employ the tools of public prosecution and even civil litigation to punish and hold accountable those who violate construction laws. This will bring to an end the perception of impunity, while affording justice to victims. It may also serve as a deterrent to those who may be desirous of violating the law. But for the public prosecution agencies to work effectively, there is certainly need for support and cooperation from the agencies that regulate the various aspects of the construction sector.

In conclusion, therefore, let me make the point that the construction boom will only have meaning for our people if its outcome is a sustainable built environment. The sustainability of our built environment would be possible if there is strict adherence to, and enforcement of, the relevant laws, which, after all, are calculated to ensure that very sustainability. Adherence to, and enforcement of these laws, however, Ladies and Gentlemen, would be much easier if there was a greater synergy in the construction sector than there currently appears to be. There is need for greater inter-agency collaboration to
promote legal compliance. While law reform to ensure harmonisation is an important step, deliberate efforts need to be taken even within the existing legal framework to ensure enhanced inter-agency cooperation.

For one, as far as inter-governmental cooperation is concerned, the Constitution, at Article 189 thereof, already establishes a framework for cooperation between the two levels of government in the discharge of their functions and in the exercise of their powers. Ensuring legal compliance in the construction industry is just one of those areas that there is scope for cooperation between the National Government and the County Governments.

Ladies and Gentlemen, I thank you all for your time and kind attention.

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8th
7/11/2018