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## Press Statement

### Response to the Press release by Kenya Revenue Authority.

Keroche Breweries limited being a law-abiding Kenyan Company did not want to discuss anything that is in court but because one of the most respected institutions in the Republic of Kenya has decided to put this information in the public domain, we have decided to respond based on their statement.

#### Dear Kenyans,

We would never want to be seen as if we are engaging in a back and forth with one of the most respected Kenyan institutions, KRA. It is with a lot of humility that we seek to respond to what KRA has explained to the Kenyan public on the brief history of the dispute between Keroche breweries and KRA. We wish to respond as follows:

#### Introduction:

Keroche Breweries Limited (Keroche) was born 25 years ago and from a very humble beginning has grown to be the largest, fully locally owned brewery in Kenya, and in the East African region.

Keroche is globally recognized for ending the 80-year-old monopoly in Kenya's alcoholic beverages industry.

Keroche now stands as a state-of-the-art brewing facility with a capacity to produce **1.1 million hectolitres** per year of beer and spirits and wine line capable of producing 10,000 bottles per hour and 15,000 bottles per hour respectively. Keroche has directly employed hundreds of workers and is a source of livelihood for thousands of others through its distributorship and retail supply chain.

#### Background Information:

For the last 16 years, the Kenya Revenue Authority (KRA) has classified Keroche as a large tax payer. Keroche's current annual tax remittances amount to approximately **Kes 2 Billion**. The firm has been progressively working to capture increased market share, which at full capacity, would lead to remittances of annual taxes in excess of **Kes 10 Billion** and would create more direct and indirect employment for thousands of Kenyans.

As in other parts of the world, economic development in manufacturing and other business ventures, is not devoid of tax disputes between the taxing authority and tax payers. Tax disputes are a normal feature of tax administration, globally.

However, Keroche and KRA's tax dispute has spanned over a decade and a half and has grown into a subject of sharply divided public opinion.

So what has made the Keroche vs KRA tax disputes become almost toxic and a subject that has severely divided public opinion in Kenya?

**Due to reclassification of Existing Products to Higher Tax Brackets & Backdating of uncollected Tax by KRA**

At inception, through a letter dated 4<sup>th</sup> June 1997, KRA gave Keroche's Viena Fortified wine a classification under Harmonized System (HS) **Code Tariff 22.04** attracting **45% as the excise duty**. This classification was reconfirmed by KRA to Keroche through a letter dated 27<sup>th</sup> April 1998.

The cost-friendly and high-quality Viena Fortified Wine brought more Kenyans into the drinking tax bracket. KRA's tax collections from Keroche surged, tax relations between the Keroche and KRA were amicable and by June 2006, **KRA was due to remit to Keroche a tax refund of Kes 84 million.**

Shockingly on 23<sup>rd</sup> Oct 2006, KRA wrote to Keroche stating it had made a mistake by classifying Viena Fortified Wine under **HS Code Tariff 22.04 attracting 45% as the excise duty**, and that KRA had decided to re-classify the product in a **higher HS Code Tariff 22.06**, attracting Excise duty at the rate of **60%**. **The tax rate on Viena Fortified Wine was disrupted.**

Keroche wrote an objection on 09<sup>th</sup> November 2006 regarding the tax audit and on 29<sup>th</sup> Nov 2006 KRA wrote informing us that the position of KRA as communicated to us earlier through their letter dated 23<sup>rd</sup> Oct 2006 remains and consequently went ahead to issue assessments of **Kes 1.1 Billion**. In the assessment, KRA had backdated the new **HS Code Tariff 22.06** for **5 years** to recover their "error" amounting to **Kes 1.1 Billion** (the difference between the initial HS Code tariff 22.04 and the new HS Code Tariff tariff 22.06) with full knowledge Keroche had **NEVER collected** this money from the public! The matter went to court. In a ruling delivered in Nairobi on 6<sup>th</sup> July, 2007, the High Court quashed KRA's notice ruling and stated;

**"The classification of the products had a direct bearing on the price Keroche was selling its products and applying a different classification years later is unfair, oppressive, irrational, unreasonable and constitutes abuse of power and authority aimed at aiding Keroche's competitors".**

However, Keroche's victory was short-lived. Soon afterwards, the 2007/2008 Finance Bill forced the change of Viena Fortified Wine classification to a higher HS Code Tariff 22.06 attracting 60% excise duty. This high taxation priced our Viena Fortified wines out of reach of the intended target market by tripling the cost.

KRA appealed the High Court ruling through the Court of appeal.

The Court of Appeal in its judgment in summary ruled that:

- *"An order of certiorari is hereby issued to remove into the high court and quash the decision of the appellants contained in the letter dated 29<sup>th</sup> November 2006 to issue assessments on income tax, excise duty and withholding tax for the total sum of **Kes. 802,919,447.00.**"*

- *“An order of certiorari is hereby issued to remove into the high court and quash the decision of the appellants’ contained in the letter dated 29<sup>th</sup> November 2006 to issue an assessment on Value Added Tax, interest and penalty thereon for the total sum of **Kes. 305,094,183.00.**”*

“The above orders shall remain in force until the appellants have issued a reasonable notice(s) accompanied by supporting documents. For the avoidance of doubt, we set aside the following orders **(1)**, as follows:”

- *An order of certiorari be and is hereby issued to remove into the High Court and quash the decision of the respondents and/or the fifth respondent to remove the applicant’s fortified products from the classification under Harmonized system (H.S) Code tariff Heading 22.04 and to classify the applicants fortified wine produces under the Harmonized System (H.S) Code Tariff heading 22.06.*
- *An order of prohibition be and is hereby issued directed to each and all the respondents prohibiting each and all of them from removing the applicants fortified wine products from the classification under the harmonized system (H.S) Code tariff Heading 22.06*
- *An order of prohibition be and is hereby issued directed to each and all the respondents prohibiting each and all of them from classifying the applicants fortified wine products from the classification under the harmonized system (H.S) Code tariff Heading 22.06*

Shockingly, on 10<sup>th</sup> May 2017, KRA in defiance sent the same assessment of 29<sup>th</sup> November 2006 - that had been quashed by the High Court - and demanded that Keroche pays the **Kes 1.1 Billion** within **14 days**.

**On 2<sup>nd</sup> June 2017**, Keroche objected to the demand of the **Kes.1.1 Billion** by KRA and on **03<sup>rd</sup> August 2017**, KRA made an objection decision confirming the assessments of the **Kes.1.1 Billion** and advised Keroche that: “if you wish to appeal to this assessment you may do so as provided for and in accordance with section 52 of the Tax Procedures Act, 2015 within thirty (30) days as provided under section 13 of the Tax Appeals Tribunal Act, 2013.

Unsatisfied with the KRA assessment despite the court’s decision that KRA issues reasonable notice(s) accompanied by supporting documents, Keroche took the matter to the TAT. In our considered opinion, 11 years down the line cannot be considered reasonable notice. Furthermore, the 2006 documents re issued by KRA were based on reclassification of Viena Fortified wines from HS Code tariff 22.04 to HS Code Tariff 22.06 which had been nullified by two court decisions (High Court, 2006 and Court

of appeal, 2017) making all the demands arising thereof amounting to **Kes.1.1 billion** null and void.

The matter remained pending till 2019 when the newly constituted Tax Appeals Tribunal (TAT), took it up and in March 2020 decided in favor of KRA in the much-publicized, **Kes.9.1Billion** decision.

Keroche stands with:

1. **The 2006 High Court ruling that, “the classification of the products had a direct bearing on the price Keroche was selling its products and applying a different classification years later is unfair, oppressive, irrational unreasonable and constitutes abuse of power and authority aimed at aiding Keroche’s competitors”.**
2. **The 2017 court of appeal ruling that: “the orders shall remain in force until the appellants have issued reasonable notice(s) accompanied by supporting documents.” To date, KRA have never issued Keroche with any new supporting documents. Moreover, eleven years down the line cannot be reasonable time to file ‘reasonable notice(s)’.**
3. **KRA were disallowed from reclassifying Keroche’s Viena fortified wines from HS Code tariff 22.04 to HS Code Tariff 22.06 and all the demands arising thereof amounting to Kes.1.1 billion were therefore null and void.**

The 2006 demands of **Kes.1.1 Billion** marked the beginning of the false narrative; **Keroche owes billions to KRA”** and **“Keroche does not pay Taxes”**.

As earlier stated, the contested **Kes 1.1Billion** amount concerns a product phased out in 2006 after the reclassification of Viena Fortified Wine priced it out of the intended market leading to its demise.

### **Conclusion:**

The chain of events triggered by the 2006 KRA demand interestingly coincided with Keroche’s announcement of a **Kes.1Billion** investment in a beer brewing plant. This marked the first **“coincidence”** that would be repeatedly manifested in a suspicious pattern going forward.

The question is; **why and how can KRA propagate the false narrative that Keroche is a tax evader when one considers the following facts?**

1. How can KRA issue a start up with a Tariff for a product, allow that company to manufacture for 10 years, collect taxes, then turn around and issue an assessment based on a different higher tariff and backdate it by 5 years and send a demand on monies that they know were never collected?

2. The High Court in 2006, and, the Appeals Court in 2017 barred the KRA from reclassifying Keroche's Viena fortified wines from HS Code tariff 22.04 to HS Code

Tariff 22.06. This makes the KRA demands amounting to **Kes.1.1 Billion** derived from this quashed classification to be null and void.

After the death of Viena Fortified Wine in 2007 Keroche Breweries was left with no choice than deploy fresh strategy to recapture a market it had cultivated for 10 years.

*The effect of the 2007/2008 Finance Bill forced the change of Viena Fortified Wine classification to a higher **HS Code Tariff 22.06** that attracts **60% excise tax**. This plus the high taxation priced our Viena Fortified wines out of reach of the intended target market by tripling the cost.*

*[It is important to note that in the same 2007/2008 Finance Bill, Keroche's main competitor- 'Senetor Keg' was zero rated to enable the low end market afford the product. During the same budget speech Keroche's Viena Fortified Wine (the pioneer for low end consumption and which had been in the market for 9 years) excise tax was hiked from HS Code Tariff 22.04 attracting 45% as excise duty to a higher HS Code Tariff 22.06 attracting 60% as excise duty.*

Our **competitor's new product** was given a **tax incentive**. This selective legislation was done on 2 occasions by two different **Ministers for Finance**.

Being the pioneer in the Kenyan low end alcoholic beverages market, Keroche Breweries in 2007 presented a new alternative for moderate drinking, a ready-to-drink vodka derived from our existing Crescent Vodka. This is similar to what a consumer would do – walk into a bar, buy some tots of Crescent Vodka and mix with water or soda. The only difference is that Keroche uses naturally distilled water and mixes to precision for moderate drinking. For illustration, **188ml of Crescent Vodka (40%) is mixed with 312ml of naturally distilled high quality water, which makes 500ml of Viena Ice ready-to-drink Vodka (15%)**.

Seven (7) years later, on 20<sup>th</sup> August 2014 Keroche Breweries received communication from KRA disputing our formula of the Viena Ice ready-to-drink Vodka.

The letter directed that our Viena Ice ready to drink Vodka would now attract **Kes. 101.20 per litre**. This in essence meant that **water** added to our Crescent vodka to make Viena Ice ready to drink Vodka would now attract excise duty at the same rate as the vodka itself. This meant that our Viena Ice ready to drink vodka would now attract higher taxes than any other expensive vodkas, whiskys, brandys and gins that are known worldwide that cater for the high end market. One again, the logic was questionable as it demonstrated the overwhelming influence that foreign multinationals have over the decisions made by government agencies geared towards suppressing local enterprises.

This was the basis of the computation of the several assessments that we received that were backdated for 3 years amounting to **Kes 6.113 Billion!**).

On 23<sup>rd</sup> August 2014, we disputed the basis of KRA's computation and illustrated clearly that the formula of our Viena Ice ready to drink vodka is 188ml crescent vodka plus 312ml water.

This is the genesis of the highly publicized new **Kes 9.1 Billion** demand. It is important to note that the two issues at the TAT - 2006 Reclassification and new demands on water added to our vodka to make Viena Ice ready to drink Vodka - totals **Kes 7.2 Billion (Kes 1.1 Billion + Kes 6.1 Billion)**.

While we protested the new tax on the water as irrational and punitive, after several correspondences with KRA on the matter, KRA on 22<sup>nd</sup> July 2015 clearly acknowledged that Viena Ice ready-to-drink Vodka met the standards of innovation.

In the letter KRA advised the following to resolve the issue;

- Address the concerns to the National Treasury or Parliament, or,
- The Alternative Dispute Resolution (**ADR**), or,
- The Tax Appeals Tribunal - **TAT**.

We opted to go to the ADR. The ADR process lasted between 2016 and 2018.

A number of disputes between the KRA and Keroche Breweries were resolved through the ADR process. However, the issue of Viena Ice ready to drink vodka remained unresolved when we failed to agree on a proposal by KRA. KRA proposed to abandon all past alleged demands totalling **Kes 6.1 Billion** (2012 /13/14)), if only Keroche agreed to apply the proposed new rate going forward. Our conviction has always remained that taxing the water used to dilute our Crescent Vodka to make our Viena Ice ready to drink vodka is punitive and incorrect in principle. In addition, this would result in a drastic price increase and automatically drive it out of the reach of the intended market. Additionally, this is not value for money to the target consumer.

Since the dispute involved **different interpretations of rules of classifications** it was resolved that the dispute progresses to the Tax Appeals Tribunal (TAT) for determination.

With the TAT awaiting proper constitution, our submissions were delayed till June 2019.

Through these arbitration and negotiation processes (2014-2019), KRA continued monthly collection of taxes due for the 188ml Crescent Vodka that is in our 500ml Viena Ice ready to drink Vodka, and continued issuance of excise duty stamps on a daily basis.

However, on 14th June 2019 KRA withdrew their support for this arrangement with a new letter demanding Keroche to apply the KRA rate (which we had disputed) going forward - now at **Kes 210/litre** - or change our formula and create a product that is below **10% alcohol content** and pay at **Kes 110/litre**. Neither of these proposals favoured both Keroche and ironically the KRA itself.

If the rate of **Kes 210/litre** of water used to dilute our Crescent Vodka to make our Viena Vodka Ice ready to drink vodka is applied, the **product cost goes up by 200%**. This will automatically push the product out of the market. **KRA loses all the taxes they were collecting from the product.**

If Keroche is forced to create a ready to drink vodka product that is below **10% alcohol content** and **90% water** the product loses its competitive edge in every market. Additionally, its retail price is not value for money. Keroche loses a huge customer base. KRA loses a huge amount of tax they were collecting from the product.

On 18<sup>th</sup> June 2019, Keroche objected.

Keroche and KRA held a meeting and KRA team re-affirmed their decision that we pay as per their letter.

Subsequently, a Keroche Management meeting was held on 19<sup>th</sup> June 2019 to deliberate the way forward and opted to go with the second KRA option to create a less than 10% Ready to Drink Vodka. As per our initial fears, we have now lost 90% of the market we had cultivated for 12 years. This product was on its death bed. To the intended market, this new formula was not value for money.

These **reclassifications, back dating** and **change of formula** are the basis of the exorbitant amounts in question (The **Kes 9.1Billion** explained above and the **Kes 14.4 Billion** Tax Case – currently in court).

On 9<sup>th</sup> March 2020, the Tax Appeals Tribunal issued a decision in favour of KRA. The **Kes 9.1Billion** decision was contradictory. While the Court of Appeal has stopped KRA from reclassifying Viena Fortified wine from HS Code Tariff 22.04 to HS Code Tariff 22.06, the TAT allowed KRA to do an assessment based on their decision to reclassify to HS Code Tariff 22.06. Surprisingly the TAT changed our formula and determined a '**new rate**' of **Kes 94/litre** whose basis **CANNOT** be established.

In their ruling, The TAT strangely allowed KRA to collect taxes demanded on Viena Ice ready to drink Vodka less the rebate for the excise duty paid on Crescent Vodka. **This decision supports our long held position that Viena Ice ready to drink Vodka is 188ml Crescent Vodka and 312ml added water.**

**In other words, KRA has already collected taxes due on the 188ml Vodka. What they are demanding is tax on the 312ml water. Our position is this water cannot be charged.**

### Other Pending cases:

1. The **Kes.14 Billion** case which is currently in high court has been explained as part of our statement above which is purely based on the re-classification of our Viena ice ready to drink vodka which due to punitive taxation was forced out of the Market in 2020.
2. The last nail on our Viena ice ready to Drink vodka was in June 2020, when KRA issued a circular indicating that the ready to drink vodka should NOT be above 6% alcohol content. Mixing of **940ml of water** and **60ml vodka** would definitely taste like water and we were therefore forced to stop the manufacturing of our Viena ice ready to drink vodka in December 2020.

To make the matters worse, KRA deployed all its enforcement resources to ensure that we are not producing that brand and shockingly they claimed that they found some **3 bottles** of our Viena Ice ready to drink vodka which was allegedly at 12% alcohol content and which we are yet to ascertain where they got them from.

It was shocking that KRA backdated all our Viena Ice produced during that time and re-classified it to a new tariff and this is the basis of the current case of Kes. 256 Million currently at the Tax Appeals Tribunal (TAT).

We believe this case was a matter of pure witch-hunting. The sad part of it is that our Viena ice ready to drink vodka which was created through innovation and developed from 2007 had to be phased out of the market through punitive taxation in June 2020.

3. It is good to note that the figure of **Kes.3,998,561,062** {a combination of **Kes. 1.1 BILLION** (2006 case) and **Kes.2.9BILLION** water added into our Viena Ice ready to drink vodka (2012-2015)} as mentioned by KRA which was a subject of abandonment application arose from ADR settlement. The settlement was amicable and meant to provide a way forward on future taxes. The settlement figure was therefore hypothetical as Keroche had Neither charged nor collected the taxes due to ambiguity on the rates applicable

### Current Taxes (Feb 2021 – Jan 2022):

Keroche breweries appreciates the support accorded by the government through its agent the Kenya Revenue Authority (KRA), who are mandated to implement the tax policies and collect taxes on behalf of the government. However, we wish to highlight the run offs with KRA leading to closures of the company's factory at Naivasha. The ground for closure was due to outstanding tax arrears of **Kes.322 Million** that accrued

from February 2021. Failure to be up to date on the payments was explained to KRA as low business leading to poor cashflows that could not fully meet all the cash obligations of the company (taxes, utilities, salaries, suppliers, etc.). We subsequently entered into a

proposed payment plan with KRA but we could not manage to honor the same due to frequent interruptions by KRA:

- 1) On 7<sup>th</sup> December 2021 KRA closed the factory and further issued agency notices to 36 Banks in Kenya. This completely collapsed all our business operations since we could neither produce, sale nor access any financing from any of the banks to assist in settling the arrears.

We started negotiating for a payment plan and we requested for 24 monthly instalments based on our financial projections which KRA rejected and insisted on six monthly instalments. We proceeded with their proposal although we knew it was unrealistic since we wanted to have our plant re-opened and we were desperate to take our products in the market during the festive season.

- 2) On 22<sup>nd</sup> December 2021 KRA re-opened, but unfortunately, the earliest our products could reach the market was on 27<sup>th</sup> December 2021. We only managed to sell for three days till the end of the year but KRA were on our case demanding for the arrears according to the payment plan. We remitted Kshs. 10 million which was available in our accounts then; which to them was insufficient.
- 3) On 10<sup>th</sup> January 2022 KRA again shut down the factory and we re-negotiated the payment plan (24-installment) which they still rejected.
- 4) On 15<sup>th</sup> January 2022, after another round of back-and-forth discussions, KRA re-opened the plant. For us to go into production we needed revenue stamps which we had to apply and it took a further one week to get approval and issuance from KRA. We, therefore, started production on 22<sup>nd</sup> January 2022 and even before these products reached our markets KRA struck again.
- 5) On 31<sup>st</sup> January 2022, KRA closed the plant once again. In such circumstances of operating less than a week, it was impossible for us to raise the amount of money KRA were demanding. We managed to make a further payment of Kshs. 2.5 Million within the short period we were in operation. At this point they refused to accept further negotiations and the office of the Commissioner-Domestic Taxes Department, advised us that their hands were tied and we should seek support from the office of the Commissioner-General. Since then we have been trying to reach and even going to his office but we have been unable to reach him for his intervention.

From 1<sup>st</sup> February 2022 to date, we have remained closed and yet we have over 2 Million litres of beer worth about Kshs 512 Million in our tanks which have fixed costs to a tune of about Kshs 30 Million required to maintain the same monthly. This has drained

all our resources and unfortunately if nothing is done in the next seven days, we will be forced to drain down all the beer and lay down over 250 direct employees and thousands within our nationwide distribution network.

The recent closures of the factory by KRA have created a lot of uncertainty on the company's operations and future plans which if not addressed are likely to result to:

- i) Loss of 2 million Litres of beer in the tanks under fermentation worth Kshs.512 million.
- ii) Loss of 250 direct jobs originating from all over Kenya whose livelihoods depend on the existence of the company.
- iii) Loss of income to thousands of Kenyans who are indirectly involved in the distribution network.
- iv) Erosion of the Investors' confidence both Local and Foreign
- v) Killing of our local industries leaving the Multinationals to monopolize our economy (killing of the goose that lays the golden egg).

**Conclusion:**

This tussle between Keroche and KRA sheds a lot of light on how torturous our 25-year-old journey has been. Even though our faith in the cause of Kenyan entrepreneurship remains unshaken, it is time to voice the question that is being asked across Kenya – **how does a local enterprise survive in such a hostile environment and yet they have contributed to the Kenyan economy from the time of its inception:**

- i) Creation of direct and indirect jobs.
- ii) Breaking of the monopoly by Multinationals in the Alcoholic beverages sector and giving the Kenyan consumers a choice that is more premium.
- iii) Contribution of over Kshs.30 Billion in taxes to the Exchequer.
- iv) Putting the Nakuru County and by extension Kenya on the Global map due to the latest 21<sup>st</sup> Century brewing technology.

**Our humble appeal to the Commissioner-General:**

- 1) Assurance of a certain operating environment free from any harassment, unexplained tax demands, punitive taxation introduced on our products leading to their being wiped out of the market.
- 2) To kindly but urgently request the re-opening of our plant to prevent huge losses as described above and enable us resume production, sales and distribution and most importantly protect and safeguard the livelihoods of thousands of Kenyans employed by the company both directly and indirectly.
- 3) To kindly request the lift the agency notices with the 36 banks to enable us access financing.



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- 4) Due to the many disruptions, we have gone through since December 2021; we kindly request KRA to give the company 18 months grace period on the taxes in arrears. However, the company will continue paying the current taxes as they fall due.
- 5) To kindly give us an audience as one of the indigenous enterprises.

**To my fellow Kenyans:**

We are more than grateful to the honest support, encouragement and prayers that you have shown us. A million words would not be enough to describe how grateful we are. Our future depends on the enterprise we build today for the future generations.

**KEROCHE BREWERIES LTD MANAGEMENT.**