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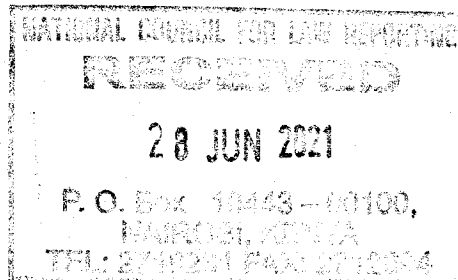
NAIROBI, 27th May, 2021

CONTENT

Bill for Introduction into the Senate—

PAGE

The Lifestyle Audit Bill, 2021 1017



THE LIFESTYLE AUDIT BILL, 2021
ARRANGEMENT OF CLAUSES

Clause

PART I—GENERAL PROVISIONS

- 1 — Short title.
- 2 — Interpretation.

PART II—CONDUCT OF A LIFESTYLE AUDIT

- 3 — Standards of professional conduct when carrying out a lifestyle audit.
- 4 — Authority to conduct a lifestyle audit.
- 5 — Lifestyle audit process.
- 6 — Unexplained wealth.
- 7 — Search warrants.
- 8 — Search without warrants.
- 9 — Misleading statements.
- 10 — Statements in general.
- 11 — Application for an interim freezing order.
- 12 — Discharge of an interim freezing order.
- 13 — Compensation.
- 14 — Application for an account freezing order.
- 15 — Setting aside of an account freezing order.
- 16 — Account forfeiture notice.
- 17 — Complaints by members of the public.
- 18 — Obligation to provide information.
- 19 — Immediate family.
- 20 — Referral of matters to the Director of Public Prosecutions.
- 21 — Deferred prosecution agreement.

PART III— MISCELLANEOUS PROVISIONS

- 22 — Publication of information.
- 23 — Regulations.
- 24 — Amendment of section 26 of No. 4 of 2003.
- 25 — Amendment of section 30 of No. 4 of 2003

THE LIFESTYLE AUDIT BILL, 2021

A Bill for

AN ACT of Parliament to give effect to Article 10 and Chapter 6 of the Constitution; to provide for the procedure for undertaking lifestyle audit; and for connected purposes

ENACTED by the Parliament of Kenya, as follows —

PART I- GENERAL PROVISIONS

1. This Act may be cited as the Lifestyle Audit Act, 2021. Short title.
2. In this Act— Interpretation.
 - “account freezing order” means an order that prohibits a person by or for whom the account to which the order applies is operated from making withdrawals or payments from the account;
 - “Commission” means the Ethics and Anti-Corruption Commission established under section 3 of the Ethics and Anti-Corruption Act; No. 22 of 2011.
 - “interim freezing order” means an order that prohibits a person from dealing with property that is subject to a lifestyle audit exercise;
 - “Kenya Revenue Authority” means the Kenya Revenue Authority established under section 3 of the Kenya Revenue Authority Act; No. 2 of 1995.
 - “lawfully obtained income” means an income obtained lawfully under the laws of the country from where the income arises;
 - “lifestyle audit” means an investigative audit of a person's living standards to ascertain consistency with a person's lawfully obtained and reported income; and
 - “public officer” has the meaning assigned to it under Article 260 of the Constitution.

PART II—CONDUCT OF A LIFESTYLE AUDIT

3. The following standards of professional conduct shall apply when a lifestyle audit is carried out with respect to a public officer— Standards of professional conduct when carrying out a lifestyle audit.

- (a) due care and professionalism;
- (b) objectivity;
- (c) confidentiality; and
- (d) existing standards under any other written law.

4. The Commission may undertake a lifestyle audit under this Act.

Authority to conduct a lifestyle audit.

(2) The Commission may collaborate with the Kenya Revenue Authority, a responsible Commission under section 3 of the Public Officer Ethics Act or any other entity it may consider necessary for the effective conduct of a lifestyle audit.

No. 4 of 2003.

(3) All public bodies shall co-operate with the Ethics and Anti-Corruption Commission whenever the Commission is conducting a lifestyle audit.

(4) Without prejudice to subsection (3), any public body that has information leading it to suspect that a public officer's lawfully obtained income is insufficient to allow the officer to obtain property held by such officer shall provide that information to the Ethics and Anti-Corruption Commission.

5. (1) A lifestyle audit may be carried out if—

Lifestyle audit process.

- (a) there are reasons to believe that a public officer is living beyond the officer's lawfully obtained and reported income;
- (b) a public officer is unable to account for their source of income; or
- (c) a public officer has misappropriated funds under that officer's care and trust.

(2) The Commission shall, where grounds exist for the conduct of a lifestyle audit under subsection (1) —

- (a) inform the officer of the requirement to carry out the audit;
- (b) submit to the officer, information regarding the intended audit and the reasons for the audit; and
- (c) accord the officer a right to be heard on the audit in accordance with subsection (3).

(3) Before conducting a lifestyle audit, the Commission shall give the officer—

- (a) a seven day's notice of the nature and reasons for the proposed lifestyle audit;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of the right to legal representation, where applicable;
- (d) notice of the right to cross-examine, where applicable; and
- (e) information and evidence relied upon to make the decision to conduct the lifestyle audit.

6. The Commission may, where there are reasonable grounds to suspect that a public officer's lawfully obtained income would be insufficient to allow the officer to obtain property held by such officer, apply for a search warrant to be issued against the officer—

Unexplained wealth.

- (a) to explain the nature and extent of their interest in a particular property; and
- (b) the manner in which the property was acquired.

7. (1) Where the Commission intends to conduct a lifestyle audit, it may apply for a search warrant against the public officer from the High Court.

Search warrants.

(2) When making an application under subsection (1), the Commission shall specify the grounds on which the application is made and if material relevant to the lifestyle audit is likely to be found on the premises specified in the application.

- (3) Where a search warrant is issued, it shall contain—
- (a) the address of the premises to be searched;
 - (b) grounds for the conduct of a lifestyle audit;
 - (c) the name of the public officer; and
 - (d) an explanation that material relevant to concluding the lifestyle audit is likely to be found on the premises.

(4) A search warrant shall be executed within thirty business days or such period as may, upon application to the Court, be extended.

8. (1) A search may be conducted without a warrant in exceptional cases where there are reasonable grounds to believe that evidence may be removed or destroyed.

Search without warrant.

(2) Sections 119, 120 and 121 of the Criminal Procedure Code as to the execution of a search warrant shall apply to a search without a warrant under subsection (1).

Cap. 75

9. (1) A person commits an offence if, during the conduct of a lifestyle audit, that person knowingly makes a statement that is false or misleading.

Misleading statements.

(2) A person who commits an offence under this section is liable, on conviction, to imprisonment for a term not exceeding two years or to a fine not exceeding five million shillings or to both.

10. A statement made by a person during the conduct of a lifestyle audit may be used in the conduct of negotiations for a deferred prosecution agreement in accordance with the law on deferred prosecution agreements.

Statements in general.

11.(1) The Commission may, where it considers necessary, make an application to the High Court for an interim freezing order with respect to a property that is subject to a lifestyle audit.

Application for an interim freezing order.

(2) Where the Court issues an interim freezing order, it shall specify the period for which the order shall be valid.

(3) The period specified by a Court under subsection (2) shall not exceed three months from the date that interim freezing order is made.

12.The High Court may at any time vary or discharge an interim freezing order on application made by the Commission or a person affected by the order.

Discharge of an interim freezing order.

13. (1) Where an interim freezing order in respect of any property is discharged, the person to whom the property belongs may make an application to the High Court for compensation.

Compensation.

(2) An application under subsection (1) shall be made within three months from the date of discharge of the interim freezing order.

(3) The Court may make an order for compensation only if satisfied that—

- (a) the applicant has suffered loss as a result of the making of the interim freezing order;
- (b) there has been a serious default on the part of the Commission; and
- (c) the order would not have been made had the default not occurred.

(4) Where an officer, acting on behalf of the Commission and who without reasonable cause applies for or knowingly relies on false information to apply for and obtains an interim freezing order and the interim freezing order is subsequently discharged and compensation awarded pursuant to subsection (3)—

- (a) the officer of the Commission shall be personally liable to pay the compensation; and
- (b) disciplinary action may be undertaken against that officer.

14. (1) The Commission may apply to the High Court for an account freezing order in relation to an account which is the subject of a lifestyle audit.

Application for an account freezing order.

(2) An application for an account freezing order may be made without notice if the circumstances of the case are such that notice of the application would prejudice the taking of any steps under this Act to freeze the account.

(3) An account freezing order ceases to have effect at the end of the period specified in the order.

(4) The period specified by the Court under subsection (3) shall not exceed three months from the date the account freezing order is made.

(5) An account freezing order shall provide for notice to be given to persons affected by the order.

15. (1) The High Court may at any time vary or set aside an account freezing order on an application made by—

Setting aside of an account freezing order.

- (a) the Commission; or
- (b) a person affected by the order.

(2) The Court shall, before it varies or sets aside an account freezing order, give an opportunity to be heard to a person who may be affected by its decision.

(3) A person against whom an account freezing order is issued may, subject to subsection (4), make an application for compensation.

(4) The Court may make an order for compensation where satisfied that—

- (a) the person against whom an account freezing order was made has suffered loss as a result of the making of the interim freezing order;
- (b) there has been a serious default on the part of the Commission; and
- (c) the order would not have been made had the default not occurred.

(5) Where an officer, acting on behalf of the Commission and who without reasonable cause applies for or knowingly relies on false information to apply for and obtains an interim freezing order and the account freezing order is subsequently discharged and compensation awarded pursuant to subsection (4)—

- (a) the officer of the Commission shall be personally liable to pay the compensation; and
- (b) disciplinary action may be undertaken against that officer.

16. (1) The Commission shall give notice to an account holder for the purpose of forfeiting money held in the frozen account.

Account forfeiture notice.

(2) The Commission shall, in issuing an account forfeiture notice under subsection (1),—

- (a) state the amount of money held in the frozen account which it is proposed be forfeited;
- (b) specify the period within which the account holder may raise an objection to the proposed forfeiture and the address to which any objections should be submitted; and

- (c) specify that the money will be forfeited unless an objection is received at that address within the period for raising an objection.

(3) A person who intends to raise an objection to an account forfeiture notice under subsection (1) shall submit an objection, in writing, to the address specified in the order within thirty days of receipt of the notice.

(4) Where an account holder fails to raise an objection and the period specified under subsection (3) has lapsed—

- (a) the amount of money stated in the notice shall be forfeited;
- (b) the bank in which the frozen account is maintained shall transfer that amount of money into an interest-earning account nominated by, and in the name of, the Commission; and
- (c) the account freezing order made in relation to the frozen account ceases to have effect upon the transfer of the funds.

(5) A person aggrieved by the determination made by the Commission on the objection may appeal to the High Court within thirty days after the date of such a determination.

(6) An appeal shall not automatically operate as stay of forfeiture of the money held in the frozen account under subsection (1).

(7) Where an appeal has been instituted, the High Court may on an application, order a stay of forfeiture on terms the Court considers just.

17. (1) A member of the public may lodge a complaint to the Commission where such person has reason to believe that a person holds unexplained wealth of a public officer.

Complaints by members of the public.

(2) A person who intends to lodge a complaint under subsection (1) shall submit the complaint in the prescribed form together with a statutory declaration made in accordance with the Oaths and Statutory Declarations Act.

Cap. 15.

(3) Upon receipt of a complaint under subsection (1), the Commission may—

- (a) call for information or a report regarding such complaint from any person within such reasonable time as it may specify; and
- (b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

(4) The Commission may decline to investigate a complaint if it considers that the complaint is trivial, frivolous, vexatious or is not made in good faith.

(5) If the information or report called for under subsection (3)(a) is not received within the time stipulated, the Commission may proceed to inquire into the complaint without such information or report in accordance with this Act.

(6) The Commission shall, within fifteen days of its decision, notify the complainant of the decision and the reasons for its decision in writing.

18. (1) The Commission may apply *ex parte* to the High Court for an order requiring an associate of a public officer subject to a lifestyle audit to provide, within a reasonable time specified in the order, a written statement stating, in relation to a property specified in the order, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

Obligation to provide information.

(2) In subsection (1), “associate” means a person whom the Commission reasonably believes has had dealings with a public officer who is the subject of a lifestyle audit and in relation to property reasonably believed to have been acquired by use of unlawfully obtained income.

(3) The Commission may by notice in writing require a person to provide, within a reasonable time specified in the notice, information or documents in the person’s possession that relate to a public officer subject to a lifestyle audit exercise.

(4) A person who fails to comply with a requirement under this section commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or

Cap. 80.

to imprisonment for a term not exceeding three years, or to both.

(5) A requirement under this section shall not require anything to be disclosed that is protected under the advocate-client privilege including anything protected by section 134 or 137 of the Evidence Act.

19. A lifestyle audit may be carried out on an immediate family member of a public officer if it is established that a property which is a subject of a lifestyle audit is owned by the immediate family member, including joint ownership.

Immediate family.

20. Where, as a result of a lifestyle audit under this Act, the Commission is of the view that criminal proceedings should be instituted against a public officer, it shall refer the matter to the Director of Public Prosecutions.

Referral of matters to the Director of Public Prosecutions.

21. A person who is the subject of a lifestyle audit may enter into a deferred prosecution agreement with the Director of Public Prosecutions in accordance with the law on deferred prosecution agreements.

Entering into a deferred prosecution agreement.

PART III— MISCELLANEOUS PROVISIONS

22. (1) The High Court may defer the publication of information under this Act for such a time as it considers necessary, if it appears to the Court that the postponement is necessary to avoid substantial risk of prejudice to the administration of justice in—

Publication of information.

- (a) legal proceedings;
- (b) an investigation under this Act; or
- (c) a criminal investigation under any other written law.

(2) In proceedings under this Part, the High Court may, in the interests of justice, public safety, public security or propriety or for any other sufficient reason, make an order requiring —

- (a) any information which is contained in a Court document intended to be produced before the Court, be removed or be sufficiently redacted; or
- (b) a person not to publish such information, or do an act that is likely to lead to the publication of such information.

(3) A person who contravenes subsection (2) commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

23. (1) The Commission may make Regulations generally for the better carrying out into effect of this Act. Regulations.

(2) Without prejudice to the generality of subsection (1), the Commission may make regulations providing for—

- (a) the procedure for cooperation between the Commission and other relevant bodies under section 4(2); and
- (b) guidance and regulation in the submission of information and carrying out of investigations under this Act.

(3) The Director of Public Prosecutions may, in consultation with the Commission, issue guidelines on cooperation and collaboration in the investigation of crimes under this Act.

24. Section 26 of the Public Officer Ethics Act is amended in subsection (1) by inserting the words “and the Ethics and Anti-Corruption Commission” immediately after the words “public officer”. Amendment of section 26 of No. 4 of 2003.

25. The Public Officer Ethics Act is amended by deleting section 30 and substituting therefor the following new section— Amendment of section 30 of No. 4 of 2003.

Access to
declarations.

30. The information contained in a declaration or clarification made under this Act shall be accessible to the public.

MEMORANDUM OF OBJECTS AND REASONS

The principal purpose of the Bill is to provide a legal framework for the carrying out of a lifestyle audit on public officers. The Bill seeks to incorporate the values and principles of governance under Article 10 of the Constitution into the public or state officers' public work.

There is no legal framework presently as to how a lifestyle audit is to be carried out on a public or a state officer who is suspected to be living beyond that person's lawful income. The Bill cures this lacuna in the law.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill delegates legislative powers to the Ethics and Anti-corruption Commission to make regulations for the better carrying into effect of the provisions of the Bill once enacted.

This Bill does not limit fundamental rights and freedoms.

Statement on how the Bill concerns county governments

The Bill concerns county governments in terms of Articles 110(1) (a) of the Constitution in that it contains provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution. The obligations proposed to be imposed by the Bill will have a direct impact on the means through which State and public officers serving in county governments discharge their functions under Part 2 of the Fourth Schedule to the Constitution.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

This Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 21st April, 2021

FARHIYA ALI HAJI,
Senator.

Section 26 of No. 4 of 2003, which it is proposed to amend—

26. Declaration required

(1) Every public officer shall, once every two years as prescribed by section 27, submit to the responsible Commission for the public officer a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependent children under the age of 18 years.

(2) The declaration shall be in the form set out in the Schedule and shall include the information required by the form.

Section 30 of No. 4 of 2003, which it is proposed to amend—

30. Access to declarations

(1) The contents of a declaration or clarification under this Act shall be accessible to any person upon application to the responsible Commission in the prescribed manner if the applicant shows to the satisfaction of the responsible Commission that he or she has a legitimate interest and good cause in furtherance of the objectives of this Act, in such declaration or clarification:

Provided that prior to the responsible Commission making an affirmative decision under this section, it shall grant the opportunity to the affected party to make representations on the matter.

(2) No information obtained pursuant to subsection (1) shall be published or in any way made public except with prior written authority of the responsible Commission.

(3) Any person who—

(a) publishes or in any way makes public any information obtained under the foregoing sections without prior permission of the responsible Commission;

(b) knowingly republishes or otherwise disseminates or discloses to another person information to which this section relates where—

(i) such information was disclosed to himself or to some other person; or

(ii) such information was obtained in contravention of this Act,

shall be guilty of an offence and liable on conviction to imprisonment for five years or to a fine not exceeding five hundred thousand shillings, or to both.

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