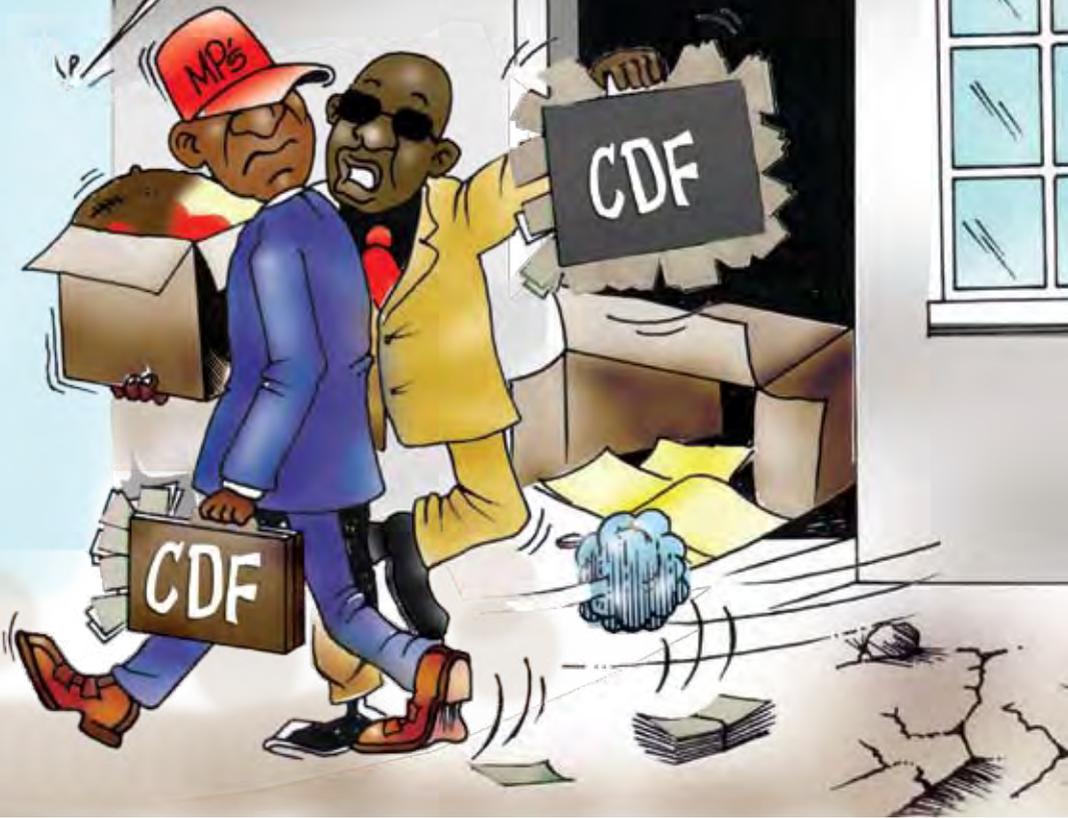


WHERE ELSE
DO WE GO?

CDF COMMITTEE OFFICE



What Next for CDF?

The Story of 5 Counties

 THE OPEN SOCIETY INITIATIVE
FOR EASTERN AFRICA

 Eds
CEDGG



 TISAF
The Institute for Social Accountability

 The Way
IT STARTS WITH US
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FOR EASTERN AFRICA**

The Open Society Initiative for Eastern Africa (OSIEA) supports and promotes public participation in democratic governance, the rule of law, and respect for human rights in Kenya by awarding grants, developing programs, and bringing together diverse civil society leaders and groups.

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What Next for CDF?

The Story of 5 Counties

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Acknowledgement

This report is a result of a partnership among The Institute for Social Accountability (TISA), Centre for Enhancing Democracy and Good governance (CEDGG), Centre for Human Rights and Civic Education (CHRCE) and Vihiga, Emuhaya, Sabatia and Hamisi Initiative (VESH Initiative).

The organizations are grateful for the dedication, work, energy, enthusiasm and time expended by various institutions and individuals in making this report a reality. We acknowledge the technical support provided by The Institute for Social Accountability (TISA).

We recognize the financial support from our development partner, the Open Society Initiative for East Africa (OSIEA), without which this initiative would not have been possible. We thank all those who in one way or another have contributed towards making this process and report a success.

Executive Summary

This report was commissioned by The Institute for Social Accountability (TISA), Centre for Enhancing Democracy and Good governance (CEDGG), Centre for Human Rights and Civic Education (CHRCE) and Vihiga, Emuhaya, Sabatia and Hamisi Initiative (VESH Initiative) and sets out the findings and recommendations of the social audit programme implemented by the four organizations.

Since its inception in 2003, CDF has facilitated a transfer of over Kshs. 70.956 billion from the central government to 210 different constituencies. These funds are earmarked to finance the implementation of public projects that have contributed towards the overall socio-economic development of Kenya as a country.

However, concerns about the utilization of funds under this program have emerged. Although CDF was designed to consider local needs and preferences a number of concerns have been raised about the weak institutional framework supporting the CDF, its lack of transparency, and ultimately that it does not address sufficiently the political imperfections that distorted political incentives to serve equally all the poor.

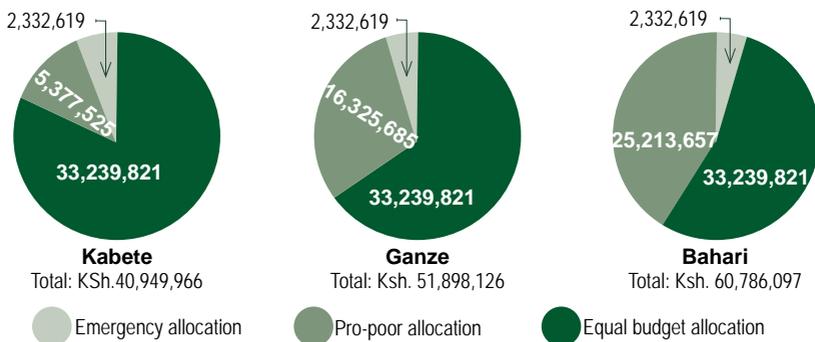
This report recommends Immediate release of the CDF Task Force Review report; the removal of MPs from CDF; the consolidation of the 2.5% allocated to CDF into the soon to be created County development structure; the winding up of CDF through a final disbursement in the coming financial year (2011/2012) to complete all pending but viable projects and a repeal of the CDF law.

1.0 | About CDF

1.1 | Background:

The Constituency Development Fund (CDF) was established in 2003 through the CDF Act in the Kenya Gazette Supplement No. 107 (Act No. 11) of January 9th 2004 and amended in the CDF (Amendment) Act 2007¹.

CDF was established to ensure that at least 2.5% of the government ordinary revenue is channelled directly to the constituency to support development projects as identified and prioritized by members of that particular Constituency. 3% is allocated to CDF Board for administration; 97% is allocated to constituencies in the following formula; 5% of the 97% is allocated to Emergency Reserve; 75% of the balance is allocated equally amongst all the 210 constituencies and the balance of 25% is allocated based on the Constituency Poverty to show the breakdown Index modelled by the Ministry of State for Planning, National Development & Vision 2030.



The government allocation to the CDF kitty, comprising 2.5 per cent of the annual budget, has been increasingly steadily over the years, from Kshs. 1.2 billion in the 2003/2004 budget to Kshs. 14.3 billion in the current financial year 2010/2011, a pointer that it could raise in the next financial year. In its strategic plan, the CDF board acknowledges there has been an annual average increase of 135%.

¹ CDF Act, available at the CDF website.

Funds allocated to constituencies from central government since CDF's inception

Year	Kshs. (Billions)
2003/2004	1.260
2004/2005	5.600
2005/2006	7.245
2006/2007	10.038
2007/2008	10.100
2008/2009	10.100
2009/2010	12.329
2010/2011	14.283
TOTAL	70.956

1.2 | Objectives of CDF

- » To control imbalances in regional development brought about by partisan politics.
- » To off-load fundraising burden from Members of Parliament
- » To ensure citizen participation through decision-making in project identification, implementation, monitoring and evaluation
- » To change development focus from the district to the constituency.

The Act provides for management structures to be put in place to oversee the implementation of CDF projects and more importantly to ensure prudent utilization of the funds. They are the Constituencies Development Fund Committee (Section 27), National Management Committee (NMC) - Section 5, District Projects Committee (Section 39) and the Constituencies Development Committee (CDC) – Section 23.1.

At the constituency level, the MP plays a critical role in the establishment of Constituencies' Development Fund Committee (CDFC) which manages the CDF monies and determines the projects to be funded by CDF². The MP is also a member of the CDFC. Besides, the MP is required to table proposals of projects to be funded under CDF to the Board³.

On the CDF Board's website, it is indicated that around Kshs. 70,956,300,000 has been allocated to CDF since its inception and over 60,000⁴ CDF projects in various stages of completion have been established throughout the country with a significant

² Section 27 of the CDF (Amendment) Act, 2007

³ Section 41 Ibid

⁴

percentage of these having been completed and in use. The sectors funded thus far include: Education-33.9%; Education (Bursary) 12.3%; Health Sector - 6.5%; Water -11.5%; Roads & Bridges - 6.2%; Security Sector 4.0%; Agriculture Sector - 1.3% and Others (M & E, Emergency, Environment, Recurrent, sports etc) 24.3%. However, the quality of projects is not stated.

1.3 | Key Milestones in CDF

1.3.1 2003: Parliament passes the Constituency Development Fund (CDF) Act

The Constituencies Development Fund (CDF) Act was first brought to the floor of Parliament during the 8th Parliament concerned with increasing demands for harambee contributions due to political allocation of national development funds. The bill received widespread support but was never passed into law. One of the first milestones of the 9th Parliament was the passage of the CDF into law on December 31, 2003 upon receiving Presidential assent. Section 51 protects CDF funds from being misappropriated. Any person who misappropriates these funds will be liable to prosecution, with a maximum five years imprisonment or up to Kshs. 200,000 fine or both.

The fund has faced numerous challenges ranging from a lack of accountability, as there was no regulatory framework governing the allocation of the funds, nor was there a standardized criterion for financial or performance reporting on their use. Furthermore, the CDF blurred traditional lines of oversight by reversing the constitutional separation of powers between the executive and Parliament, since the legislature ended up executing the program while the executive was overseeing it. There was also minimal involvement of the community in the CDF process. All these sanctioned the review of the Act.

1.3.2 2007: Amendment to the CDF Act. Now referred to as the CDF (Amendment) Act 2007 (In the Kenya Gazette Supplement No. 112 (Act No. 16) of 22nd October 2007)

Following the amendment of the CDF Act, 2003, the CDF programme was moved from the Ministry of Finance to the Ministry of Planning, National Development and Vision 2030.

The Act was amended through the CDF (Amendment) Act, 2007 provided for the formation of a CDF Board to replace the National Management Committee (NMC), which wound up its work in January, 2008. Formation of the CDF Board was delayed until 24th April, 2008, when a Minister was appointed on 13th April, 2008. Its membership is drawn from select Government ministries and public and private organizations and headed by a CEO. Even though it is autonomous from the Parliamentary Service, its membership includes the Clerk of the National Assembly⁵. Part V of the Act creates a Constituencies Fund Committee (CFC) comprising MPs appointed by parliamentary political parties. The CFC determines the monies to be allocated to constituencies, appoints the non-official members of the CDF Board, receives reports on CDF and tables the same to Parliament.

Sec 23 (1) (j), sec 23 (9) and sec 33 introduced Fund Managers to serve as accountants to the fund; they were also mandated to serve as custodians of all records and equipment of the CDFC office.

The CDF Management Board Sec. 52 (2) is charged with receiving complaints and disputes and taking appropriate action. All cases will be handled by the Board in the first instance, and where necessary the Minister (of Planning) will appoint an arbitration panel. The CDF Act 2003 stipulated that; 3% was to be spent on administration by the CDCs, 5% set aside for emergency, 10% for bursary and the remaining 82% was to be spent on development projects within the constituency. The amendment of 2007 allocated money as follows; 3% for administration, 5% for emergency, 15% for bursary, 3% for acquisition of CDFC vehicle and equipments, 2% for monitoring and evaluation expenses, 2% for sports 2% on environmental projects and the remaining 66% on development projects (Government of Kenya 2007, Gikonyo 2008).

The CDF Amendment Act, 2007, did away with printed estimates allowing parliament to draw funds from the consolidated fund in contravention of section 100 (1) of the former Constitution of Kenya and needs to be redressed.

⁵ Section 4 of Ibid

Section 28 of the Amended CDF Act provides that the Board will submit monthly reports to Parliament on the status of approved projects and their status and a summary of disbursements to the constituencies. However, the Board has not been updating this information onto the website demonstrating that it is either deliberately withholding information or not generating the needed information and is therefore in breach of the law.

The Act introduced a committee at the project level known as the Project Management Committee (PMC) which was charged with implementation of a project.

1.3.3 2009: Minister of State for Planning, National Development & Vision 2030 Wycliffe Oparanya sets up a task force to review the CDF Act

The Minister for Planning, National Development and Vision 2030 (MOPND) established The CDF Review Taskforce⁶ in 2009, to review and recommend amendments to the CDF Act 2003.

The taskforce was chaired by former Ol Kalou MP Eng. Muriuki Karue, the architect of the CDF concept during his tenure in the Ninth Parliament. Besides conducting public hearings in selected parts of the country the task force printed over 250,000 questionnaires which were made available in chiefs' camps for the community members.

The CDF task force received numerous constructive recommendations on how to streamline the funds' operations, among them was the demand by citizens that they should decide on the projects instead of the MP deciding for them. Citizens also demanded that they be involved in the appointment of the management committee as opposed to the MP appointing members single-handedly. This report is much awaited and the Minister of Planning owes members of the public who participated eagerly in the taskforce proceedings an update of its progress.

1.3.4 2011: CDF Board Strategic Plan 2010 – 2014 launched in April

In a surprising move this April (2011), the CDF Board launched a Strategic Plan 2010 – 2014, yet the Ministry of Planning has failed to release the findings of the CDF task

⁶ Kenya Gazette Vol. CXI – No.57

force. The plan, which the board says is informed by the yet to be released findings of the CDF Review Taskforce articulates the strategic vision and mandate of the CDF Board through to the year 2015. This is in spite of the ongoing reforms in the country such as the Task Force on Devolved Government that is developing a structure for the Country's devolved systems. The question that begs to be answered is: Should CDF continue with the Constitutionalisation of an Equalisation Fund⁷ that seeks to address of CDF objective of controlling imbalances in regional development brought about by partisan politics?

2.0 | Implementation Challenges

2.1 | Introduction

Numerous reports from various institutions such as National Anti-Corruption Campaign Steering Committee (NACCSC); Institute of Policy Analysis and Research (IPAR), Kenya Institute for Public Policy Research and Analysis (KIPPRA) and the Institute of Economic Affairs (IEA-K); Hanns Seidel Foundation; International Budget Partnership; Muslims for Human Rights (MUHURI); The Kenyan Section of the International Commission of Jurists (ICJ Kenya), The Institute for Social Accountability (TISA) and the Social and Public Accountability Network (SPAN) in conjunction with Kenya Human Rights Commission (KHRC) list the challenges that the CDF has faced since inception in 2003/2004.

Although the CDF was designed to consider local needs and preferences a number of concerns have been raised about the weak institutional framework supporting the CDF, its lack of transparency, and ultimately that it does not address sufficiently the political imperfections that distorted political incentives to serve equally all the poor.

These studies have also pointed out that the fact that MPs are the legislators, implementers and auditors of the CDF activities imposes a major constraint on the transparency and accountability of the fund.

The International Budget Partnership's documentary examining MUHURI's social audit in Mombasa, demonstrated the problems in the operations of institutions that are charged with accountability and/or transparency in Kenya's CDF.

In a survey of some 21 districts, the NACCSC study⁸ found out that some CDCs were composed of MPs' spouses, close relatives and supporters. It also found numerous forms of corruption were found to be reducing CDFs efficiency and effectiveness.

⁷ See Article 204 of the Constitution of Kenya 2010

⁸ Constituency Development Fund: An Examination Of Legal, Structural, Management And Corruption Issues In Kenya

These forms or avenues of corruption include manipulation of the process by the MP (e.g. in CDF committee selection and exclusion of majority); gender bias; tribalism and nepotism in the award of tenders; lack of transparency in allocation and use of disbursed funds; funding of non-priority projects; lack of serious monitoring and evaluation, bribery to secure contracts, location of CDF office at the MP's home or rented from MP's premises at exorbitant and unrealistic monthly rates among others.

On their part, Mapesa & Kibua (2006) found glaring management deficiencies within CDF. For example, whereas the CDF projects are in line with national development needs, the institutions for decision-making are weak, accountability and transparency mechanisms are absent and there is insufficiency of technical staff, poor community participation and generally low awareness levels among intended beneficiaries.

IEA, IPAR and KIPPRA have raised several concerns with regard to the accountability of the fund, citizen participation and financial management putting into doubt the effectiveness of the CDF. For instance, a survey conducted by KIPPRA (2006) on the CDF in 35 constituencies found that half of the survey respondents believe that the CDF monies have been widely mismanaged. According to KIPPRA's survey the CDF is viewed as the worst managed fund among all the devolved funds (Rural Electrification Programme Levy, Local Authority Transfer Fund, Roads Maintenance Funds, Secondary School Education Bursary Fund, HIV/AIDS Fund and the Free Primary Education). KIPPRA respondents mentioned that the main reason for the CDF mismanagement is the power given to the local MPs to appoint and replace members of the CDF committee. Other main reasons mentioned were that political loyalties have led to the unfair sharing of the resources across the constituencies and wards. In addition, it was reported a lack of transparency and accountability due to the blending of supervisory and implementing roles.

The IEA conducted a survey in 25 constituencies in 2005 interviewing 1,231 citizens and 577 members of CDF management committees. The study found extremely low participation among residents in CDF activities, and weak mechanisms in place for the grassroots to have a say in the projects to be implemented. IEA's survey respondents claimed that the biggest challenge facing the CDF was how to be well managed.

A study conducted by IPAR in five constituencies (Kajiabo, Kangundo, Limuru, Machakos and Makadara) also highlights other problems of the CDF (Mapesa and Kibua, 2006). Using both primary and secondary data sources the study finds that the CDF lacks of direction, transparency and has flawed legal foundations. Although on average in the constituencies examined people are aware that there are resources for the constituency, people do not have enough knowledge on how exactly the CDF operates. The majority of people interviewed disagree in the way in which the

CDF committees were selected and a very small percentage (less than 2%) of the respondents participated in the selection of the committees.

IPAR's study finds overwhelming evidence and acceptance that the CDF has been used to advance the political agenda of the MPs. Evidence was found of a "tug-of-war" between MPs and councillors that believe there are enough loopholes that can be exploited for individual financial-political advantage. This is aided by the fact that in four out of five of the constituencies analysed, the appointments of the members of the CDF committees are composed by MP's supporters and friends not elected by the local population. With a few exceptions, the members of the CDF committees were found to be technically incompetent, lacked an understanding of how the CDF operates, and had a limited capacity in project identification, planning, monitoring and evaluation.

The Hanns Seidel Foundation (2006) argues that the current Kenyan decentralization policy is characterised by an umbrella of funds with overlaps of areas and responsibilities. For instance, education funds are given under the LATF, Education Funds and CDF creating overlaps. In addition to this lack of coordination among funds there is lack clarity on the total amount of resources being allocated to each Local Authority and constituency.

2.2 | Access to information

Access to information remains difficult, preventing the ability of the public to monitor how the government uses their tax money. In some cases, the information that is available about local CDF projects is often inconsistent or inaccurate. Community groups attempting to access information about CDF projects often are unsure of the processes or encounter difficulty in getting the necessary documents.

A qualitative study by The Institute for Social Accountability (TISA)⁹ (then the CDF Accountability Project) in 2008 to assess the extent of citizen access to information on CDF in Nairobi found that constituents were unable to access basic project information either from their local CDFC or the national CDF Board. Officials at the Constituency level in all eight Constituencies of Nairobi County refused to provide CDF records without permission of the Board or the MP. Despite numerous requests, permission was not obtained.

A research by ICJ Kenya (The Kenyan Section of the International Commission of Jurists), cites section 47 (1) of the CDF Act as a barrier to citizens access to information at National, Constituency and project levels. "The Act mandates the Board to keep

⁹ Available at <http://www.tisa.or.ke/website/archives.html>

accurate records of all disbursements made for the projects in all the Constituencies.” However, Citizens are unable to hold the officers to account regarding planning and implementation because the Act has no provision for inspection of documents by members of the public.

In 2009, TISA, CEDGG and other Social and Public Accountability Network (SPAN¹⁰) members in conjunction with Kenya Human Rights Commission (KHRC) conducted a research: **Harmonisation of decentralised development in Kenya: Towards alignment, citizen engagement and accountability**, that established interpersonal communication as the most reliable way of getting information on most of the decentralized funds for a majority of the respondents. Other sources included Radio at 21% for CDF and Chief’s barazas at 15.7% for CDF.

A 2006 survey¹¹ by the Kenya Institute for Public Policy Research and Analysis (KIPPRA), confirms that the bulk of awareness on CDF was acquired through hearsay, but the media was also instrumental while fund committee members were indicted for undertaking no education. Consequently, participation was minimal, restricted to friends and relatives of project management.

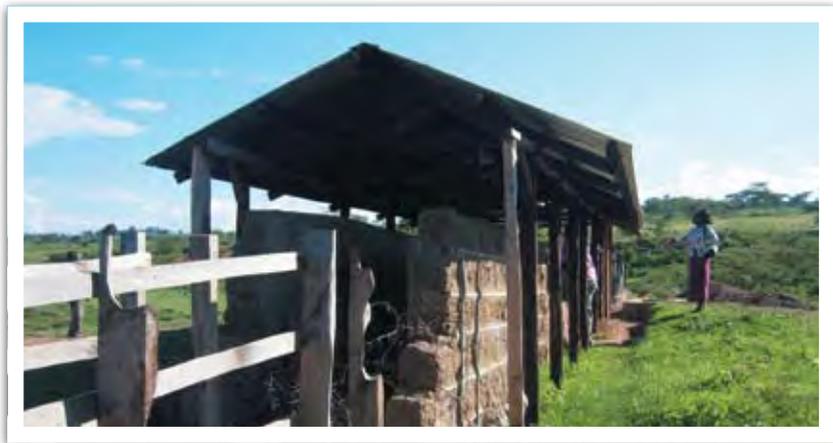
2.3 | Citizen participation

The SPAN-KHRC study echoes the findings of previous studies that demonstrate that citizen participation in local development funds remains poor due the absence of an effective citizen engagement culture. Local development in which citizens cannot participate effectively is a sham and is costly to the tax payer because it results in the establishment of projects that do not meet the real needs of citizens.

The NACCSC study concurs by revealing that less than 40% of the population may be involved in project implementation, management and monitoring and evaluation at any time. The majority (60%) are not. The rather low public involvement or community participation in project identification and prioritization may be responsible for the low project ownership that characterizes many CDF projects in some constituencies.

¹⁰ SPAN founder members comprise Abantu for Development, Action Aid Kenya, Centre for Enhancing Democracy and Good Governance (CEDGG), Centre for Peace and Democracy (CEPAD), MS Kenya, Social Economic Rights Foundation, The Institute for Social Accountability (TISA) and World Vision.

¹¹ Baseline Survey Report On Decentralized Funds In Kenya: A Review of Bondo, Bungoma, Nakuru, Machakos, Kirinyaga, Wajir and Mombasa Districts, and Nairobi Province.



Boror Cattle Dip, Rongai
Constituency, Nakuru County

2.4 | Accountability and corruption

Some communities often did not know members of the management committees, when and how much money had been allocated and what it was being used for. There was widespread perception that the funds were for politicians. Further, ignorance of fund frameworks undermined clear identification of impacts.

Members of Parliament, who are the patrons, were found to have excessive powers in picking the CDF committee members and to award contracts. However in some constituencies like Emuhaya, Vihiga Sabatia, the MPs have given wananchi an opportunity to select their own representatives to the CDFC.

There have been cases of corruption, nepotism, lack of community participation and few mechanisms of oversight to hold Parliamentarians accountable.

With particular emphasis on the MP in CDF, the study by TISA and her partners under the SPAN network found that the role of politicians in implementation directly undermines oversight and accountability and promotes political patronage over development goals. The report also cited too much power over CDF wielded by MPs as the reason for the failure of the fund to achieve optimum results. The study recommended that MP's need to get out of the implementation role of CDF.

The KIPPR report notes that communities do not know how much is disbursed and what projects are being funded by what money and, therefore, are not in a

position to know who to question. In other cases such as the bursary, beneficiaries do not sign anywhere and it is, therefore, difficult to say how much has been used (could we give the example of Kibera). Furthermore, due to the various sources from which a bursary can be given, the community is not told whether it is from CDF, LATF or the bursary fund. The fund managers do not show their account details to community members, making the latter feel there is no transparency. This was common in Mombasa, Kirinyaga, Nairobi, Bungoma and Bondo. Composition of fund committees was also obscure, with most of them being supporters of the area MP, for example in Machakos, while in Bondo the chairman of the CDF is also a councillor.



In Wajir, the CDF officials were seen to owe their allegiance to MPs “who employs them”. The identities of other fund managers were not known especially in Nairobi, making it difficult to know who to question on the usage of the funds. Ignorance was evident in Nairobi. There is also duplication of projects in some communities and, therefore, the community cannot tell which fund is utilised for which project and its beneficial impact. Committees also operate in distant locations, making accessibility to them and to the funds difficult, e.g. in Wajir.

Similarly, the NACCSC study in Kenya found that 88% of respondents felt that transparency in the CDF management was poor or lacking entirely. It found that the general lack of transparency in CDF matters is well manifested in lack of open discussion on allocation and use of the fund.

The IEA, KHRC CRC report concludes that about half of the beneficiaries were either dissatisfied or had no opinion on overall cost of projects, composition of management

committees and dispute and conflict resolution mechanisms. Committee members were however, more positive about management issues; apart from issues of conflict resolution and redress mechanisms. In general over 80% of committee members were either fully or partly satisfied with management issues.

2.5 | Role of Project Management Committees (PMCs)

The Project Management Committee (PMC) is recognized in the CDF Amendment Act 2007¹² as the committee responsible for implementation of a project. The CDF Implementation guidelines further expressly recognize PMC's as a procurement unit subject to government financial regulations.

In a report - **Gross Illegalities in Constituency Development Fund Need Urgent Redress**¹³- to evaluate the impact of CDF, TISA warned that the continuous recognition of PMCs as procurement entities was a gross violation of the law.

The Public Procurement Oversight Authority clearly states that the PMC has no legal mandate to award tenders under the current procurement law. In direct contravention to this position the CDF Implementation Guidelines recognize the PMCs as procurement entities. This is in disregard of the Public Procurement & Disposal Act, 2005 Sec. 143 that amended the Exchequer & Audit Act Cap 412 by deleting sec. 5A hence PMC's are no longer recognized as an independent public entity and cannot establish a tender committee. Section 5 (1) of the Procurement Act further clarifies, "where there is conflict with any other Act or regulation, the Procurement Act shall prevail. It therefore appears that PMC procurement by CDF PMC's is illegal."

An article by **The Link** monthly¹⁴ quotes the chairman of the Parliamentary Select Committee on CDF, Mr. Ekwee Ethuro, saying his committee is consulting with the Ministry of Finance to come up with a harmonized structure that will allow the PMCs to award tenders of up to a certain financial limit.

"We are seeking a legal interpretation of the Act that will see the law revised to allow the committees award tenders of projects below Kshs. 5 million," the monthly publication quotes Ethuro who further questioned the logic behind the resolve to have small projects tendered at a higher level, if the PMCs have the requisite capacity to successfully procure them.

¹² Section 35 and 36 of the CDF (Amendment) Act, 2007

¹³ Available at <http://www.tisa.or.ke>

¹⁴ A monthly governance publication of the Institute for Civic Affairs & Development

2.6 | Completion rates

The CDF Act is silent on professional skills and competences for Constituency Development Committee (CDC) members, which implies a significant lack of structure for sound management including planning, implementation, monitoring and evaluation of development projects.

Contrary to sec 24(2) of CDF Act, most CDF projects takes too long to complete and some projects are stalled with no signs of completion. During the FGDs, beneficiaries in the IEA, KHRC survey stated that implementation of CDF projects was mainly slowed down because of the bureaucratic processes in fund disbursements. The process of getting the technical arm of the government for their technical input was slow and cumbersome thus causing delays in projects implementation. In addition, there were many cases where people were not aware of the mechanisms to resolve disputes.



A stalled Bridge

The Public Expenditure Review Policy for Prosperity 2010-2012¹⁵ notes that despite the 10 fold increase in spending under the CDF there has been a limited realization of improved services. Reports from the Kenya Anti- Corruption Commission and the Controller and Auditor General suggest misuse and inefficient use of funds. There have been numerous problems with CDF-financed projects, with a number of low quality works and ghost projects, unaccounted funds and irregular payments documented in these reports. As the number of CDF projects has increased over the period, the project completion rate has deteriorated from 45 percent in 2003/04 to only 17 percent in 2007/08. Although the CDF Act limits the number of projects that can

¹⁵ Available at www.monitoring.go.ke

be funded, it appears that constituencies have been defining the scope of projects widely. As a result, constituencies end up spreading their CDF allocations so thinly which sometimes leads to stalled or incomplete projects.

The National Taxpayers Association Citizen Report Card for Othaya Constituency in 2008 found that Kshs. 8,624,710 of taxpayer's money had been wasted, due to badly built, complete and incomplete projects. Badly built, complete and incomplete projects were 26 while well built, incomplete projects were 82. 11% of the total CDF funds awarded in FY 2006-07 were spent on badly implemented projects.

The NACCSC study found the pace of project Implementation to be generally low and delays were reported in disbursement of funds.

Experiences drawn from the Centre for Peace and Democracy (CEPAD) Social Audit reports in 2009 indicate that there are a number of projects, particularly those that involve construction of offices, and community utilities like boreholes that were built on plots or parcels of land that were not public, yet there were no arrangements for the sale of the same. A well built, complete and functional borehole in Kisumu Rural that could not be accessed for this reason.



Bore Hole in Kisumu Rural, complete but not operational due to a land dispute

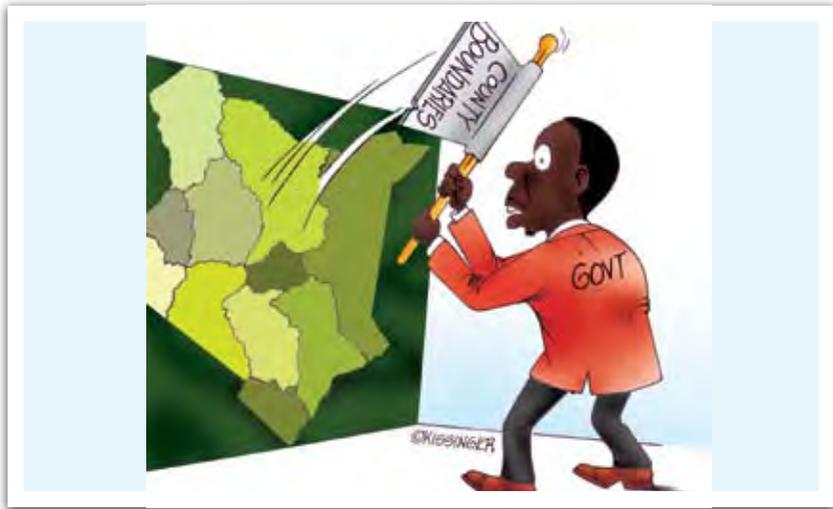
3.0 | Experiences of Social Audit Work in Kenya: the story of five counties

3.1 | Introduction:

In Kenya discussions have intensified recently over the role of civil society in bringing about greater government accountability to its citizens, particularly with regard to the flow of public resources. Through the lessons of civic engagement, participation, and civic ownership, citizen groups in Kenya are now beginning to hold a growing number of public officials and service providers accountable for their actions and behaviours. Such social accountability through various methodologies is working to bring about more efficient and equitable governance by reducing corruption and improving delivery of public services to the Citizens.

The Open Society Initiative of East Africa (OSIEA) has supported the use of social audits by several civil society groups among them Centre for Enhancing Democracy and Good governance (CEDGG); Centre for Human Rights and Civic Education (CHRCE); The Institute for Social Accountability (TISA) and Vihiga, Emuhaya, Sabatia and Hamisi Initiative (VESH).

The organisations sought to promote the participation of the Kenyan citizenry in the management of Kenya's Constituency Development Fund with a view to improving its efficiency through awareness creation and citizen engagement through the social audit methodology implemented in five Counties: Nakuru, Nairobi, Kitui, Machakos and Vihiga. A total of 13 constituencies were covered CEDGG in Nakuru (Rongai, Nakuru town and Naivasha), CHRCE (Mwingi North, Mwingi South and Kitui Central in Kitui County and Yatta in Machakos County); TISA in Nairobi (Embakasi, Kasarani, Langata and Westlands) and VESH in Vihiga Emuhaya, Hamisi, Sabatia and Vihiga).



The counties of Kenya

3.2 | About Social Audits

A social audit is a process that seeks to evaluate how well public resources are being used to meet the real needs of target beneficiaries. If well implemented the social audit is an important tool to enable local communities influence local development outcomes.

A social audit examines all aspects of a public project, including the management of finances, officers responsible, recordkeeping, access to information, accountability, levels of public involvement, and so forth. It seeks to engage the widest possible cross section of stakeholders. Public awareness meetings and a public accountability forum are an integral part of the social audit process.

Through their Social Accountability programmes, the four organizations are empowering communities to monitor public funds so that they can participate in the proper administration and implementation of development projects and demand accountability of public officials.

During the period 2009 – 2010, the organizations conducted social audits using different methodologies and they found that:

3.3 | Access to information

Access to information was a big challenge in the constituencies. Some officials were outrightly reluctant to share project information while others provided basic information. CDFCs in Nakuru County issued a directive to PMCs not to share any information or issue project files without authorization from the CDFC office, especially from the projects coordinator for the case of Nakuru Town Constituency. Rongai and Nakuru Town constituencies use notice-boards to relay information, especially on tendering and bursary disbursements. Rongai constituency has an SMS system that, according to a number of constituents is not useful in giving valuable information. Meetings are not held to prioritize projects to share CDF information. In Nairobi County, some information was obtained from the CDFCs but most of the CDF Project status reports were available from the official website up to 2007/8 financial year. The allocations for 2008-2010 were not available from any source despite numerous requests. Project work plans and bills of quantity were not availed by either of the CDF offices. Social auditors in Mwingi North, Kitui Central and Yatta constituencies were able to collect the information with minimal challenges. However, in Mwingi South the MP allegedly directed CDFCs to instruct PMCs not to share any information or issue project files.



3.4 | Citizen participation

The lack of active community participation in a number of constituencies, led to both lack of prioritization of projects and mismanagement of the funds. Specifically; CDF was found not to have an explicit citizen engagement framework. This weakness was capitalized upon by CDFCs who failed to account to the constituents. Nonetheless, in some constituencies, especially in Nairobi, citizen participation was reasonable at the identification stage, but very low at other stages of project implementation. This has diminished project impacts greatly.

In Nairobi full participation was recorded at 10.25%; participation at identification stage was highest at 55% and no participation at all was second highest at 32.25%. Langata constituency had the highest number of projects with full citizen participation in the implementation process while Embakasi constituency had the lowest levels of citizen participation. In Nakuru County projects with good Citizen Participation were 10% while no Citizen Participation was highest at 50% followed by partial Citizen Participation at 40%. In Kitui and Machakos County full participation totalled 5.95%, partial was 46.8% and no citizen participation was 47.25%.

3.5 | Accountability and corruption

A number of corruption/suspected corruption cases were noted in all the Counties. There were numerous discrepancies between the official data, the progress on the physical site and the evidence of the project committees as detailed in the individual project reports. Of the 41 CDF projects sampled in the four Nairobi Constituencies, approximately Kshs. 36,577,791 was lost to suspected corruption in 17 or an equivalent of 41.47% projects. The total number of cases of suspected corruption out of those audited in Nakuru County totalled 7 Projects worth about Kshs. 3.5 Million. In Kitui and Machakos, the total projects with cases of suspected corruption stood at 85 or 49.71% valued at approximately Kshs. 20,000,000



Gioto dumpsite, Nakuru County

The spending of money on non-existent projects such as construction of a perimeter fence and rehabilitation at Gioto Dumpsite where a total Kshs. 914,675.45 was allocated was noted.

There was another trend of CDF initiating projects but funding them midway. An example is Givole Dispensary in Hamisi Constituency where the CDF contribution was well utilised but could not complete the project. LATF funding was used to complete this project but the materials supplied were substandard. Citizens intervened and demanded an explanation. The contractor was forced to apologise to the community and has since been blacklisted.

In Mwingi, the two CDF committees contributed Kshs. 3.35 million for the Mwingi Stadium/Musila Gardens. This project stalled but the ministry of culture intervened and completed it. None of the CDF committees has explained how the money allocated for this project was used.



Musila Gardens

3.6 | Completion rates

Under the Act, the projects do not have end dates. Any uncompleted project from a previous financial year is allowed to remain on the project list and is allowed to continue attracting funding in successive years. The provision does not obligate any new Member of Parliament to complete what was started by a previous member.

Audit reports¹⁶ indicate that projects were either incomplete, badly built thus poor quality construction hence money was wasted. Others were incomplete and not funded in the subsequent years hence taxpayer's money was also wasted. The other pinpointed problems are the ghost projects where funds are allocated but projects do not exist.

For instance, out of 41 CDF projects sampled in Nairobi, 19 were complete four were ongoing while 17 were stalled. Embakasi constituency had the lowest completion rates of CDF projects while Langata had the highest. Kasarani constituency had the highest number of stalled projects while Langata had the lowest. In Kitui and Machakos County, it was found that 86 out of 171 projects were incomplete meaning that there were incomplete projects standing at 50.3 % of the total projects audited.

¹⁶ See: a) The Nairobi Social Audit Report. (2010): TISA
b) The CDF Social Audit Report. A community's Verdict Vol. 2. (2011): CEDGG
c) Kitui Central Constituency Social Audit Reports, Mwingi South & North Constituency Social Audit Reports & Yatta Constituency Social Audit Reports. (2010): CHRCE

The completed and in use were 75 equivalent to 43.8% of the total projects audited. In Nakuru County, Rongai only 36% of projects sampled completed while in Nakuru Town the rate was 27%.



Perimeter wall at Kibera Primary School

Experiences drawn from the Social Audit reports indicate that there were a number of projects, particularly those that involve construction that were on plots or parcels of land that were not public, yet there were no arrangements for the sale of the same.



Mwariki East Secondary School

At Mwariki East Secondary School, the total amount allocated to this project built on disputed land was Kshs. 4 million of which Kshs. 3.5 million was spent. A one floor storied block of classes was constructed with three ground floor classrooms constructed to completion. Before the alleged owner moved to court, the school was

already in operation. Later students were arrested alongside their parents and locked up in police cells. Currently, the project has stalled due to the land ownership dispute and the first floor block has been weakened and vandalised.

Kalatine girls' secondary in Kakuyu location, Mwingi South is another case of a complete but stalled project due to a land dispute. The school received KShs. 3.6 million.

3.7 | Role of Project Management Committees (PMCs)

One opportunity for citizen participation in CDF management is the selection of Project Management Committees (PMC). While most projects investigated had PMCs, it was revealed that the process of constituting them was not participatory. Save for school projects where school management committees were in charge, PMCs for other projects were either hand-picked by CDFs or were self appointed by community elites. PMCs do not report to the public.

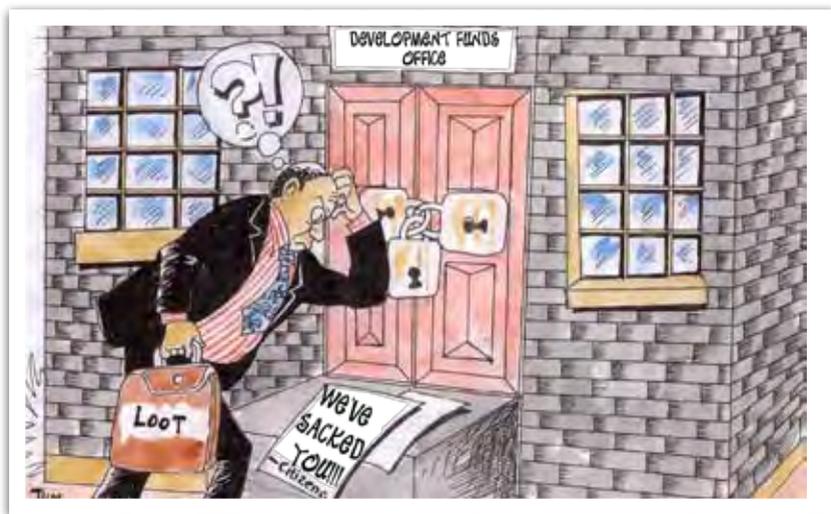
Although the PMCs may have lost their legal mandate to award tenders for CDF projects years ago, the social audit teams found PMCs still acting as procurement entities contrary to provisions of the Public Procurement and Disposal Act, 2005. According to PPOA, PMCs have no legal mandate to award tenders under the procurement law.

4.0 | Does CDF pass the Constitution of Kenya 2010 test?

4.1 | Is CDF factored in the Constitution of Kenya 2010?

Article 186 of the Constitution of Kenya 2010 confers functions to only two levels of government; the national and county levels. Further Articles 202 and 203 which deal with equitable shares, entitle only two levels of government to equitable shares of the revenue raised nationally. Obviously, this will be unaffordable, and will in all likelihood introduce competition between funds such as the Equalization Fund and other mandated transfers. There is also a need to ensure coordination between the fiscal activities of the two levels of government, on the one hand, and the activities of other government agencies and funds, on the other. If CDF continues, who will be managing it? Will it be the Senate which is closer to the people or will it be the National

Assembly? From whose kitty will the 2.5% be drawn from? The national government will say it has disbursed funds to the County level and to the Equalisation Fund. The County on the other hand will be busy setting up base and building/strengthening institutions.



Lately, there have been varying opinions about the fate of the CDF in the face of the new Constitution. While some people say the fund should be retained, others say the fund should be scrapped now that we have the minimum 15 per cent of the national revenue going to the counties. Clearly, there is no room for CDF under the Constitution of Kenya 2010. This is because the Constitution has clearly responded to the marginalised communities and the lack of services in parts of the Country by creating the equalisation fund.

Issues of inequality are to be addressed by the equalization fund 0.5% of the national revenue for a period of 20 years with possibilities of renewal. The new law also provides for an equalisation fund (Article 203), into which shall be paid one half per cent of all the revenue collected by the national government to be used for the provision of basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation. Therefore, what CDF deemed to have been doing - fighting poverty and shift planning/identification of projects to the local communities is a role already allocated to the County Governments.

MPs need not worry about marginalisation. The requirement for equity within and between counties has set the stage for Kenyans to take the government to task when communities or areas are perceived to be discriminated against. Previously, the government did deny essential services to some areas on the grounds that they had voted against the ruling party. These regions were cynically advised by former President Moi that, “**Siasa Mbaya, Maisha Mbaya** (bad politics was bad for their lives), meaning that unless they toed the political line set by political leaders, they would suffer discrimination. In future, however, affected communities will have recourse to a constitutional court, a fact that will most likely encourage more responsible political behaviour on the part of leaders.

4.2 | Separation of powers

MPs are officers of the national government and not of the counties. They therefore have no role at the counties who have been given the role CDF used to play. Schedule 6, 7 (2b) of the constitution of Kenya states, “a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer.” The Kenyan constitution vividly outlines the traditional Principle of Separation of Powers. The Principle requires that the government be divided into different branches each with its clearly spelt out powers and functions. It finds the main arms of government as threefold: The Executive, The Legislature and The Judiciary. The Constitution adopts this principle by creating and defining specific powers and functions of the Legislature at Chapter Eight (8), the Executive at Chapter nine (9), and the Judiciary at Chapter ten (10). The doctrine of separation of powers would require that the role of MP’s in CDF be that of Independent Watchdogs

This article brings out the issue of separation of powers as a clear principle in the constitution. Through implementation of CDF by MPs, it is clear that the Legislative arm of Government has usurped the Executive powers and functions. It is high time Parliament respected the principle of separation of powers enshrined in the Kenya Constitution 2010¹⁷ and got out of the executive management of CDF.

¹⁷ Republic of Kenya (2010). The Constitution of Kenya. Nairobi: Government Printers.



4.3 | Access to information



An Accountability board

The obstacles faced in accessing CDF documents and conducting social audits demonstrate the critical need for an FOI law in Kenya, requiring government officials, including CDF officials, to share information with the public. Making information public should not be left to officials' good will.

This lack of transparency prevents the people from knowing what the government is doing with public resources and demanding change. Making access to information a legal obligation will begin to create an institutional framework that will allow for the scaling up of involving the public in monitoring the use of public funds. Ultimately, this will

help to improve overall budget transparency and accountability.

The fact that Kenya does not have an access to information law makes obtaining CDF information even more challenging. Many are afraid to ask when it comes to public financed projects, even though they have many questions.

Article 35 gives Kenyans the right to access information held by the State. Legislation is necessary to provide for how the right will be enjoyed. Therefore an FOI Legislation should be enacted in Kenya at the earliest possible and before the next elections in 2012.

4.4 | Citizen participation

Article 10 of the Constitution expressly provides for not only the devolution of power, but also the active participation of the people in improving governance and service delivery. Giving citizens the power to have a voice in the decision-making process is a fundamental theme we see woven throughout the Constitution. Unfortunately, CDF does not meet this test as it does not provide a clear framework for citizen engagement. The only reference to citizen participation in the CDF Act is sections 35 and 38 which allows support to community initiatives and allows the community to nominate representatives to any PMC of a project being implemented in their locality.

4.5 | Prudent financial management

Chapter 12 of the Constitution of Kenya 2010 begins in Article 201 with guiding principles and a framework for public finance. Among the key principles are requirements that there should be: openness, accountability & public participation; promotion of equity; public expenditure that promotes equitable development and addresses marginalized areas and groups; prudent and responsible use of public resources and responsible financial management with clear fiscal reporting.

Article 226 on accounts and audit of public entities states that holders of public or political office will be held liable for loss or use of public funds contrary to law or instructions and shall make good the loss whether still in office or not.

Article 227 on procurement requires state organs to ensure their systems are fair, competitive, transparent and cost-effective. In addition to requiring Parliament to enact an appropriate procurement law, it also provides for preferences that protect persons previously discriminated against and disadvantaged. It incorporates sanctions against contractors and persons, who act unprofessionally, default or engage in corruption, which is a reflection of past government and CDF management failures to take action against well-connected contractors. Clearly, CDF does not meet the prudent financial

management principles and therefore has no room in the Constitution of Kenya 2010. The Constitution bestows great responsibility on the Executive and the Legislature to ensure that all aspects of public finance are guided by the principles of openness, accountability, clear fiscal reporting and responsible fiscal management. The principle of public participation is itself a strong pillar of this process and this is expressly provided for in Article 221(5) that calls on the relevant Committee of Parliament to seek public opinion on the estimates prior to their consideration by Parliament.

5.0 | Recommendations

5.1 | MPs must get out of CDF

There is a need for a separation of powers to improve accountability for public funds. A conflict of interest is created when MPs have both a role in the appointment of CDF committees where they are in charge of expenditure of funds, and at the same time these MPs sit in Parliament and are responsible for oversight of the funds. They must therefore get out of CDF in upholding the principle of separation of powers.

5.2 | The 2.5% added to the County kitty

The Constitution of Kenya 2010 at article 1(3) and (4) establishes two levels of government; the national and county levels of government. It does not envisage any parallel management structure being created. CDF should therefore be managed through the county planning, implementation and monitoring process. The CDF law should be repealed, and staff of its institutions integrated into the County framework. The 2.5% should be consolidated into the soon to be created County development structure.

5.3 | CDF Review Taskforce: Mr. Minister, release the report immediately

The minister must ensure CDF conforms to the Constitution; he must devise effective strategies for consulting and involving the people of Kenya. Mr. Minister, as we approach a new financial year it is unfortunate that CDF will continue with its present shortcomings.

Recent statements on CDF are a publicity stunt/political grandstanding to hoodwink Kenyans and shirk the parent ministries responsibility in funds management. How can the masses benefit when they have no access to the findings and recommendations contained in the CDF Task Force Review report? We demand that the Minister release this report!

5.4 | Wind up CDF

In the transition from CDF to Counties, we call upon the Government to allocate the final disbursement to all constituencies and ensure the amounts are enough to complete all pending but viable projects in each Constituency. Thereafter CDF should be scrapped by repealing the law since it no longer has a constitutional basis.

We further call upon the Government and all reform minded institutions to ensure that the final allocation to CDF in financial year 2011/2012 will be disbursed and spent to the last cent and accounted for before Parliament is prorogued.

5.5 | Repeal CDF and institute a transition mechanism from CDF to Counties

We call upon all the institutions under CDF to perform their responsibilities and tasks for the fulfilment of the Constitution, after consultation with and the participation of the people, as the Constitution itself requires, and in the spirit of the sovereignty of the people as acknowledged in the Constitution to ensure no money is wasted on duplicating functions assigned to the County and the National Government as outlined in the fourth schedule of the Constitution. We therefore recommend the removal of CDF because it is not a necessity now and it has no Constitutional basis whatsoever. The Ministry of Planning should immediately provide a timetable for the restructuring of CDF to Citizens, Parliament and civil society including opportunities for public comment, redrafting, and further comment. The draft itself should be brought into the light as soon as possible.

6.0 | **Call to Action: Get MP's out of CDF!**

To:

The Speaker of the National Assembly of Kenya, Hon. Kenneth Marende,
The Chairperson, Parliamentary Select Committee on CDF, Hon. Ekwere Ethuro
The Chairperson, Commission for Implementation of the Constitution (CIC)
The Chairperson, Task Force on Devolved Government

Dear Honorable Speaker and all reform minded institutions,

We demand that:

1. MP's must get out of CDF

Our representatives in Parliament (MP's) get out of CDF implementation and management with immediate effect as their continued presence in the fund negates the principle of separation of powers.

2. Transition from CDF to counties,

To ensure no money is wasted on duplicating functions assigned to the County and the National Government as outlined in the fourth schedule of the Constitution. We recommend the removal of CDF because it has no Constitutional basis.

3. CDF to citizens

The Constitution bestows responsibility on the Executive and the Legislature to ensure that all aspects of public finance are guided by the principles of openness, accountability, clear fiscal reporting and responsible fiscal management. The principle of public participation in Article 10 and in Chapter 12 Article 221(5) are strong pillars of Citizen engagement and participation in the budget allocated to CDF and must be involved in decisions relating to the fund as we prepare for its winding up.

4. Audit all CDF Allocations and Projects and;

Every year 2.5% of all the government's ordinary revenue is allocated to the Constituency Development Fund (CDF). The developmental results, however do not match the figures. It is not a secret that a great deal of the Constituency Development Fund allocations across the country have either been stolen, misused or mismanaged. What is not common knowledge is just how much of the money has been misused in the last eight years. Therefore we demand a careful, regular auditing of CDF cash and projects by an independent organisation as we wind up CDF and transit to Counties.

5. Prosecute those responsible for abuse of CDF funds

Article 226 of the Constitution states that holders of public or political office will be held liable for loss or use of public funds contrary to law or instructions and shall make good the loss whether still in office or not. To put an end to impunity we recommend the prosecution of all those responsible for abuse of CDF funds.

Sign up now to **Get MPs out of CDF**: log onto
www.tisa.or.ke



Annexes:

Annex 1: Organizational profiles

Centre for Enhancing Democracy and Good governance (CEDGG)

Centre for Enhancing Democracy and Good governance (CEDGG) is a grassroots civil society organization which was founded in 1995 and works to empower vulnerable people groups and ethnic communities on their governance and development rights. The head office of the organization is located in Nakuru town. The organization undertakes its programmes in Rift Valley province of Kenya.

CEDGG has undertaken Social audit of CDF funded projects in Nakuru Town, Rongai and Naivasha constituencies in Nakuru County for two years since 2009

Centre for Human Rights and Civic Education (CHRCE)

Centre for Human Rights and Civic Education (CHRCE) is a non-political, non partisan and non-profit making membership organization. The organization was found in 1996 and has been registered as an NGO in Kenya under the 1990 NGO Coordination Act since 2005.

CHRCE is dedicated on improving enjoyment of Human Rights and rooting for Democratic Governance among the people in Eastern Region of Kenya. CHRCE was awarded 1st Runners Up award in the Civil Society of the Year Award (CSOYA 2008) and Overall Winner (CSOYA 2008) governance and management Award category. In the year 2010, CHRCE received an Award for Exemplary Work during the National Conference on Non State actor's Role in Decentralized Financing in Kenya co-organized by the Institute for Economic Affairs (IEA) and other civil society organizations including TISA.

Within the audit period of Six months, the social auditors audited 39 projects in Mwingi South Constituency, 40 projects in Mwingi North, 44 projects in Kitui Central and 44 Projects in Yatta constituencies.

The Institute for Social Accountability (TISA)

The Institute for Social Accountability (TISA) is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya, to uplift livelihoods of, especially, the poor and marginalized. TISA has been operational since March 2008, and is a locally registered trust.

Among TISA's objectives are the promotion of citizen social audit practice in local development and the harmonisation of Kenya's decentralization framework through policy reform and shared learning.

TISA serves as the secretariat for the SPAN group. TISA is presently coordinating social audit work on behalf of the Open Society Initiative for East Africa in over 20 constituencies and in this regard manages a social audit learning group. In 2008 in collaboration with OSIEA, TISA launched and disseminates the CDF Social Audit Guide.

Between June and October 2010, TISA in conjunction with Shelter Forum and Ufadhili Trust undertook the **Nairobi Social Audit Campaign** that targeted three decentralized funds: The Constituency Development Fund [CDF], The Local Authority Transfer Fund [LATF] and The Economic Stimulus Programme [ESP], in four Nairobi constituencies; Embakasi, Kasarani, Langata and Westlands.

TISA has various publications to its name including the Nairobi Social audit report which was published after the Nairobi Social audit exercise.

Vihiga, Emuhaya, Sabatia and Hamisi Initiative (VESH)

VESH Initiative is a community based organization that trains communities to enhance effective citizens' participation in decision-making processes towards good governance and leadership accountability that respects citizens' rights.

VESH Initiative works in Vihiga County in the four constituencies - Emuhaya, Hamisi, Sabatia and Vihiga. During the years 2009 and 2010, VESH Initiative implemented the **Community Decentralized Funds Audit: Transformative leadership and Participation programme** to enhance effective citizens' participation in decision-making processes towards good governance and leadership accountability that respects citizens' rights.

20 community resource persons and 20 Community social auditors were trained on social auditing; 25 community resources persons were trained on decentralized funds and each of the CDFC brought in 25 participants including leaders from community groups in the respective constituencies. Four social audit committees

were constituted to monitor CDFC projects in the respective constituencies; a leaders training was undertaken that brought together 27 participants comprising of, DOs, Chiefs, their assistants and other community opinion leaders.

Further, a review and reflection meeting brought together 150 participants while Strategic Plan meeting that brought together departmental heads, political leaders, Provincial Administration and community opinion leaders to develop the strategic plan for Hamisi and Planning Meetings/ trainings conducted to develop Discussion Action Briefs for constituencies for discussion for Vihiga County fora. All resource persons held meetings in their respective locations and reached approximately 8500 people.

What Next for CDF?

The Story of 5 Counties



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