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Quote of the Month

“Corruption offenders can be relied upon to spare no expense to keep their ill gotten gains.”

Jack Smith 'et al'.

ASSET RECOVERY IN KENYA: Outstanding Questions...

By Kwame Owino

Grand corruption is not only a violation of law, but often results in the loss of property that belongs to the public. In realization of the fact that the primary motivation for corruption is the financial payoff, most of the legislation regarding corruption includes clauses that address the matter of recovery of assets. Under the Anti-Corruption and Economic Crimes Act of 2003, the legislature in Kenya provides a mechanism for the Kenya Anti-Corruption Commission (KACC) to seek

to recover assets and property that belong to the people of Kenya and which were acquired in pursuit of or as a result of acts of corruption. Lying behind this is the logic that whereas criminalization of corruption and the prosecution of the corrupt are necessary, it is equally important to complement the criminal law processes with efforts to reduce the financial gain that emanates from acts of corruption. Indeed, this is such a significant pillar of most anti-corruption efforts that substantial resources

ASSET RECOVERY IN KENYA: Outstanding Questions....

are often dedicated towards recovery of assets.

Specifically, section 7 of the Anti-Corruption and Economic Crimes Act of 2003 provides powers for the Kenya Anti-Corruption Commission (KACC) to investigate the extent of liability for the loss of or damage to any public property and to institute civil proceedings against any person for the recovery of such property or for compensation. Impliedly therefore, this clause is intended to be applied in order to diminish the gains that any person may derive from keeping property that has been accumulated through corrupt means. At the same time, the law is clear that the right to property of any person should not be violated and therefore, requires that such confiscation be done after the KACC has instituted civil proceedings. It therefore means that Kenya's asset recovery regime is subject to judicial proceedings in a civil court.

Knowing the lengthy processes that characterize the civil suits heard in Kenya's courts, the mere existence of the clauses permitting the KACC to pursue the recovery of assets would cause anxiety. Information from the official website of KACC www.kacc.go.ke/ reports that there are nearly 200 individual cases of asset recovery that are being pursued. Most of the details of the cases are understandably unavailable to the public but there is keen interest in the most high profile cases of corruption because of the reported amounts of money that are involved. Kenya Anti-Corruption Commission has not publicly reported any assets recovered for a variety of reasons. Among these reasons are that the proceeds of crime are often subjected to complex transactions in order to hide their sources and sometimes completely taken away from the direct jurisdiction

of institutions as the KACC through transfer to foreign nations. Invariably therefore, most attempts at recovery of assets of corruption are unduly complicated in addition to being costly in terms of time and resources.

In the eyes of the Kenyan public, the corrupt activities surrounding the Goldenberg scandal remains the major test of anti-corruption initiatives in Kenya. This is because it is declared as the single largest case of corrupt activities perpetrated in Kenya and which resulted in massive loss of public funds and other assets. Since 2003, the KACC has been pursuing a claim intended to recover the Grand Regency Hotel from the directors of a firm known as the Uhuru Highway Development Limited (UHDL) and 15 other parties. Subsequently, a settlement was reached by the parties to amicably resolve the dispute under which the defendants ceded possession to the KACC who would hand it over to the Central Bank of Kenya. The decision to opt for this one of a kind agreement was informed by the reality that the time spent in court was delaying the conclusion of the matter. Besides this it is also evident that a party that feared that

outcome of the case would be adverse to his interests could act strategically by filing counterclaims with the aim of indefinitely postponing the conclusion of the trial.

On the basis of a settlement entered into between the KACC on the one side and the two principal defendants in the case, the Grand Regency Hotel was formally handed over to the Central Bank of Kenya (CBK) on the 9th April 2008 in Nairobi. In exchange for the surrender of claims to the property in dispute, the Central bank of Kenya abandoned all other claims against the defendants. While the event demonstrated the outcome of the use of available instruments of law to achieve the goal of asset recovery, separate unverified information appearing in the press prompted questions about the conditions, timing and the material disclosures of the consent entered. Most of the claims in the print and electronic media made allegedly imply that the agreement was not properly and transparently done and were consequently not backed by evidence. In spite of this, the manner of the agreement reached and the material disclosures about it present an opportunity to review the manner of this recovery more dispassionately.

it is hardly enough to make a high profile announcement about the asset recovery when subsequent transactions regarding the management, valuation and sale of the asset are not properly disclosed.

The Outstanding Questions

The set of complicated business activity and fraudulent transactions that are known under the name of the Goldenberg Saga is characterized by conflicting claims. While a unique Commission was set to investigate the entire set of transaction, the report that was prepared by the Commissioners was not made available to the public. Naturally therefore, any matter regarding asset recovery in respect to this case is likely to be viewed with suspicion. On the other hand, asset recovery related to corruption

is often predicated on the fact that a court convicted the person or persons in possession of that property. Laudable as the recovery of the Grand Regency Hotel is, it stands in a peculiar position because there have been no convictions regarding the matter of Goldenberg transactions. The absurdity of the situation was further emphasized by the electronic media showing the individual associated with the Uhuru Highway Development Limited suggesting that the property was handed over as a gift.

Reading the consent agreement suggests that an agreement was reached on the basis of a repudiation of any legal claims to the Grand Regency Hotel. Public cynicism therefore, is understandable as it is based on the failure to resolve the criminal part of this matter primarily because claims such as these have been frustrated by the failure to convict any person for crimes related to the Goldenberg issue. To the extent that the manner of recovery of the Grand Regency Hotel involved a private arrangement and was not the result of a prior criminal conviction makes it an unpersuasive precedent. In spite of this, it is important to note that article 54 the United Nations Convention Against Corruption (UNCAC) advises that non-criminal proceedings should be explored because of the lower burden of evidence that is required.

A third point that illustrates the incompleteness of the transaction under discussion is that of custody and valuation of the property. The claim against UHDL was based upon the fact that the facility was constructed from funds loaned to its owners by the Central Bank of Kenya. The failure to make payment for that loan was the reason for a charge on that property. In the interpretation of the KACC, the hotel was rightfully claimed by the Central Bank of Kenya and was duly handed over. As a matter of principle, it is probably right to immediately return the

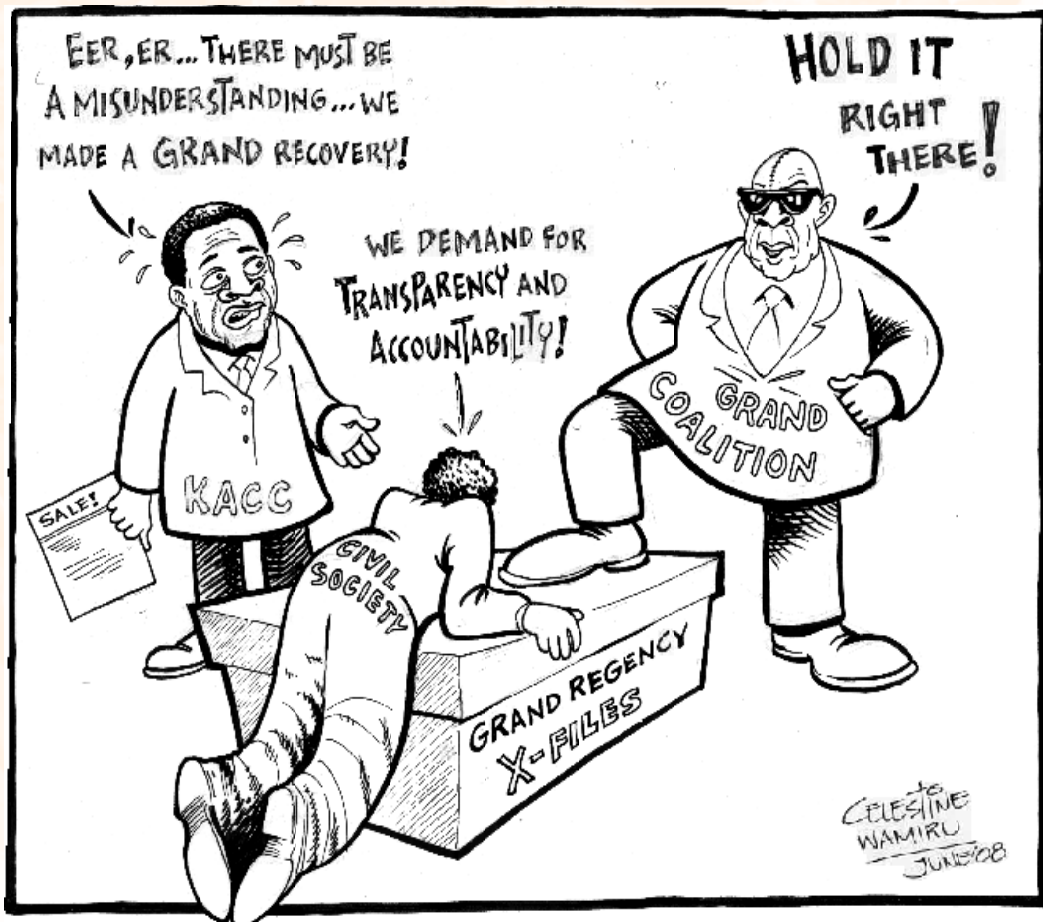
facility to the public body that was owed a large sum of money.

Considering that the provisions of the law allowing for recovery failed to explicitly specify the manner of returning any property, it has shown that there's need to consider establishment of trusted custodian of public assets. Without prejudice to the real claims that the Central Bank of Kenya may have regarding the Grand Regency Hotel, it is absurd that it has an interest at all in an asset of this nature. Its claim and rights regarding the property are arguably limited to the funds that were loaned out and the interest that have reasonably accrued thereon. To that extent therefore, the liquidation of the asset by an independent public institution ought to have been the way out in order to reimburse the Central Bank of Kenya. The fact that the information regarding the expected liquidation of the asset is


unavailable to the public, to an extent justifies claims that the asset has not been properly valued.

The management of recovered assets is of public concern in all situations where successful recovery occurs. Any subsequent transactions in respect of the Grand Regency Hotel will remain under close public scrutiny. Its impending sale should be conducted with utmost transparency not only because this is the only acceptable standard for public sector disposal of assets, but also because the entire record of Kenya's asset recovery could be besmirched by any suspicious transactions. Indeed, as is already happening, this lack of clear and consistent information regarding the method of disposal and the valuation of the property accounts for cynicism about the whole consent agreement.

Cont. on pg 4 col. 1



from pg 3 col. 3

In conclusion, the recovery of the Grand Regency Hotel by the KACC is an achievement that creates trust in the institution and the laws of Kenya in respect to corruption. As argued, it is hardly enough to make a high profile announcement about the asset recovery when subsequent transactions regarding the management, valuation and sale of the asset are not properly disclosed. In the recovery of assets, it is also imperative that the entire transaction be as transparent as possible to secure public trusts that the entire recovery process is not designed to cover up other crimes. Given the timing of the agreement and taking account of the political events that happened in the year, such disclosures are necessary in order to maintain the high degree of public trust that is necessary for the KACC to remain above reproach. This complicated case also demonstrates ably that a separate custodial facility is required apart from the Treasury and the Central Bank of Kenya (CBK) because the very existence of the Goldenberg scandal implicated Officers who were then working within these institutions. These shortcomings notwithstanding the success of this recovery shows that Kenya should choose to extend the pursuit of assets outside the country where most of the illegally acquired assets reside. As the prefatory statement above states, the corrupt do not yield stolen assets easily. 

Security Governance

Interview with Mr. Murimi Njoka, a sociologist currently working on his PhD on Social Protection in Kenya, and a lecturer at the Institute of Development Studies (UON).

What is the impact of security on good governance?

Security is an important guarantor of democratic rights and freedoms like speech, movement and assembly. These freedoms create favorable environment for good governance. People living in insecure places are less likely to have confidence expressing themselves as they are more prone to manipulation.

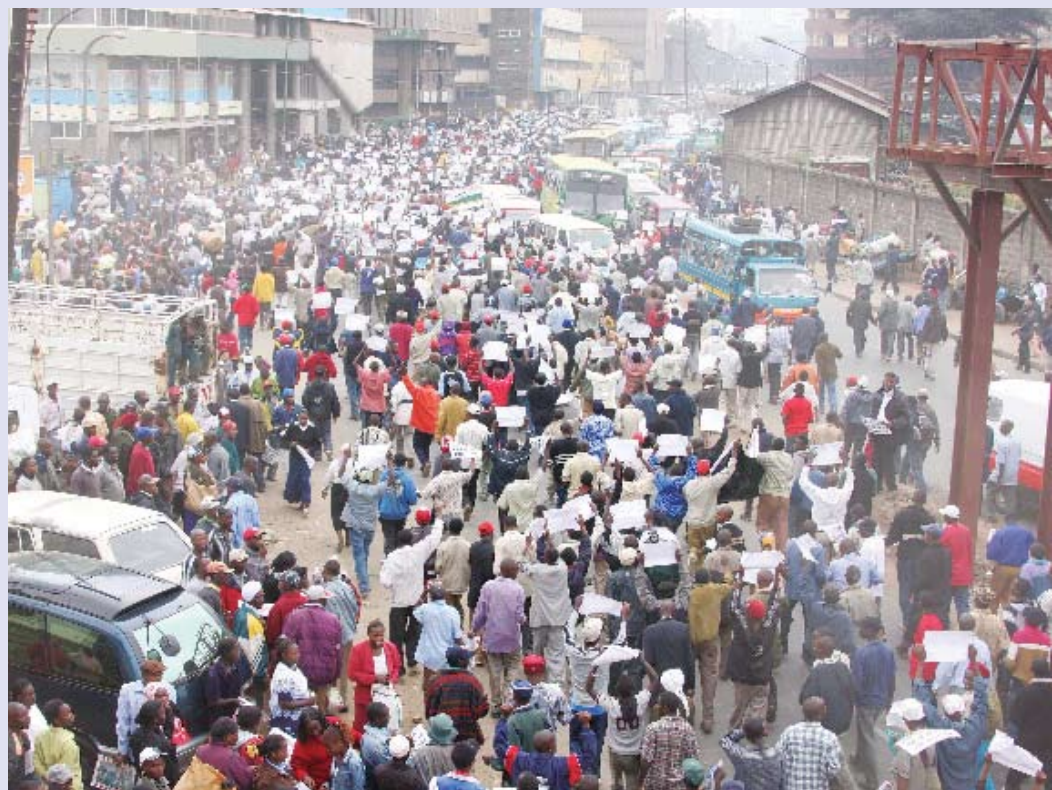
Do you think that corrupt leaders hide behind “national security” to engage in corruption?

Obviously, those who undertake dubious deals can easily hide under national security. This is a gap in law which anyone wishing to do so could take advantage. I am sure the issue of “national security”

in security-related tendering is a loophole worldwide. Security and tendering experts need to discuss this issue so as to balance the philosophy of competitive bidding and reducing the security concerns involved.

How is the complexity of security an issue when fighting corruption in the regular police force?

Fighting corruption in the regular police force is a difficult issue given the fact that one needs the police to maintain security, but also the macro-nature of poverty and inequality that threaten human security (freedom from want) in the country. Corruption is also a social network that is very difficult to break as it is led by very dangerous and moneyed persons who can stop at nothing.





Do you think that this is what has led to the public having negative perception of the police?

We first inherited a Police Force (NOT Police Service) from the colonial era. The colonial police instilled fear and terror among the people. This partly accounts for the negative attitude towards the police. Then there is of course the corruption which has made people have negative attitudes not just towards the police, but also towards public servants.

The Police have topped the Kenya Bribery Index (KBI) since inception. Is there a co-relation between corruption

in the force and the complex nature of understanding security, its structure and their responsibility?

No, there isn't. The police are very capable of understanding and handling insecurity. They know their responsibility and are up to the task of serving Kenyans. However, what is the motivation? Their pay and conditions as we have witnessed over the years, or is it the fact that they apprehend criminals only for the latter not to face justice due to long delays among other factors within the judiciary? Let's look at the police as people whose work is also governed by facts in life, human realities and relationships with other players.

..... what is the difference between the unfairly highly paid person and the policeman taking a bribe? Both are corrupt; only that we think one is a bigger evil.

Is the Kenyan government unable to monopolize violence?

The Government of Kenya (GoK) is able to monopolize violence, but the extent to which this can happen is dictated by politics, like when government uses violence against suspected criminals, what do you hear and see human rights advocates say? Governments all over have ability and resources to monopolize violence, but how they use it depend heavily on the effectiveness of the checks and balances, in civil society, watchdog bodies, political opposition, amongst others.

How can the government deprive militia/vigilante groups of their power?

The government cannot deprive the militia groups of their powers. Government can only re-channel those powers into more positive outlets. This needs to be done by careful analysis of the power in question, identification of the best demobilization options, processes, and reintegration of the groups. The fact that the militia groups have power and can control parts of the country for several hours and even days is evidence that these powers cannot be washed off overnight or as soon as one would wish. Use of force and politically instigated dialogue without addressing the long term issues behind the rise and empowerment of militias is an effort in vain, at least in the long term.

How does this pose as an impediment to the security apparatus?

The problem with militias and politics is that we have inadvertently accepted a culture of violence during campaigns. Politicians are therefore, able to hire the militia groups for security and terrorizing opponents. Politicians appear to also have mortgaged the country and have their way. We have to change the culture of violence by rejecting violent-prone leaders and also by rescuing this country from this crop of politicians. 🌐



International News Roundup

High Tax Rates Trigger Corruption By Rachel Horner, Freetown

Commissioner General of the country's national revenue authority has told an anti-corruption crusade marking the launch of two revealing books that high tax rates trigger corruption. Alieu Sesay said such unfavorable conditions could create opportunity for corruption to thrive. He made reference to huge tax levies among many causes that lead to bribery often with deleterious and devastating effects on administrative performance, economic and political development.

"Corruption could affect the efficiency of public spending, especially when bribes are used to influence the allocation of monetary benefits. It may even decrease government budget revenues. Often bribes are used to reduce the amount of taxes or other fees collected by NRA from private parties," he said. Sesay noted that corruption can also affect the level of investment and entrepreneurial incentive and

therefore hinder foreign direct investment.

He said poor accountability structures, including lack of transparency, and weak enforcement are also key factors that create incentive for corrupt practices. "Bad incentives or low wages are causes of corruption," Sesay noted. A Freetown resident Sahr Komba said higher taxes could lead to a more difficult financial crisis and that will affect the way of life of people. "The higher the taxation the higher the cost of social facilities," he said. A civil servant Marie Sesay said high taxation rates could increase cost of living which would subsequently lead to financial constraints and to an increase in corruption. 🌐

*Source: Concord Times
(Freetown-Sierra Leone)*

Nigeria Slams Corruption Charges on Two Ex-ministers

Nigeria's anti-corruption agency has slammed corruption charges on two former aviation ministers and the former head of the country's National Airspace Management Agency (NAMA) over their alleged role in the disbursement of the 19.5 billion naira aviation intervention fund for the renovation of four international airports in the country (118 naira=US\$1).

Former aviation ministers Femi Fani-Kayode and Babalola Borishade and ex-NAMA boss Roland Iyayi were arraigned at the Abuja Chief Magistrate's Court Wednesday, following their arrest by the Economic and Financial Crimes Commission (EFCC), and were charged with criminal conspiracy, breach of official trust, forgery and misappropriation. All the accused pleaded not guilty and were ordered remanded in EFCC custody till Friday, when their applications for bail are expected to be heard. The arrested officials were alleged to have been involved in the inflation of some contracts awarded for the upgrading of the key airports. They were arrested after they testified before a Senate panel investigating how the 19.5 billion naira intervention fund for the sector was spent during the administration of former President Olusegun Obasanjo. Earlier last month, the anti-graft agency had arrested an Austrian contractor, Mr. Eider George, who got the allegedly inflated contract, and he is currently being prosecuted.

According to the Senate Aviation Committee, the controversial Safe Tower contract awarded to Austrian firm Avsatel for 6.5 billion naira might have been inflated to the tune of 5 billion naira. Several committees of the Senate and the House of Representatives are currently investigating the activities of agencies in their areas of authority during as part of their oversight functions. 🌐

Source: Pana News Agency

United Nations Convention Against Corruption: Article 54

Mechanisms for recovery of property through international Cooperation in confiscation

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:
 - (a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;
 - (b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and
 - (c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.
2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:
 - (a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;
 - (b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and
 - (c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

The Public Procurement Oversight Authority has been established under section 8 of the Public Procurement and Disposal Act 2005.

Its main function includes:

1. Ensuring that all public entities are complying with the Act and the Regulations.
2. Assisting public entities in Implementation of the Act by ensuring they have the appropriate capacity and by offering technical advice.
3. Ensuring professionalization in the procurement function.
4. Monitoring performance of the system and bringing about modernization of the procurement system including through the introduction of e-procurement. The government is in the process of organizing a formal launch of the Authority and appointing its Advisory Board. (b) Promoting Corporate Decision Making and Greater Accountability and Transparency on Procurement. The law introduces an institutional framework in public entities that will ensure that decisions on procurement are made in a corporate fashion i.e. no one individual will be responsible for all procurement decisions. This should enhance checks and

balances and bring greater accountability by public officials. The law also clarifies who is accountable for which decisions and makes mandatory the publication of information on procurement including on contract awards. (c) Better Management of Disposal of Public Assets. This has been one area that has been neglected and has caused the public to lose large sums of money through irregular disposal methods. The new rules on disposal should bring an end to that and ensure that the public gets proper value when public assets are disposed off. The Act establishes clear procedures to be followed when assets are disposed and provides for the proper management of the disposal process. (d) Preference and Reservations. The law introduces the use of Preference and Reservations of certain procurements below certain thresholds for local contractors and suppliers. This includes:

5. Exclusive preference for local companies procurements value is below Shillings fifty million (Kshs. 50 m) for procurements in respect of goods or services; and Shillings two hundred million (200 m) for procurements in respect of works.
6. Margin of preference of fifteen percent of the evaluated price of the tender where suppliers are using goods manufactured, mined, extracted or grown in Kenya.

7. Margin of preference of 6% of the bid price where the local shareholding in the bidding companies is less than twenty percent; and 8% where the local shareholding is between 20% and 50%.

The introduction of these provisions on preferences and reservations are aimed at ensuring that local industry including small and medium enterprises are beneficiaries of government contracting and will promote economic development. (e) Security Procurements. The law provides for a requirement that all procurements by security arms of the Government be conducted under the Public Procurement and Disposal Act 2005 and that they be audited by the Controller and Auditor General. This will promote greater accountability in security related procurement an area that has been particularly challenging in the past. (f) Penalties. The law provides clear penalties for those who carry out procurement or disposal in a manner that is not in accordance with the law, this law provides for clear penalties. These penalties can be levied against public officials or against suppliers and contractors and they include surcharge and debarment from participation in public procurement.



EVENTS

Events: Workshop on “Transparency in Political Finance”

Organized by: TI-S and TI-Kenya

Date: 29th - 31st July 2008

Venue: La Mada Hotel, Thika Road

Events: International Corporate Social Responsibility Conference 2008-Responsibility Meet the Bottomline

Organized by: OWW Consulting, RUSS Consulting and the EU-Malaysia Chamber of Commerce and Industry

Date: 29th - 31st July 2008

Venue: Hilton Kuala Lumpur, 3 Jalan Stesen Sentral, Kuala Lumpur, Malaysia



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visit: <http://www.tikenya.org>

TI-Resource Centre:- you can now view our online catalogue on
<http://www.tikenya.org/knowledge.asp?id=1&ID=7>
Our resource centre is also open to the public

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