

**DATED**

**20**

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*(Name of the Principal)*

**-and-**

*(Name of the Agent)*

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**AGENCY AGREEMENT**

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THIS AGREEMENT is made the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_ between  
*(Name of the Principal) (description of the Principal e.g. a limited liability company  
incorporated in Kenya and a member of the NSE)* and of P O Box *(insert postal address)*  
(hereinafter referred to as “**the Principal**” which expression shall save where the context  
admits include its successors and assigns) of the one part; and

*(Name of the Agent) (description of the agent e.g a limited liability company incorporated in  
Kenya)* and of P O Box *(insert postal address)* (hereinafter referred to as “**the Agent**” which  
expression shall save where the context admits include its successors and assigns) of the  
other part.

WHEREAS:

- A. The Principal is desirous to procure the professional services of the Agent in relation to the transactions described in “**Schedule ....**” hereto and more particularly described in the Information memorandum a copy of which the Principal has furnished the Agent (hereafter “**the said services**”);
- B. The Agent has represented to the Principal that the Agent holds the relevant professional qualifications and licences required in order to provide the said services and is willing and capable of providing the said services,

NOW THIS AGREEMENT WITNESSES AS FOLLOWS:

## **1. Interpretation**

- a) Unless the context provides or requires otherwise:

“**CMA**” means the Capital Markets Authority, a statutory body incorporated under the Capital Markets Act Chapter 485A of the Laws of Kenya and includes any body replacing it or any of its functions;

“**Information memorandum**” means the information memorandum made by persons whether or not party to this Agreement and given to the Agent by the Principal in connection with the services required under this Agreement provided that

nothing in this Agreement shall be construed to mean that the information memorandum shall be made and issued by the Principal;

“**Liability**” means any loss damage cost charge claim demand expense judgment action proceeding or other liability whatsoever (including without limitation in respect of taxes duties levies imposts and other charges) and including any value added tax or similar tax charged or chargeable in respect thereof and legal fees and expenses on a full indemnity basis;

“**NSE**” means the Nairobi Stock Exchange;

“**Party**” means a party to the Agreement and includes its successors in title permitted assigns and permitted transferees which have acceded to this Agreement in accordance with its terms;

“**Person**” includes natural person firm partnership corporations societies associations state agency and any other body or association of persons;

“**Property**” means any property and includes money goods documents information and any other thing that may be given that description;

“**Successor**” means in relation to any party appointed under the Agreement any successor to any one or more of them which shall become a party pursuant to the provisions of the Agreement and/or such other or further agent in relation to the said services as may from time to time be appointed as such and notice of whose appointment has been duly given to the concerned persons;

“**the Agreement**” means this Agreement and the schedules hereto and includes any other document which is expressly provided herein as forming part of the Agreement;

**b) Clauses and Schedules:**

- (i) Any reference in the Agreement to a Clause or sub-clause or a Schedule is, unless otherwise stated, a reference to a clause or a sub-clause hereof or a schedule hereto;

- (ii) References in the Agreement to any clause sub-clause schedule or paragraph without further designation shall be construed as references to the clause sub-clause schedule or paragraph of this Agreement so numbered.
  - (iii) The schedules form part of the Agreement and any reference to the Agreement shall be deemed as reference to this Agreement and the schedules hereto.
- c) **Currency and symbols:**
  - (i) reference to monies value of benefits and/or value of property shall unless stated otherwise be taken as reference to monies value of property or value of benefits in Kenya Shillings;
  - (ii) "Kshs" and "Kenya Shillings" denote the lawful currency for the time being of the Republic of Kenya.
- d) **Statutes:** Any reference in this Agreement to a statute, any provision thereof or to any statutory instrument, order or regulation made thereunder shall be construed as a reference to such statute, provision, statutory instrument, order or regulation as the same may have been, or may from time to time be, amended or re-enacted.
- e) **Headings:** Headings and sub-headings are for ease of reference only and shall not affect the construction of this Agreement.
- f) Words denoting the singular only shall include the plural and vice versa;
- g) Words denoting any gender include all genders and words denoting persons shall include firms corporations and other legal entities and vice versa.

## 2. Commencement and duration of the Agreement

The Agreement shall commence and shall continue being in force for the duration shown in “**Schedule ...**” and thereafter may be renewed for a further term in accordance with the said Schedule.

## 3. Appointment

- a) The Principal hereby appoints the Agent to be his lawful agent and to provide the services specifically provided for in the Agreement and on the terms and conditions set out in the Agreement;
- b) The Agent accepts the appointment on the terms set out in the Agreement and undertakes that he/it will provide or procure the provisions of the services in strict accordance with terms of the Agreement and in accordance with instructions given to him/it by the Principal;
- c) The Principal hereby reserves the right to appoint during the currency of the Agreement other and further agents to carry out the services in respect of which the Agent presently is appointed;
- d) The Agent undertakes that during the currency of the Agreement he/it shall not enter into similar agreements or agreements in conflict with the Agreement with any other person other than the Principal and shall provide the services referred to in the Agreement to the Principal to the exclusion of any other person;
- e) The Principal hereby reserves the right to provide the services referred to in the Agreement directly to the clients without the need for any permission of or notice to the Agent notwithstanding the fact that the Agreement shall be in force;

#### **4. Obligations of the Agent**

- a) The Agent shall:
  - (i) Carry out his obligations under the Agreement with all proper care and professionalism;
  - (ii) Make proper efforts to negotiate and where appropriate conclude the transactions in accordance with the Agreement;
  - (iii) Communicate to the Principal all the necessary information without unreasonable delay;
  - (iv) Comply with all instructions given to him by the Principal.
- b) The duties to be performed by the Agent under the Agreement shall be as set out in the Schedule hereto marked as “**Schedule ...**”

- c) The Agent shall maintain records of all documents received by it in connection with its duties hereunder and shall make such records available for inspection at all reasonable times by the Principal and any other person authorised by the Principal.
- d)
  - (i) The Agent shall maintain a register of all the transactions made or entered into by him pursuant to the Agreement and the said register shall be kept at its office to be specified in writing by the Principal (“**the Specified Office**”) in accordance with the Agreement and shall be made available by the Agent to the Principal and any other person authorised by the Principal for inspection and for the taking of copies or extracts there from at all reasonable times.
  - (ii) The said register shall be prepared and kept in accordance with the provisions of “**Schedule ...**” hereto.

## **5. Warranties by the Agent**

- a) The Agent hereby warrants to the Principal as follows:-
  - (i) in the case of investment banks and stockbrokers they hold a current valid license from the CMA as an Investment Bank and a Stockbroker respectively;
  - (ii) in the case of stock brokers and investment banks they are full members of the NSE;
  - (iii) in the case of commercial banks they hold a current banking license from the Central bank of Kenya as a commercial bank;
  - (iv) no receiver (whether statutory or otherwise) has been appointed over the entire business and /or assets, or part thereof of the Agent;
  - (v) no order has been made or resolution passed or petition presented for the winding up of the Agent or for a provisional liquidator to be appointed in respect of it and no meeting has been convened for the purpose of winding-up the Agent.
- b) It is hereby agreed that if any of the above warranties is found to be incorrect or misleading in any respect or any of the authorisations or licences is withdrawn

cancelled or suspended then the Principal shall not be under any obligation to pay any monies to the Agent notwithstanding that the Agent may have provided the said services and the Principal shall thereupon be entitled to immediately terminate the Agreement.

## **6. Covenants by the Agent**

The Agent covenants with the Principal that during the currency of the Agreement the Agent shall unless authorised by the Principal the authority of which shall be given in writing:-

- a) not act in a manner which will incur any liabilities on behalf of the Principal;
- b) not pledge the credit of the Principal;
- c) not allow its duties to conflict with the duties that it owes the Principal under the Agreement;
- d) not on behalf of the Principal take part in any dispute commence or defend any proceedings before a court or any other tribunal including arbitration tribunal or settle or attempt to settle any dispute or make any admission concerning any such disputes;
- e) not make a communication or representation that is likely to raise reasonable inference that he/it is not acting on behalf of the Principal;
- f) on termination of the Agreement immediately cease to describe himself/itself as an agent of the Principal and cease to use all trade marks trade names and brand names of the Principal

## **7. Obligations of the Principal**

The Principal undertakes and covenants with the Agent that the Principal shall:-

- a) at all times act faithfully towards the Agent;
- b) supply the Agent at the Principal's own expense information documents forms and any other material that the Principal is obliged to supply to the Agent under the Agreement;
- c) ratify all the transactions made on the Principal's behalf by the Agent provided that the said transactions shall be within the express authority of the Agent in accordance with the Agreement;

- d) to pay the Agent all monies that the Agent is entitled to from the Principal under the Agreement;

#### **8. Remuneration of the Agent**

- a) The Agent shall receive remuneration for services provided pursuant to the Agreement and the scale method and time of making and/or receiving such remuneration shall be as set out in the schedule hereto marked as “**Schedule ...**”
- b) Save for the remuneration payments that the Agent is entitled to in respect of the said services and pursuant to the Agreement the Agent shall not accept for his own benefit any trade commission discount or similar payment in connection with activities pursuant to the Agreement and the Agent undertakes that it shall ensure that its employees servants and/or agents do not receive any such additional remuneration.
- c) The Agent shall not make any refund of any commissions provide discount in respects of commissions or share any commissions with any person who is not a member of the Nairobi Stock Exchange without the prior written approval of the Principal.

#### **9. Expenses reasonably incurred by the Agent**

- a) The Principal shall reimburse the Agent in respect of all expenses and indemnify the Agent against all liabilities incurred in the reasonable performance of the Agent’s duties pursuant to the Agreement;
- b) Notwithstanding anything to the contrary contained in the Agreement the Principal shall not be liable to reimburse nor indemnify the Agent in respect of expenses or liabilities incurred in consequence of the Agent’s default breach of duty negligence recklessness or transactions which are outside the scope of the Agent’s authority as contemplated under the Agreement.

#### **10. Disclosure by the Agent**

- a) In all the transactions with the Principal the Agent shall disclose every material fact which is or ought to be known by him if such fact is reasonably likely to operate upon the Principal’s judgement;

- b) If the Agent fails to make a material disclosure the Principal shall be at liberty to rescind the Agreement whether or not it has been completely executed without the necessity of establishing fraud or negligence on the part of the Agent.

## **9 Conflict of Interest**

- a) The Agent shall not put his duties under the Agreement in any manner howsoever in conflict with his interest;
- b) The Agent shall not enter into any transaction which he knows or reasonably ought to know is likely to produce conflict of interest with his obligations under the Agreement unless he has first made to the Principal in writing the fullest disclosure of the exact nature of his interest and the Principal has given his consent in writing expressly authorising the Agent to enter into the said transaction.

## **10 Dealings with the property under the custody of the Agent**

- a) Where the Agent is entrusted with any monies goods or property on behalf of the Principal the Agent shall not dispose of or in any manner howsoever part with such monies goods or property without the prior written authority of the Principal;
- b) Where the Agent disposes or otherwise deals with any property without the written authority of the Principal as required in (a) above the Principal shall not be bound by the transaction and notwithstanding anything to the contrary the Principal shall be at liberty to follow the property into the hands of the third persons who have acquired interest in the property and receive it or its value and the Agent shall be liable to pay the expenses incurred by the Principal in making any such recoveries.

## **11 Indemnities**

### **a) Indemnity in favour of the Agent**

The Principal shall indemnify the Agent against any claim demand action liability damages cost loss or expense which it incurs otherwise than by reason of its own (or that of its employees, servants or agents) negligence or wilful misconduct default or bad faith as a result or arising out of or in relation to its acting as the agent of the Principal under this Agreement.

### **b) Indemnity in favour of the Principal**

The Agent shall indemnify and keep indemnified the Principal against any loss liability cost claim action demand or expense (including, but not limited to, all reasonable costs, charges and expenses paid or incurred in disputing or defending any of the foregoing) that the Principal may incur or that may be made against it as a result of the Agent's negligence delay bad faith breach of contract or default or that of its officers employees or agents.

## **12 Agent to act in good faith and in accordance with the laws and the relevant regulations**

In all his/its dealings under the Agreement the Agent shall:-

- a) act in utmost good faith;
- b) act in accordance with the laws of Kenya and any other law for the time being in force in Kenya;
- c) act in accordance with the provisions of the Capital Markets Act Chapter 485A of Laws of Kenya and all the Regulations rules and directions given thereunder;
- d) act in accordance with the Rules and Regulations governing the conduct of business at the NSE;
- e) act in accordance with instructions given to him by the Principal.

## **13 Denial of the Principal's rights**

- a) The Agent shall not at any time and in any manner howsoever deny the rights and/or interests which have accrued to the Principal in consequence of the Agreement;
- b) The Agent shall not whether in himself or third parties set up any claims which are adverse to the rights and/or interest of the Principal accruing as a result of the Agreement;
- c) The Agent while in possession of property acquired on behalf of the Principal under or as a consequence of the Agreement shall not deny that the possession of the property and the interest therein s that of the principal;
- d) The Agent shall not set up a statutory title against the Principal nor maintain his own title as true owner over a property where such claim is adverse to the rights and/or interests of the Principal under the Agreement or under any law for the time being in force.

## **15 Unauthorised benefits**

- a) The Agent shall not without the knowledge and written approval of the Principal acquire any profit benefit interest or right (hereafter “the benefit”) under the Agreement except for the benefit that is expressly provided for under the Agreement as accruing to the Agent;
- b) Notwithstanding the fact that the Principal has in fact acquired the profit benefit interest or right he contemplated from the Agreement and the transaction in question the Agent shall nevertheless comply with the provision of the clause;
- c) Where the Agent receives the benefit as provided in (a) above the Agent shall pay forthwith and without unreasonable delay the full value of the benefit to the Principal.

## **16 Use of the information etc acquired under the Agreement**

- a) The Agent shall employ the materials facts and information obtained by him as a consequence of the Agreement solely for the purposes provided for herein and as may from time to time be directed in writing by the Principal;
- b) The Agent shall not use any materials facts or information acquired as a consequence of the Agreement in any manner inconsistent with this Agreement and shall use the materials facts or information in good faith and with utmost diligence;
- c) The Agent shall not volunteer or in any manner howsoever divulge any materials facts or information acquired under the Agreement to third parties unless the Principal has given his written consent to such divulgence;
- d) The Agent shall not employ any materials facts or information acquired by him during the term of the Agreement for the purposes of competition either by himself or by third parties with the Principal;
- e) The provisions of this clause shall be observed by the Agent all the times notwithstanding the fact that the Agreement shall have come to an end.

## **17 Announcements**

- a) The Agent hereby consents to the Principal making any announcement of whatsoever nature in relation to any matter relating to the said services and the transactions involved.
- b) The Agent shall not make any announcement except with the prior written consent of the Principal save (in the absence of agreement) for any statement or disclosure which may be required by law or mandated by a court order or an order of a tribunal having quasi-judicial powers.

## **18 Assignment**

The Agent shall not be entitled to assign its rights or obligations in whole or in part hereunder without the prior written consent of the Principal.

## **19 Accounts**

- a) The Agent shall keep accurate accounts and records of all transactions he undertakes pursuant to the Agreement and shall produce such accounts and records when required to do so by the Principal or some other person named by the Principal to receive such accounts and records;
- b) All monies received by the Agent on behalf of the Principal shall be accounted for to the Principal upon demand;
- c) The Agent shall account for any monies received by him on behalf of the Principal notwithstanding the fact that the transaction in respect of which the monies are received is void illegal or voidable;
- d) The Agent shall not be entitled to retain any monies received by him on behalf of the Principal in respect of a debt to the Agent from the person making the payment or because of some claim made to them by some third person;
- e) Where the Agent receive monies on behalf of joint principals the Agent shall account to the principals jointly and shall not be discharged from his obligations under the Agreement merely because he has made payment to one or more of the principals only unless a written approval of all the principals is received by him;
- f) All monies due from the Agent to the Principal which are not paid on the due date shall bear interest from day to day at the current interest rate applicable in the market and such interest shall be recoverable as part of the principal sum due.

## **20 Principal's right on bankruptcy of the Agent**

- a) Where the Agent is adjudged or becomes bankrupt enters into composition with creditors or receivers have been appointed over any property of the Agent the Principal shall be entitled against the Agent's trustees in bankruptcy to follow and recover any goods belonging to the Principal and in possession of the Agent together with any debts which may be due to him in his capacity as the agent of the Principal;

- b) Where the Agent has mixed the Principal's monies or property with his own monies or property the Principal shall have a first charge as against the Agent's trustees in bankruptcy and creditors in the mixed fund or property.

## **21 Termination of the Agency**

The Agency relationship shall be terminated under any of the following circumstances:-

- a) Resignation

The Agent may resign its appointment upon giving not less than Thirty (30) days' notice to the Principal and the CMA (with a copy to any remaining agents) and the reasons thereof PROVIDED HOWEVER that such resignation shall not take effect until a Successor Agent (hereinafter defined) has been duly appointed in accordance with the Agreement and notice of such appointment has been given to the concerned persons.

- b) Revocation

The Principal may revoke its appointment of the Agent in whole or in part by giving Thirty (30) days' notice to the Agent and the CMA.

- c) Automatic Termination

The appointment of the Agent shall terminate forthwith if:

- (i) the Agent becomes incapable of acting;
- (ii) a secured party takes possession, or a receiver, manager or other similar officer is appointed, of the whole or any part of the undertaking, assets and revenues of the Agent;
- (iii) the Agent admits in writing its insolvency or inability to pay its debts as they fall due;
- (iv) a liquidator is appointed over the whole or any part of the undertaking, assets and revenues of the Agent (or an application for any such appointment is made);

- (v) the Agent takes any action for a readjustment or deferment of any of its obligations or makes a general assignment or an arrangement or composition with or for the benefit of its creditors or declares a moratorium in respect of any of its indebtedness;
  - (vi) an order is made or an effective resolution is passed for the winding-up of the Agent; or
  - (vii) any event occurs which has an analogous effect to any of the foregoing.
- d) Additional and Successor Agents

The Principal may appoint an agent to act as a successor to the Agent (“the Successor Agent”) (and for these purposes may appoint separate parties to perform the various roles of the Agent under the Agreement).

## **22 Accrued Rights**

The termination of the Agreement howsoever caused shall be without prejudice to any obligations or rights of any of the parties hereto which shall have accrued prior to such termination and shall not affect any provision of the Agreement which is expressly or by implication provided to come into effect on or to continue in effect after such termination.

## **23 Breach of the Agreement by the Agent or the Principal**

- a) If the Agent shall fail due to no fault on the part of the Principal to comply with any of the provisions of the Agreement the Principal may give to the Agent Twenty One (21) calendar days' notice in writing specifying the default and requiring the Agent to remedy the same before the expiration of such notice and if the Agent shall fail to comply with such notice the Principal shall at the Principal's sole option be entitled without prejudice to any other right which the Principal may be entitled to under the Agreement or any law to do any of the following:
  - (i) invoke the dispute settlement mechanism provided for in the Agreement and pending the determination of the dispute to seek injunctive interim or conservatory relief from a court of competent jurisdiction; and/or

- (ii) rescind this Agreement, forfeit any monies it owes the Agent and negotiate a similar Agreement with another person(if the Principal so desires).
- b) If the Principal shall fail due to no fault of the Agent to comply with any provision of the Agreement the Agent may give to the Principal at least Twenty-One (21) days= notice in writing to comply with his obligations and such notice shall specify the default and require the Principal to make it good within Twenty-One (21) calendar days= and if the Principal then fails to comply with the notice the Agent shall at the Agent's sole option and without prejudice to any other rights or remedies to which the Agent is entitled under any law rescind the Agreement.

#### **24 No waiver**

- a) No waiver by any of the Parties of any of the requirements hereof or of any of its rights hereunder shall release the other Party or Parties from full performance of their remaining obligations stated herein and no failure to exercise and no delay in exercising on the part of any Party of any right power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any right power or privilege preclude any other or further exercise thereof or the exercise of any other right power or privilege.
- b) The rights and remedies provided in the Agreement are cumulative and are not exclusive of any rights or remedies otherwise provided by law.

#### **25 Notices**

- a) Addresses for Notices

All notices and communications hereunder shall be made in writing and shall be given, made or served by sending the same by registered post or facsimile transmission or by delivering it by hand as follows:

to the Principal:

to the Agent:

or to such other address or facsimile number as shall have been notified (in accordance with this Clause) to the other parties hereto.

**b) Effectiveness**

In the absence of evidence of earlier receipt any such notice or demand sent by hand shall be deemed to have been received at the time of delivery;

(iii) if sent by registered post shall be deemed to have been given made or served seven (7) days after posting; and

(iv) any notice or demand sent by facsimile transmission as aforesaid shall be deemed to have been given made or served twenty-four (24) hours after the time of despatch;

provided that in the case of a notice or demand given by facsimile transmission such notice or demand shall forthwith be confirmed by post and it is hereby agreed by the parties hereto that the failure of the addressee to receive such confirmation shall not invalidate the relevant notice or demand given by facsimile transmission.

**26 Miscellaneous**

- a) Nothing in the Agreement shall constitute or be deemed to constitute a partnership or joint venture between any of the parties hereto and none of them shall have any authority to bind the others in any way howsoever other than as contemplated or provided for in the Agreement.
- b) No failure or delay to exercise any power, right or remedy shall operate as a waiver of that right power or remedy and no single or partial exercise of any right power or remedy shall preclude its further exercise or the exercise of any other right power or remedy.

- c) If any term or condition of the Agreement shall to any extent be found or held to be invalid or unenforceable the parties shall negotiate in good faith to amend such term and condition so as to be valid and enforceable.
- d) If any term or condition of this Agreement shall to any extent be invalid or unenforceable the remainder of this Agreement shall not be affected and the other terms and conditions shall be valid and enforceable to the full extent permitted by law.
- e) Each of the Parties hereby agrees and confirms for the purposes of the Law of Contract Act (Chapter 23, Laws of Kenya) that he/it has executed this Agreement with the intention of binding himself/itself fully to the contents hereof.

## **27 Disputes**

Should any dispute arise between the Parties with regard to the interpretation rights obligations and/or implementation of any one or more of the provisions of the Agreement the Parties shall in the first instance attempt to resolve such dispute by amicable negotiation. Should the negotiations fail to achieve a resolution within Fifteen (15) days either Party may declare a dispute by written notification to the other whereupon such dispute shall be referred to arbitration under the following terms:-

- a) such arbitration shall be resolved in accordance with the provisions of the Kenyan Arbitration Act 1995 (as amended from time to time);
- b) the tribunal shall consist of one arbitrator to be agreed upon between the Parties failing which such arbitrator shall be appointed by the Chairman for the time being of Chartered Institute of Arbitrators of Kenya upon the application of either Party;
- c) the place and seat of arbitration shall be Nairobi and the language of arbitration shall be English;
- d) the award of the arbitration tribunal shall be final and binding upon the Parties to the extent permitted by law and either party may apply to a court of competent jurisdiction for enforcement of such award; and
- e) notwithstanding anything herein contained a Party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrator.

## **28 Modification**





Signature of person certifying