

**AGREEMENT**

**BETWEEN**

**THE GOVERNMENT OF THE REPUBLIC OF KENYA**

**AND**

**THE GOVERNMENT OF THE REPUBLIC OF SOUTH  
AFRICA**

**ON**

**AUDIO-VISUAL CO-PRODUCTION**

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**PREAMBLE**

The Government of the Republic of Kenya and the Government of the Republic of South Africa (hereinafter jointly referred to as the "Parties" and separately as a "Party"),

**SEEKING** to enhance co-operation between the Parties in the audio-visual sector;

**DESIROUS** of expanding and facilitating the co-production of audio-visual works which may be conducive to the audio-visual industries of both countries and to the development of their cultural and economic exchanges;

**CONVINCED** that these exchanges will contribute to the enhancement of relations between the Parties;

**HEREBY AGREE** as follows:—

**ARTICLE 1****OBJECTIVE**

The objective of this agreement is to provide an effective co-production landscape that enhances opportunities for the sector growth by opening up streams of international finance, skills transfer, removal of audio-visual trade barriers, and the economic growth of the industries of distribution and production of film, television, video and new media works between the two countries.

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**ARTICLE 2**  
**DEFINITIONS**

In this Agreement, unless the context otherwise indicates—

“**Administrative Authority**” means the authority referred to in Article 2 (1);

“**Audio-visual co-production**” means an audio-visual work which is approved by the Competent Authorities and has been made by one or more South African co-producers with one or more Kenyan co-producers or, in the case of a third party co-production, with a third country co-producer;

“**Competent Authority**” means the authority referred to in Article 2 (2);

“**national**” means –

- (a) In the case of a natural person, a citizen of, or permanent resident in, the territory of a Party; and
- (b) In the case of a juristic person, an entity that was lawfully established or incorporated in the territory of a Party;

“**producer**” means a national that manages the production of a work;

“**third party co-producer**” means any co-producer from another country with which the Republic of Kenya or the Republic of South Africa maintains a film or audio-visual co-production agreement as referred to in Article 6;

“**audio-visual work**” means any record of a sequence of related images, with or without accompanying sound, irrespective of length, which is intended to be made visible as a moving image through the use of devices, regardless of the medium of initial or subsequent fixation, and for which there is an expectation for public exhibition, and includes films and

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video recordings, animation and documentary productions for exploitation in theatres, on television, DVD or by any other form of distribution.

### ARTICLE 3

#### COMPETENT AUTHORITIES

- (1) The Administrative Authority responsible for the overall administration of this Agreement shall be—
  - (a) in the case of the Government of the Republic of South Africa, the Department of Sport, Arts and Culture; and
  - (b) in the case of the Government of the Republic of Kenya, the Ministry of Youth Affairs, Sport and the Arts.
- (2) The Competent Authorities responsible for the implementation of this Agreement shall be—
  - (a) in the case of the Republic of South Africa, the National Film and Video Foundation; and
  - (b) in the case of the Republic of Kenya, the Kenya Film Commission.
- (3) Each Competent Authority may publish guidelines regarding—
  - (a) how applications contemplated in this Agreement are to be made to the Competent Authority;
  - (b) how this Agreement shall operate;
  - (c) how the Competent Authorities will decide on approved co-production status; and
  - (d) factors which will be taken into consideration when exercising any discretion conferred on it.

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**ARTICLE 4****RECOGNITION OF AUDIO-VISUAL WORKS AND BENEFITS**

- (1) Subject to the approval of both Competent Authorities, an audio-visual work co-produced in compliance with this Agreement shall be deemed to be a national audio-visual work in the territories of the Parties and every co-producer shall be fully entitled to all the benefits which are or may be accorded to national audio-visual works by each of the Parties under their respective domestic laws.
- (2)
  - (a) The Competent Authority of a Party shall provide to the Competent Authority of the other Party a list of provisions concerning the benefits referred to in sub-Article (1).
  - (b) If the provisions concerning the benefits are changed in any way by a Party, the Competent Authority of that Party shall inform the Competent Authority of the other Party of the details of such change.
- (3) Any benefit referred to in sub-Article (1) shall accrue to the co-producer who is permitted to claim those benefits in accordance with the domestic law of that Party.

**ARTICLE 5****APPROVAL OF AUDIO-VISUAL CO-PRODUCTIONS**

- (1) Audio-visual co-productions shall require joint approval of the Competent Authorities prior to the commencement of shooting.
- (2) The approval for an audio-visual work shall be given in 2 stages:

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- (a) provisional approval upon application;
  - (b) final approval upon the completion of the audio-visual work.
- (3) Provisional or final approvals shall be given—
- (a) only if the application is made in accordance with the guidelines contemplated in Article 2(2) of this Agreement;
  - (b) in writing;
  - (c) specifying the conditions upon which they are granted; and
  - (d) subject to the minimum requirements set out in the Annex 1 this Agreement.
- (4) The Competent Authorities shall exchange all information concerning the approval, rejection, change or withdrawal of any application for approval of the co-production.
- (5) Before an application for approval is rejected, the Competent Authorities shall consult with each other.
- (6) Once the Competent Authorities have approved the co-production of an audio-visual work, such approval may not be later revoked by a Competent Authority without the written consent of the other Competent Authority.
- (7) The approval of the co-production by the Competent Authorities shall not be related in any way to the film rating systems of either Party.
- (8) To benefit from the provisions of this Agreement as it relates to the completed audio-visual work, producers shall submit the project for final approval before its first commercial screening in each country.
- (9) Nothing in this Agreement binds the Competent Authorities to permit the public exhibition of an Audio – visual work which has been granted co-production approval.
- (10) Where the Competent Authorities have granted co-production status to an Audio-visual work, such status shall not subsequently be withdrawn unless the said Competent Authorities agree thereto.

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**ARTICLE 6****CO-PRODUCER STATUS**

The Competent Authorities shall ensure that—

- (a) the South African co-producer fulfils all the conditions relating to status which would be required to be fulfilled, if that producer were the only producer in order for the production to be eligible as a South African audio-visual work;
- (b) the Kenyan co-producer fulfils all the conditions relating to status which would be required to be fulfilled, if that producer were the only producer in order for the production to be eligible as a Kenyan audio-visual work; and
- (c) none of the co-producers shall be linked by common management, ownership or control, except to the extent inherent in the making of the audio-visual co-production concerned.

**ARTICLE 7****THIRD PARTY CO-PRODUCTIONS**

- (1) Where either Party has an existing film or audio-visual co-production agreement with a third country, the Competent Authorities may jointly approve an audio-visual work as an audio-visual co-production under this Agreement that is to be made in conjunction with a co-producer from that third country.
- (2) Any third party co-producer shall fulfil all conditions required to be fulfilled under the terms of a co-production agreement in force between that co-producer's country and either the Republic of South Africa or the Republic of Kenya, as the case may be.

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- (3) The conditions of approval of such audio-visual work as a co-production shall be determined in each individual case by the Competent Authorities.

## **ARTICLE 8**

### **PARTICIPATION**

- (1) Individuals participating in an audio-visual co-production must be nationals of the Republic of South Africa and the Republic of Kenya, and where there is a third party co-producer, nationals of the third co-producer's country concerned.
- (2) In exceptional circumstances and by written agreement of the Competent Authorities, restricted numbers of performers or technical personnel from other countries may be engaged.

## **ARTICLE 9**

### **CONTRIBUTIONS**

- (1) Each co-producer shall contribute to the budget of the audio-visual co-production, between 10% and 80% towards the costs of the production of the audio-visual co-production.
- (2) In principle, the technical and artistic contribution of the producer of each Party shall be reasonably proportional to each co-producer's financial contribution, save in the event of an exemption granted by the Competent Authorities in exceptional circumstances.

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**ARTICLE 10****LOCATION AND STUDIO FILMING**

- (1) In principle, audio-visual co-productions made under this Agreement shall be filmed in one of the countries of the participating co-producers.
- (2) The Competent Authorities may approve location filming in a country other than those of the participating co-producers where the script or action of the audio-visual work so requires.
- (3) Notwithstanding Article 7, where location filming is approved in accordance with this Article, citizens of the country in which location filming takes place may be employed as crowd artists, in small roles or as additional employees whose services are necessary for the location work to be undertaken.
- (4) Filming in studios shall take place in studios located within the territory of either one of the Parties.

**ARTICLE 11****SOUNDTRACK**

- (1) The original soundtrack of each co-production shall be made in one of the official languages of either the Republic of South Africa or the Republic of Kenya or in any combination of those languages.
- (2) Narration, dubbing or subtitling in any commonly used language or dialect of the two countries of the Parties shall be permitted.
- (3) Post release print dubbing into any other language may be carried out in third countries.

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**ARTICLE 12**

**MAKING UP TO FIRST RELEASE PRINT**

- (1) Audio-visual co-productions shall be made and processed up to the manufacture of the first release print in the Republic of South Africa and/or, the Republic of Kenya and/or, where there is a third party co-producer, in that third co-producer's country.
- (2) Unless the Competent Authorities agree otherwise, at least 90% of footage must have been specifically shot for the audio-visual co-production.
- (3) Audio-visual co-productions shall be exhibited in any form of distribution platform in both countries as agreed upon by the co-producers of the audio-visual work.

**ARTICLE 13**

**ACKNOWLEDGEMENTS AND CREDITS**

- (1) An audio-visual co-production and the promotional material associated with it shall carry a credit title indicating that the audio-visual work is—
  - (a) an "Official Republic of South Africa – Republic of Kenya Co- production";
  - (b) an "Official Republic of Kenya – Republic of South Africa Co- Production"; or
  - (c) where relevant, the result of, or a credit reflecting the participation by the Republic of South Africa, the Republic of Kenya and a third party co-producing country.
- (2) The co-production between the Parties shall also be referred to in the event that such audio-visual works are shown at festivals.

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**ARTICLE 14****IMMIGRATION AND FACILITATION**

Subject to the domestic law relating to immigration in force in the countries of the Parties, each of the Parties shall permit the nationals of the country of the other Party, and nationals of the country of any third co-producer approved under this Agreement, to enter and remain in the Republic of Kenya or the Republic of South Africa, as the case may be, for the purpose of making or promoting an audio-visual co-production.

**ARTICLE 15****IMPORT OF EQUIPMENT**

Each Competent Authority shall provide, in accordance with the relevant domestic laws in force in their countries, temporary admission of cinematographic and technical equipment for the making of audio-visual co-productions, subject to provision of security, until the equipment is exported back to the country where it came from.

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**ARTICLE 16**

**OWNERSHIP**

- (1) Each co-producer shall jointly hold the tangible and intangible rights in the audio-visual work in proportion to the co-producer's contribution relating to Article 8 of this Agreement.
- (2) The material related to the audio-visual work shall be kept in a laboratory chosen by the co-producers, in their joint names.

**ARTICLE 17**

**JOINT COMMISSION**

- (1) The Competent Authorities shall establish a Joint Commission consisting of an equal number of representatives from each Competent Authority.
- (2) The Joint Commission shall—
  - (a) facilitate the implementation of this Agreement;
  - (b) recommend amendments to this Agreement, if necessary; and
  - (c) examine whether the balance of the respective contributions has been achieved in respect of the following:
    - (i) The contribution of each country to the production costs of all audio-visual co-productions;
    - (ii) the usage of studios and laboratories;
    - (iii) employment of all performing, creative and technical roles measured numerically; and

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- (iv) the participation of each major roles in creative, technical and performing roles and in particular those of writer, director and lead cast.
- (3) The Joint Commission shall meet annually, alternately in the Republic of South Africa and the Republic of Kenya.
- (4) Extraordinary sessions of the Joint Commission may also be convened at the request of either Party in the event of changes to the domestic law applicable to the Audio-visual industry or major obstacles (in particular, imbalance in contribution) to the functioning of this Agreement. The Joint Commission shall be convened within six (6) months of such a request.
- (5) The Joint Commission shall review whether an overall balance has been achieved in the contributions from the two Parties and shall implement the necessary measures in order to correct any imbalance.
- (6) If an imbalance in contributions has occurred and a session of the Joint Commission is not convened expeditiously in order to review the measures to restore balance, both Competent Authorities shall abide by the principle of reciprocity for each audio-visual work in approving co-productions.

## ARTICLE 18

### STATUS OF ANNEX

The Annex to this Agreement constitutes an implementation arrangement in respect of this Agreement and shall form an integral part of this Agreement.

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**ARTICLE 19**

**COSTS**

Each Party will bear its own costs and expenses arising out of the implementation of this Agreement subject to availability of funds and other resources of the Parties.

**ARTICLE 20**

**NOTICES**

Any and all correspondence made or notices to be sent or required to be made under this Agreement shall be in writing, signed by the Party giving such notice (claim or demand) and will be delivered through diplomatic channels.

**ARTICLE 21**

**APPLICABLE LAW**

The Parties shall perform all functions and obligations pursuant to this Agreement in accordance with the laws and regulations of both countries.

**ARTICLE 22**

**AMENDMENT**

This Agreement may be amended by mutual consent of the Parties through the Exchange of Notes between the Parties through the diplomatic channel.

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**ARTICLE 23**  
**CONFIDENTIALITY**

No Party shall disclose any information to any third party concerning the matters under this Agreement. Any proprietary information (properly identified as such by the disclosing Party) to be contained in reports or disclosed by one Party to the other Party, shall be kept strictly confidential by the receiving Party, and shall not be disclosed to any third party without the prior written consent of the original disclosing Party.

**ARTICLE 24**  
**SETTLEMENT OF DISPUTE**

Any dispute between the Parties arising out of the interpretation, application or implementation of this Agreement shall be settled amicably through consultation or negotiations between the Parties.

**ARTICLE 25**  
**ENTRY INTO FORCE**

- (1) This Agreement shall enter into force as soon as the Parties have notified each other, in writing through the diplomatic channel, of the completion of their respective legal procedures.

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**ARTICLE 26****DURATION**

This Agreement shall remain in force for a period of two years, whereafter it shall be automatically renewed for successive periods of one year unless terminated in accordance with Article 27.

**ARTICLE 27****TERMINATION**

- (1) This Agreement may be terminated by either Party by giving three months' written notice in advance to the other Party, through the diplomatic channel, of its intention to terminate this Agreement.
- (2) The termination of this Agreement shall have no effect on completed co-productions approved prior to its termination including the rights and duties of the Parties in relation to audio-visual co-productions, unless otherwise agreed upon in writing by the Parties.

**IN WITNESS WHEREOF**, the undersigned being duly authorized by their respective Governments, have signed this Agreement in duplicate in the English language, both texts being equally authentic.

Signed in duplicate, at Nairobi on this 9<sup>TH</sup> day of NOVEMBER in the year Two Thousand and Twenty-Two.

  
 FOR THE GOVERNMENT OF THE  
 REPUBLIC OF KENYA

  
 FOR THE GOVERNMENT OF THE  
 REPUBLIC OF SOUTH AFRICA



**ANNEX****IMPLEMENTING ARRANGEMENT TO THE AGREEMENT BETWEEN THE  
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE REPUBLIC  
OF KENYA CONCERNING THE CO-PRODUCTION OF AUDIO-VISUAL  
WORKS**

- (1) An application for approval for an audio-visual work shall be made to the Competent Authorities.
- (2) The application contemplated in Item (1) shall be accompanied by the following documents:
  - (a) A copy of the documentation concerning the purchase of the copyright for the production and commercial exploitation of the work;
  - (b) a synopsis including concrete information on the theme and contents of the audio-visual work;
  - (c) a list of the technical and artistic contributions from each of the countries involved;
  - (d) a work plan stating the periods and locations of principal photography on a weekly basis for studio and outdoor filming;
  - (e) the budget;
  - (f) a detailed financing plan;
  - (g) a production schedule;
  - (i) the co-production contract, as contemplated in Item (3) below, made between the producers; and

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- (j) any other documentation and all other additional information deemed necessary by the Competent Authorities.
- (3) The co-producers shall enter into a contract governing the making of an audio-visual co-production which contract shall—
- (a) include the title of the audio-visual co-production, even if provisional;
  - (b) include the name of the director;
  - (c) specify the total cost of the production, identifying the total financial contributions to be made by each co-producer;
  - (d) assign, as between co-producers, ownership of all intellectual property rights arising in the making of the audio-visual co-production;
  - (e) set out the arrangements between the co-producers regarding the exercise of rights and access to and use of copyright works created in the making of the audio-visual co-production;
  - (f) set out the financial liability of each co-producer for costs incurred in the following:
    - (i) Preparing a co-production project which is refused approval as an Audio-visual co-production by the Competent Authorities;
    - (ii) making an audio-visual work which has been given such approval and fails to comply with the conditions of such approval; and
    - (iii) making an audio-visual co-production and permission for whose public exhibition is withheld in any of the countries of the co-producers.
  - (g) set out the arrangement regarding the division between the co-producers of the receipts from the exploitation of the audio-visual co-production including those derived from export markets;
  - (h) specify dates by which the respective contributions of the co-producers to the production of the audio-visual work shall have been completed;

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- (i) specify whether the audio-visual co-production shall be shown in film festivals as a national work of the majority co-producer or as a national work of all the co-producers; and
  - (j) specify any other conditions of approval that the Competent Authorities jointly agree to.
- (4) Amendments, including the replacement of a co-producer, may be made to the original contract, but they must be submitted for approval by the Competent Authorities before the Audio-visual co-production is finished. The replacement of a co-producer may be allowed only in exceptional cases and for reasons satisfactory to the Competent Authorities.

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