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GENOCIDE IN GAZA

UNDERSTANDING THE SOUTH AFRICAN CASE BEFORE THE ICJ

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In this issue

Editorial

Unraveling historical intricacies: Scrutinizing the complicated issues in Palestine and an urgent appeal for action

Exploring the intricate historical challenges that Palestinians face necessitates a careful examination of the multifaceted issues that have molded its past and continue to influence its present. From the early 20th century to the contemporary geopolitical landscape, the region has been a focal point of contention, characterized by conflicting national narratives, territorial disputes, and an ongoing struggle for self-determination.

The roots of the modern Palestinian conflict can be traced back to the British Mandate period (1920-1948), during which the Balfour Declaration in 1917, promising a "national home for the Jewish people," created tensions between the Arab majority and a Jewish minority. Over a century ago, on 2nd November 1917, Arthur Balfour, the then-foreign secretary of Britain, penned a concise 67-word letter to Lionel Walter Rothschild, a prominent figure in the British Jewish community. This letter, known as the Balfour Declaration, had far-reaching consequences for Palestine. It pledged the British government's support for the establishment of a national home for the Jewish people in Palestine, despite the fact that over 90 percent of the population consisted of Palestinian Arab natives. The repercussions of this promise are still evident today. The subsequent British control over Palestine and conflicting promises to both communities set the stage for the protracted conflict.

People in their tens of thousands rally in Melbourne in support of Palestine and in solidarity with the Palestinian people as the State of Israel continues its bombing attacks of Gaza.

The establishment of the State of Israel in 1948, following the United Nations partition plan, marked a pivotal moment. The Arab rejection of the plan and the ensuing Arab-Israeli War resulted in widespread displacement, contributing to a lasting refugee crisis and fostering deep-seated grievances. The United Nations passed Resolution 181, advocating the division of Palestine into Arab and Jewish states. The Palestinian rejection of the proposal stemmed from its allocation of approximately 55% of Palestine to the Jewish state, encompassing the majority of the fertile coastal area. At the time, Palestinians possessed 94 percent of historic Palestine and constituted 67% of its population.

Before the expiration of the British Mandate on May 14, 1948, Zionist paramilitary forces initiated military actions to expand the borders of the anticipated Zionist state by targeting Palestinian towns and villages. In April 1948, the village of Deir Yassin, near Jerusalem, witnessed the killing of over 100 Palestinian men, women, and children, setting the tone for subsequent operations. Throughout the period from 1947 to 1949, more than 500 Palestinian villages, towns, and cities were demolished in what Palestinians term the Nakba, meaning "catastrophe" in Arabic. Palestinians continued losing their land through brutal actions of Jewish nationalists in what can only be termed wanton land grabbing.

The Six-Day War in 1967 further complicated the situation, leading to Israel's occupation of the West Bank, East Jerusalem, and the Gaza Strip. This occupation, marked by the construction of settlements and military checkpoints, not only violated international law but also intensified Palestinian resentment and resistance. On June 5, 1967, Israel seized the remaining portion of historic Palestine, including the Gaza Strip, the West Bank, East Jerusalem, the Syrian Golan

Heights, and the Egyptian Sinai Peninsula, as a result of the Six-Day War against a coalition of Arab armies. This event led to a second forced displacement, known as Naksa, meaning "setback" in Arabic, for some Palestinians. In December 1967, the Popular Front for the Liberation of Palestine, a Marxist-Leninist group, was established. Over the following decade, a series of attacks and plane hijackings by leftist groups brought global attention to the Palestinian predicament.

The Oslo Accords in the 1990s aimed at fostering peace, yet the failure to address critical issues led to a breakdown in the peace process. The ongoing construction of Israeli settlements, coupled with a lack of progress toward a two-state solution, has perpetuated the cycle of violence. The history of the Palestinian conflict is marked by a lengthy, challenging, and convoluted journey. Certainly, encapsulating its essence adequately is beyond the scope of a single editorial piece. The humanitarian situation in Palestine has suffered, with issues like restricted access to services and economic opportunities affecting the population. The international community has struggled to find a sustainable resolution, endorsing various approaches, from diplomatic negotiations to calls for boycotts and sanctions.

Comprehending the historical challenges in Palestine requires a deep understanding of the complex interplay of historical events, geopolitical strategies, and conflicting aspirations. Addressing these issues necessitates a comprehensive and inclusive approach, grounded in dialogue, mutual recognition, and respect for the rights and aspirations of all involved parties, particularly of the downtrodden people of Palestine. Only through such an approach can a just and lasting solution to the historical problems in Palestine be forged. The settlement of the Palestinian issue continues to be a stain on humanity's conscience and demands urgent, candid, and decisive attention, taking into account the historical injustices that have defined this prolonged conflict.

On Saturday, 27th January, 2024, thousands marched against femicide in Kenya. The above photos were posted by Usikimye, an organisation working towards ending the prevalence in sexual and gender-based violence, on their Instagram account.

Cover Story

Analysing the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) at the International Court of Justice

By Evans O. Ogada

Introduction

On December 29, 2023, South Africa filed a lawsuit at the International Court of Justice (ICJ) in The Hague, accusing Israel of committing genocide against the Palestinian population. South Africa initiated legal proceedings at the International Court of Justice (ICJ) against Israel, invoking the Genocide Convention, to address allegations of genocide. Both countries are parties to this international agreement.

Under the Genocide Convention, any member state has the authority to bring a case to the ICJ against another member state, addressing matters related to genocide, such as accountability for genocide, involvement in conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide or complicity in genocide.[1]

In its application to initiate proceedings, South Africa contends that no armed attack, regardless of its severity or involvement in atrocity crimes, can justify violations of the Genocide Convention.[2] The claim asserts that Israel has both committed and neglected to prevent genocidal acts, encompassing killings, severe physical and mental harm, and the imposition of conditions designed to bring about the destruction of a significant portion of the Palestinian national, racial, and ethnic group, specifically targeting the Palestinian group in the Gaza Strip.[3] Additionally, South Africa alleges that Israel has failed to effectively address or penalize instances of direct and public incitement to genocide by senior Israeli officials and other individuals.[4]

[1]Article III, Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).
[2]International Court of Justice, Application Instituting Proceedings, South Africa v Israel, [2023] ICJ Rep, https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf (accessed 13/1/2024 at 1236 hours).
[3]Ibid
[4]Ibid

A man sits on the rubble overlooking the debris of buildings that were targeted by Israeli airstrikes in the Jabaliya refugee camp, northern Gaza Strip, 1 Nov, 2023. (AP Photo/Abed Khaled)

South Africa has urged the court to declare that Israel breached its obligations under the Genocide Convention. The requested remedies include cessation of genocidal acts, punishment for individuals inciting or committing genocide, preservation of evidence related to genocidal acts against Palestinians in Gaza, and the provision of reparations.[5] Publicly, South Africa's legal team clarified that they are not pursuing a case against Hamas, emphasizing that as a non-state entity, Hamas cannot be a party to the Genocide Convention or brought before the ICJ, which exclusively deals with states in legal proceedings.[6]

The South African legal team comprised Adila Hassim SC, Professor John Dugard, Professor Max du Plessis, Blinne Ni Ghralaigh KC, Ronald Lamola, Professor Vaughan Lowe, Tembeka Ngcukaitobi SC, and Vusimuzi Madonsela.

The Israeli side counters the case by the South Africans, arguing that South Africa has misrepresented the facts in its presentation at the International Court of Justice. The defense team for Israel further contended that the country was taking measures to alleviate the humanitarian distress in Gaza, including initiatives to encourage Palestinians to evacuate.

Israel, which was represented by Professor Malcolm Shaw, Dr. Christopher Staker, a member of the Bar of England and Wales from 39 Essex Chambers, Mr. Omri Sender, an Attorney at Law from S. Horowitz & Co, Tel Aviv, and Miss Galit Raguan, the Director of the International Justice Division at the Office of the Deputy Attorney General for International Law, Ministry of Justice of the State of Israel, argued further that statements produced by South Africa as proof of "genocidal intent",

[5]Ibid
[6]Al Jazeera, 'Live: South Africa's ICJ Genocide Case Against Israel Over Gaza War' (11 January 2024), https://www.aljazeera.com/news/liveblog/2024/1/11/live-south-africas-icj-genocide-case-against-israel-over-gaza-war (accessed 11/1/2024 at 1315 hours

It is important to note that while the ICJ is a key institution for the resolution of legal disputes at the international level, its effectiveness is influenced by the voluntary compliance of states with its decisions.

were merely "random assertions" that do not establish Israel's intent to destroy the Palestinian people. According to him, none of these statements represent an official policy of the Israeli government. He argued that the court should only consider whether such statements reflect official decisions or directives from Israeli leaders and its war Cabinet.[7]

The obligation at the international level to prevent genocide: Examining the importance and characteristics of the South African case

The International Court of Justice (ICJ) was created as the principal judicial body of the United Nations (UN).[8] Apart from its role in resolving disputes between States through its contentious jurisdiction, the Court also has the authority to provide non-binding advisory opinions on legal inquiries submitted to it by specific entities. Article 65 of the court's statute stipulates that "the court may offer an advisory opinion on any legal question upon the request of anybody authorized by or in accordance with the Charter of the United Nations to make such a request".[9]

The International Court of Justice therefore possesses dual jurisdiction under the law, encompassing the resolution of disputes and the issuance of advisory opinions, meaning it adjudicates legal disputes between states submitted to it in accordance with international law (contentious jurisdiction), and it provides advisory opinions on legal queries upon the request of United Nations organs, specialized agencies, or authorized related organizations (advisory jurisdiction).

[7]The Guardian, 'Israel Accuses South Africa of Profound Distortion at ICJ Genocide Hearing' (12 January 2024) https://www.theguardian.com/world/2024/jan/12/israel-accuses-south-africa-of-profound-distortion-at-icj-genocide-hearing (accessed 12/1/2024 at 1415 hours).
[8]Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 92, available at: https://www.refworld.org/docid/3ae6b3930.html (accessed 16 January 2024).
[9]Ibid

The primary documents regulating the framework, authority, and operations of the Court are the UN Charter and the court's statute. The charter establishes the court and outlines its general powers, while the Statute dictates the Court's composition, organization, jurisdiction, and fundamental procedural rules for cases before it. Additional pertinent documents include the Rules of Court,[10] which provide detailed rules of procedure and the Practice Directions, which serve as a collection of guidelines concerning the conduct of proceedings in front of the court.[11]
South Africa's case before the International Court of Justice (ICJ) is ostensibly premised on article XI of the Convention on the Prevention and Punishment of the Crime of Genocide, which provides that, *'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'* [12]

The primary focus for the ICJ will therefore be to establish if there is indeed a dispute within the meaning of Article XI of the Convention on the Prevention and

President Cyril Ramaphosa with the delegates of Organisations supporting the Liberation of Palestine at Chief Albert Luthuli House on 18 December, 2023, in Johannesburg, South Africa. Luba Lesolle/Gallo via Getty Images

[10]International Court of Justice, 'Rules of Court,' https://www.icj-cij.org/rules (accessed on 16/1/2024 at 1235 hours).
[11]International Court of Justice, 'Practice Directions,' https://www.icj-cij.org/practice-directions (accessed on 16/1/2024 at 1240 hours).
[12]UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: https://www.refworld.org/docid/3ae6b3ac0.html (accessed 16 January 2024).

Kyiv intends to demonstrate that Russia's military intervention has no legal basis and is based on unfounded allegations of genocide. The dispute therefore concerns the interpretation and application of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

Punishment of the Crime of Genocide. The prerequisite for the International Court of Justice (ICJ) to assume jurisdiction is the confirmation of the existence of a dispute. The interpretation of what qualifies as a "dispute" under the purview of Articles 36 and 37 of the ICJ Statute has generated extensive jurisprudence from the Court, particularly in recent years.[13] From the evidence presented by both sides, the Court has to first establish whether there is a dispute worthy of attention.

The court will also need to determine whether the elements of the crime of genocide have been substantiated by the party making the application (South Africa). In the context of the preliminary application by South Africa, where it has sought an indication of provisional measures, South Africa has to at least establish a *prima facie* case.[14]

The ICJ has indeed stated that it may issue provisional measures if, the legal provisions cited by the Applicant, seem *prima facie*, to provide a foundation for its jurisdiction. However, the Court will not be obligated to conclusively ascertain its jurisdiction regarding the substantive aspects of the case at this stage.[15] The court has in the recent past issued interim measures orders in three distinct cases concerning the issue of genocide. In the case of the Gambia v. Myanmar, the International Court of Justice (ICJ) issued a provisional measures order on 23 January 2020.[16]

[13]Xue Hanqin, Jurisdiction of the International Court of Justice: Xiamen Academy of International Law Summer Courses, July 27-31, 2015, Volume 10 (Leiden; Boston: Brill Nijhoff, [2017]), 160.
[14]In the matter of the Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), the International Court of Justice (ICJ) issued a provisional measures order on 3 October 2018, as recorded in the 2018 (II) volume of the ICJ Reports at page 630, paragraph 24. (See: I.C.J. Reports 2018 (II), p. 630, para. 24, Islamic Republic of Iran v. United States of America (Provisional Measures Order, 3 October 2018)).
[15]Para. 24, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (16 March 2022) - Order.
[16]See: I.C.J. Reports 2020, para. 76, The Gambia v. Myanmar (Provisional Measures Order, 23 January 2020)

In the matter of Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), the International Court of Justice (ICJ) issued a provisional measures order on 16 March 2022. In this matter, the court stated thus; *"The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the right of Ukraine that the Court has found to be plausible"*.[17] In the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), the court issued provisional orders compelling the Government of Yugoslavia (Serbia and Montenegro) to take all the necessary measures within its powers to prevent the commission of the crime of genocide.[18] A review of the three aforementioned cases reveals the court's consistent practice of granting provisional measures when a party establishes a prima facie jurisdiction, demonstrates the rights of the individuals to be safeguarded, establishes a connection between those rights and the requested measures, and proves the existence of an urgent need for the court's intervention to prevent irreparable harm. The evaluation of the court's decision in the South African application should be conducted in light of these principles.

Conclusion

In summary, this commentary has extensively explored the nuanced dimensions of the ICJ's jurisdiction in indicating measures, as stipulated in Article 41 of the Statute of the International Court of Justice, with a particular focus on instances where such measures were granted in the context of genocide. By analyzing specific cases, we have elucidated the guiding principles adopted by the Court when issuing interim orders related to this crime. It is clear that a unified global commitment is imperative to address the underlying causes of genocide, reinforce preventive measures, and secure justice for the victims. The ongoing discourse on genocide serves as a crucial platform for raising awareness, fostering accountability, and striving towards a world free from such reprehensible acts.

The ICJ bears the weighty responsibility of upholding the relevance of international legal norms against the crime of genocide, ensuring that the principles governing the court's issuance of indication measures continue to offer valuable guidance.

The international community eagerly awaits to see whether the court will uphold its established principles in delivering its decision in the South Africa-Israel case.

Evans Ogada holds a Bachelor of Laws (LL. B) and a Master of Laws (LL.M) in Public International Law from the University of Nairobi, and a Postgraduate Diploma from the Kenya School of Law (PGD K.S.L.). He is a practicing Advocate and Lecturer at the University of Nairobi, teaching a number of subjects including Public International Law, Human Rights Law, and Jurisprudence. Contact can be made via email at ogadae@yahoo.com.

[17]See: I.C.J. Reports 2022, p. 211, Ukraine v. Russian Federation (Provisional Measures Order, 16 March 2022, para. 78)
[18]See: Z.C.J. Reports 1993, p. 3, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures Order, 8 April 1993, para. 52).

Who is fooling who...

The case of Ruto's Affordable Housing Program

By Munira Ali Omar

On the 4th of August 2010, the people of Kenya voted for a new Constitution. It was a milestone document in the history of Kenya and continues to be to this day. Through this document, Kenyans desired a state where there would be emancipation of the poor and dignity for all. One of the transformative features introduced is the express provisions on economic, social and cultural rights. The intention was to create a new society based on equality and social justice. One of these rights is the right to accessible and adequate housing and reasonable standards of sanitation.

In 2022, President Ruto unveiled his manifesto listing the plan he had for Kenyans. A plan that was a ray of hope for millions of Kenyans or so it appeared. His charming populist touch coupled with religious fundamentalism deceived many and promised the emancipation of the hustler from economic hardship. For instance, he said that he was aware of Kenyans' housing problems and one of his election promises was to build 250,000 affordable houses annually. Without asking how the President would build the houses, Kenyans bestowed trust upon their camouflaged savior President. Little did they know that he would abuse the trust left, right and centre. Little did they know

"The only medicine for tyrants and strongmen is to fight them back. They must be resisted by all means."

Sen. Okoiti Andrew Omtatah
5th January, 2024

President William Ruto at an affordable housing construction site in Nairobi.

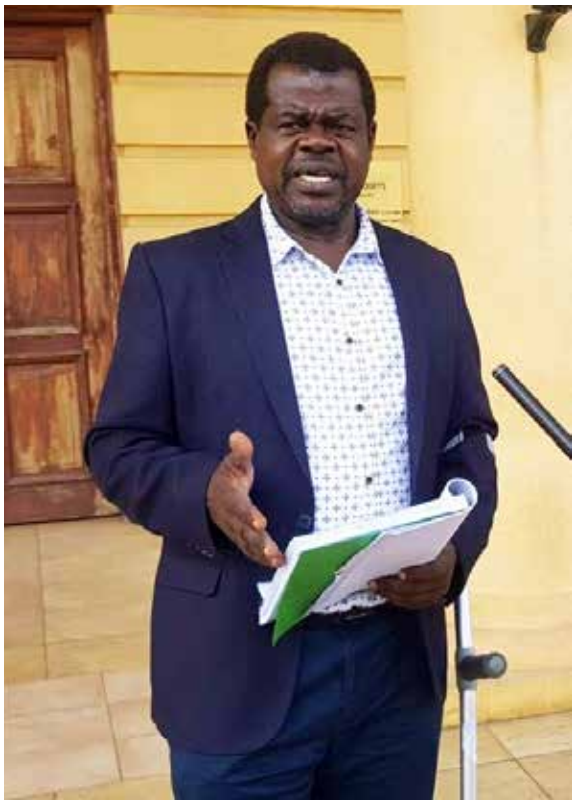
that his plan was only one: to impoverish them with an aim of pursuing his political interests and personal gains.

"Many people have questione
d me why I am bothering them with all of this; some are asking me whether they asked me for a house and why I want to deduct their money. This country belongs to all of us," so was his position.
After painting a captivating portrait of an exaggeratedly bright future for the hustlers, Ruto finally unmasked the ugly truth about his Affordable Housing Program. He revealed that his plan was to build houses by stealing land and money from poor Kenyans and this of course augured badly with many.

The illegality of Ruto's housing levy and fund

There are many types of lies, but believably the most treacherous of all is the half-truth; that which sounds convincing but is detrimentally and harmfully distant from what is true. Last year, the President declared that every employer and every salaried Kenyan employee must contribute 3% to the Housing Fund. This raised many concerns about the constitutionality of the contribution. The debate revolved around whether the fund was a tax or savings, and if it was savings why should people be compelled to save. Kenyans also demanded to know why the national government was pushing for it and how contributors would claim their savings. More than 90% of Kenyans unprecedentedly and unequivocally rejected the unpopular Finance Bill 2023 (as it then was). The fact is majority were not pro-affordable housing and the levy imposed on it, consequently Kenyans overwhelmingly rejected it as well.

Human rights activist and Busia Senator Hon. Okiya Omtata moved to the High



Busia Senator Hon. Okiya Omtata

Court to challenge the Finance Act 2023. The Court issued orders banning the implementation of the Act which the Court of Appeal lifted and deductions commenced. The senator then appealed to the apex court which declined to stop the implementation of the Finance Act, 2023.

On 28th November 2023, the Majanja-led 3-Judge Bench judgment finally pronounced itself on the Finance Act, 2023. It declared the housing levy unconstitutional and ordered the government to stop the deductions. One of the reasons that it was declared unconstitutional is that Section 84 of the Finance Act imposes burden to Kenyans in salaried employment only and is not applicable to the informal sector.

Another reason was the issue of who would collect the levy because the law is very clear that housing levy is not one of the taxes that KRA is empowered to collect.[1]

[1]Kenya Revenue Authority, Cap 469 Laws of Kenya.

President William Ruto inspects the ongoing Kibera affordable housing project on 22 November, 2023.

Additionally, the Minister with the authority to allow KRA to collect taxes is the Treasury Cabinet Secretary not the Minister of Lands.[2] Initially, the CS for Lands gave KRA authority to collect the housing tax.

The illegality of the Housing Bill, 2023

Immediately after the High Court decided on the constitutionality of the Finance Act 2023, the government filed an appeal and an application to have the judgement stayed and orders to allow the government to continue with the deductions were issued.

The Parliament then tabled the Affordable Housing Bill 2023 whose purported aim is to give effect to Article 43 (1) (b) of the Constitution. A clear reading of Section 8 of the Bill defines Affordable Housing Fund and Section 10 (1) of the Bill states that the purpose of the fund is to provide funds for the development of affordable housing and associated social and physical infrastructure.

Section 10 (2) goes ahead and states that the fund shall be used to facilitate the provision of funds for affordable housing and affordable housing schemes in the promotion of home ownership in all counties.

Yes, many Kenyans live in poor housing conditions but this is not because the government lacks funds to address the housing needs of its people, it is because leaders only care about amassing wealth and expanding capitalism.

I support my argument by drawing your attention to the government's pledge of giving land and shelter to the landless and homeless. This undertaking is already

[2]Ibid.

provided for in the Land Act 2012 as amended by the Land Law (Amendment) Act No. 28 of 2016 at Section 135 thereof which establishes the Land Settlement Fund. Currently, following the economic and social rights provided in the Constitution, people who badly need housing are sufficiently catered for in the Act because one of the purposes of the fund is to facilitate shelter and provide access to land to the landless and homeless. So instead of helping the President draft bills to amass billions, instead of aiding him to make laws in order to commit crimes, instead of helping the President loot, burden, and impoverish Kenyans with punitive tax regimes, members of Parliament must remind the President to make a promise of ensuring that the funds are not misappropriated but are used for the intended purpose. What's more, the Housing Bill violates and defeats the principles of public participation because during the debate around the Finance Bill, over 900 out of 1000 memorandums were submitted rejecting the housing levy. If anything, the move by members of Parliament and the Executive is a clear indication that they have refused to appreciate constitutional values like public participation.

Consequently, just like the housing levy, the Bill is retrogressive and a fatal departure from constitutional imperatives. It raises ethical questions and is a betrayal of the constitutional promise and Ruto's promise of providing adequate housing to those in the lower realm of society. It is simply illegal and void in its entirety since the protection of millions of vulnerable Kenyans from unlawful evictions is highly compromised by it. If passed into law, it will give the government leeway to carry out

President William Ruto during a site visit at the Kings Boma Estate, an affordable housing project in Ruiru town, Kiambu county.

President William Ruto inspecting construction of affordable housing units.

binge evictions like the ones we disturbingly watched at the beginning of the year.

Ruto's protest against hustlers

On 28th December, 2023 as Kenyans were taking a temporary break from his lies and stunts, they witnessed the mother of all gimmicks. Fearing that his plan was being sabotaged and to fight for his populist and unconstitutional and illegal programs, policies and levies, the President employed protestors and held a pro-housing levy demonstration against millions of hustlers depressed by the economy, social injustice and a President who has gone rogue.

Without colour of right and with undue regard that the matter is yet to be decided at the appellate court, the President demonstrated against the voices of citizens who were rightly condemning his illegal tax regimes. It was a move that was widely seen as aimed at frustrating the court process as evident by Ruto's swearing and threatening to abrogate the Constitution even if it is by defying court orders. They are seeing the ripple effects of electing a President who has openly and boldly declared to rule by the sword.

Illegal investments agreements superseding the law

Last year, Kenyans highlighted their fears of the impact of an opaque housing program on their lives. The legitimacy of

the Affordable Housing Bill, 2023 is not just pegged on the inclusion of the informal sector. It is also pegged on the lies told around it. Privatization of government land, the issue of who will be the custodian of the funds, and how the ownership of the said houses will be audited and the list of beneficiaries revealed cannot be ignored.

At the very outset, right from Uhuru's tenure, Kenyans were very skeptical about the Program because many government projects meant to improve the living standards of Kenyans ended up to benefit the elite. During Uhuru's regime, we saw misappropriation of funds in the name of public projects. We saw how contracts between the Government and private developers were negotiated secretly against the Kenyan people.

There was pomp and excitement around the launch of Uhuru's Big Four Agenda but seemingly Kenyans forgot that the devil is always in the details. For instance, in the case of Mombasa's Buxton housing project, neither the government nor the private company (Gulf Cap Africa) since the inception of the project to date has been willing to publicize official contract documents. Besides, they have refused to publish the list of beneficiaries since evidently; the deal did not benefit the former Buxton tenants and other deserving Kenyans who were also the target beneficiaries. It is for this reason that Haki Yetu Organization based in Mombasa has been asking: housing for who?

In the current housing policy-speak, housing project investments will not do any good for the community at large, and the President together with his allies knows this. Forced evictions and housing levies to demolish houses purposely to enrich a few should never be supported. Projects that are at variance with the country's constitutional responsibility of providing decent, accessible and secured housing must in Okiya's words be resisted by all means.

President William Ruto at an affordable housing construction site.

Conclusion

The country has good laws; the government has enough money; what the government needs to cure is Kenyan's trust deficiency. The journey ahead is devoid of anything but uncertainties. At the time of writing this piece, Kenyans are anxiously waiting to know the fate of the housing levy petition currently at the Court of Appeal. As they do so, I wish to remind them of Eric Wainana's track ***'Who is to blame'*** when he tries to satirize leaders for betraying their people. Part of the singer's lyrics goes as follows:

"Oh, our leaders help us, help us
Oh, our leaders help us, help us
Oh, our leaders help us, help us
Huyo, huyo, huyo!
Huyo msaliti huyo!"

Munira Ali Omar is an Advocate of the High Court of Kenya working with Haki Yetu Organization as a Lands Programs Officer. She has a passion to serve by reaching to vulnerable communities at the grassroots level.

If they don't fit, they must quit

By Abuya John

Section 23 of the Sixth Schedule of the Constitution of Kenya 2010 provides that within one year after the effective date, parliament shall enact legislation that shall operate despite Articles 161, 167, and 168 establishing mechanisms and procedures for vetting within a timeframe to be determined in the legislation the suitability of all judges and magistrates who are in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159. Subsection (2) provides that the removal order process leading to the removal of a judge from office by the operation of legislation contemplated under subsection (1) shall not be subject to question in or review by any court.

The transitional clause provided for a smooth transition into the new constitutional dispensation which had brought along with it the national values and principles and the independence of the judiciary. For decades since independence the judiciary had not fulfilled its purpose in Kenya as it had been influenced by the executive arm of government where the President had powers to appoint and remove judges and corruption was at the core of its operations. This made the judges to be more inclined towards achieving the

desires of the executive and not satisfying the needs of poor Kenyan citizens. The judicial process was expensive and justice could be bought and sold. As noted by the Commission of Inquiry into Post-Election Violence, the lack of independence of the judiciary led to the distrust of its processes by a majority of Kenyans which fuelled the 2007-2008 election violence.[1]

Kenyans had come to the judiciary broken to be mended, wounded to be healed, desperate to be rescued, empty to be filled and guilty to be pardoned but little did they know that they were building castles in the air. The then existing judiciary could not satisfy the desires of Kenyans and this necessitated for reformation which would ensure that the serving judicial officers were fit to serve in accordance with the national

[1]Commission of Inquiry into Post Election Violence Final Report [2008].

President William Ruto poses for a photo with Judges of the Republic of Kenya.

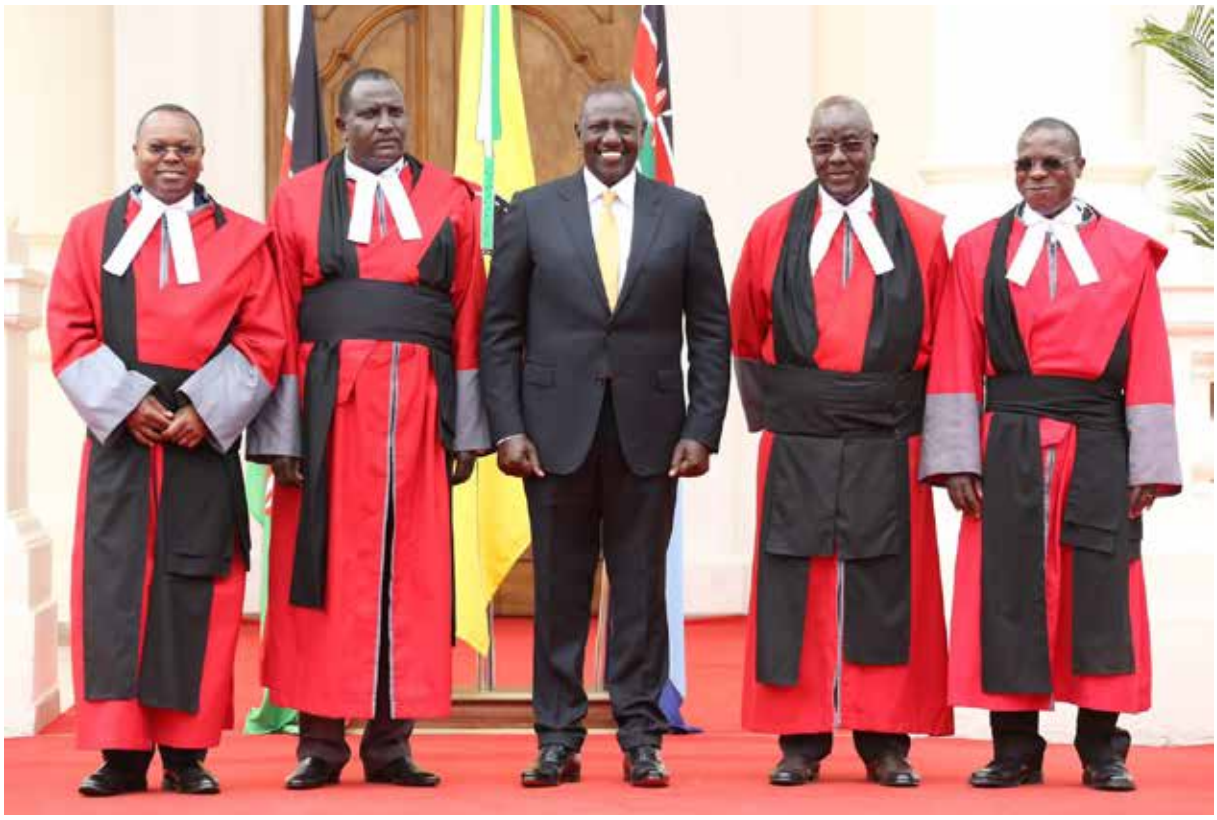
values and principles provided in the new Constitution. They were to be tested and tried and those who would be found unfit would be forced to quit.

The greatest want of the judiciary was the want of men and women, men and women would not be bought or sold, men and women who in their inmost souls were true and honest, men and women who did not fear to call sin by its right name, men and women whose conscience were as true to duty as needle is to the pole and men and women who would stand for the truth though the heavens fall.[2]

The judiciary was thus to be reformed either through the appointment of the entire judiciary or the vetting of the serving judicial officers. The vetting of judicial officers was thus recommended and all judges and magistrates who were serving before the promulgation of the new constitution were to be vetted and subsequently be removed if not found fit and they also had an option of retiring voluntarily with terminal benefits.[3] All thanks to the Constitution of Kenya 2010 which necessitated these reforms as it was the proverbial saviour who was to preach good tidings to the meek, bind up the broken-hearted, proclaim liberty to the captives, and open the prison to those that were bound.[4]

However much good section 23 of the Sixth Schedule desired, it brought along with it a great misunderstanding, particularly

[2]Ellen Gould White, Education 57.3
[3]Committee of Experts on Constitutional Review Issued on the Submission of the Reviewed Harmonized Draft Constitution to the Parliamentary Select Committee on Constitutional Review, 8th January, 2010.
[4]The Bible, Isaiah 61:1



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President William Ruto poses with newly sworn judges of the Court of Appeal at the State House in Nairobi on 14 September, 2022. From left, Justices Joel Ngugi, Weldon Korir, Aggrey Muchelule and George Odunga.

with subsection 2 which provided an ouster clause. It provided that the removal or process of removal of a judge was not to be subject to any question by the courts. The magistrates who were found to be unfit for office by the vetting board of judges and magistrates sought for redress from the courts claiming that the decision by the board was not fair and that they were excluded from the ouster clause. This meant that they could challenge their removal or process leading to their removal as they had not been expressly included in the ouster clause. This marked the beginning of court battles from the High Court to the Supreme Court on whether the magistrates were excluded from the ouster clause or not. The High Court dismissed the application claiming that the magistrates had been barred by the ouster clause while the Court of Appeal allowing the appeal said that the magistrates were excluded from the ouster clauses and thus the decision by the vetting board of judges and magistrates could be reviewed by the courts. At the Supreme Court the ouster clause was upheld to have included the magistrates and the decision by the vetting board could not be reviewed by the courts.

At the Court of Appeal[5]

The Court of Appeal propagated three statutory interpretation rules that could apply to Section 23 subsection (2) of the Sixth Schedule of the Constitution. These included the statute's plain language, presumption of consistent usage, and expressio unius est exclusio alterius.

[5]Oduor & 3 Others v Magistrates and Judges Vetting Board and Another (Civil Appeal 457,458,466 &475) (Consolidated of 2018) [2021].

a) The statute's plain language
This is the golden rule of construction where the words of a statute are to be given their ordinary, literal and grammatical meaning and if the meaning is clear and unambiguous then effects will be given to it. The court would depart from the literal construction of the statute if it leads to a manifest absurdity inconsistency hardship or result contrary to the legislative intent. The court then meant that the magistrates not being included in the ouster clause provision meant that the ouster clause did not apply to them.

b) Expresio unius est exclusio alterius
This means that the expression of one thing implies exclusion of another. Courts will thus read as meaningful the exclusion of language from one statutory provision, Section 23 (2), that is included in other provisions of the same statute, Section 23 (1). This meant that since Section 23 (1) included both the Magistrates and judges in the provision, the exclusion of Magistrates in Subsection (2) meant that they had been excluded from the ouster clause.

c) Presumption of consistent usage
The use of identical words in different parts of the statute is taken to have the same or consistent meaning and if there is a variation in a material aspect such as the use of judge only omitting magistrates where previously the expression was judges and magistrates the implication must be that there is a variation in meaning.

The dissenting judge, Hannah Okwengu, advocated for the purposive interpretation of the Constitution. It propagated the idea that the Constitution being the supreme law of the land, is a living instrument with a soul and consciousness and embodies certain fundamental values and principles that must be construed broadly, liberally

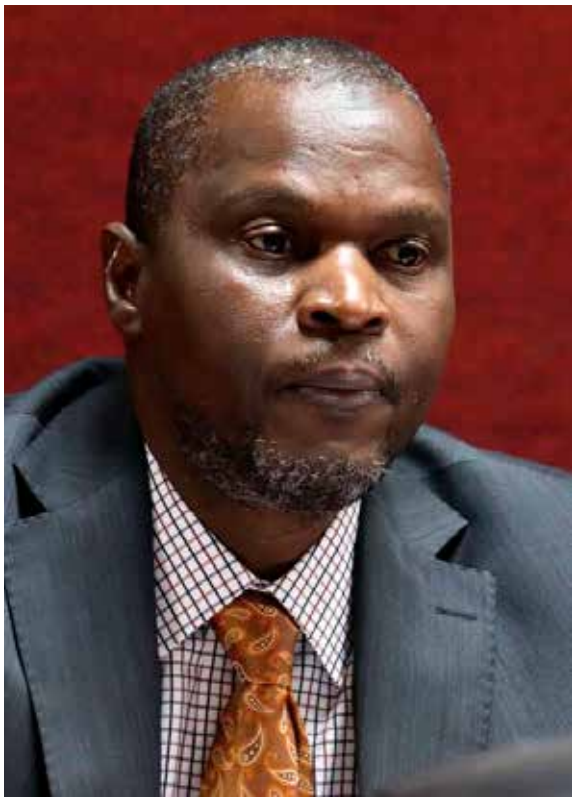

Justice Hannah Okwengu

and purposely or teleologically to give effect to those values and principles. This would mean that the magistrates were not excluded from the ouster clause.

At the Supreme Court[6]

The Supreme Court advocated for the holistic interpretation of the Constitution which gives it a purposive and contextual interpretation taking cognizance of other provisions as well as Kenya's historical context with the view of protecting and promoting the purpose, effect, intent and principles of the Constitution. Holistic interpretation of the Constitution meant the contextual analysis of constitutional provision reading it alongside and against other provisions so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history of the issues in dispute and the prevailing circumstances.

[6] Judicial Service Commission v Michael Kizito Prior & 3 Others (Petition No. 18 [E025] of 2021) [2023].



Said Juma Chitembwe

The Court stated that; "shielding the vetting process by the board from the review jurisdiction of the courts in our view represents the unique situation that we found ourselves in as a country that was transitioning from the old order. In any event, the transition operated in a specific time frame and historical context of our country. Moreover, this transition between the old Constitution and this new one was more people-centric having accrued from the referendum. It is within the prism that we went for the consideration of the vetting exercise in their transition context." In consideration of the transition context, the Supreme Court established that the Magistrates had been included in the ouster clause thus they could not petition for review of the vetting board's decision.

The Supreme Court echoed the last words of the saviour on the cross IT IS FINISHED.[7]

The Supreme Court's consideration of the transition context drilled the last nail in the coffin. MENE MENE TEKEL UPHARSIN[8] were the words written to the magistrates. They had been weighed in the balances and were found wanting. Finally the court had made the decision, If they Don't Fit They Must Quit. This has paved way for the cleansing of judiciary for example, Judge Said Juma Chitembwe was found to have contravened the Constitution and the code of ethics and conduct by the tribunal which recommended his removal. His removal was recently upheld by the Supreme Court of Kenya.

Despite the ruling that gave effect to the transitional clause for the removal of magistrates and judges not found fit, the judiciary is still faced with challenges including backlog of cases and corruption. These evils seemed to make the justice, equality and fairness promised by the new Constitution to be far-fetched and the removal of some judges was but a step towards fulfilling the objectives of the new Constitution to uphold its principles and dispense justice fairly and quickly. One of the reasons for the existence and persistence of these challenges is the presence of unfit judicial officers who are not willing to uphold the principles of the Constitution. The removal of unworthy judges and magistrates plays a big role in ensuring the judiciary serves its purpose by administering justice to Kenyans.

At the end of the day, the voices of millions of Kenyans can still be heard saying, "If they don't fit they must quit! If they don't fit they must quit".

Abuya John is a third year law student at the University of Nairobi.

[7]Bible, John 19:30.

Unpacking Supreme Court's decision in Abidha Nicholus v. the AG & 7 others and NECC & 5 others

By Caleb Weisiko

Brief facts of the case[1]

The Appellant raised concerns about the unauthorized survey and subsequent unlicensed mining on the land in Ramba area (the Land) by the 2nd and 3rd Respondents. He wrote to the Ministry of Petroleum and Mining, the Ministry of Environment and Forestry, and the National Environment Management Authority (NEMA) requesting information about mining activities, but he received no response. Upon seeking the intervention of the Ombudsman, NEMA confirmed the illegal mining activities and issued a stop order to the Respondents who ignored it.

Consequently, the Appellant notified various Respondents of the irregular mining activities and raised multiple issues such as lack of licenses, environmental destruction, child labour, insecurity, health risks and community well-being. He also claimed that the Kenya Power and Lighting Company Ltd (KPLC) trespassed the Land by erecting electricity poles and contended that the residents of the land were deprived of equal

NEMA Offices, Nairobi

enjoyment and protection of the law by the ongoing unlicensed mining activities and environmental destruction.

History of litigation

Proceedings at the Environmental and Land Court (ELC)

The Appellant filed a petition before the ELC in Kisumu, alleging violation of constitutional rights and statutory provisions, infringement of property rights, irregular gold processing, and failure to enforce constitutional and environmental laws. He sought declaratory orders and the remedies of mandamus, certiorari, prohibition, and compensatory damages.

[1]Petition No. E007 Of 2023.
[2]Section 129 (1), (2), (3) & (4) of the Environmental Management and Coordination Act, 1999.

The Respondents lodged two separate preliminary objections challenging ELC's jurisdiction. The 2nd Respondent argued that environmental issues fell under the National Environment Tribunal (NET).[2] KPLC also challenged jurisdiction based on the provisions of the Energy Act,[3] the Constitution[4] and the Fair Administrative Actions Act (FAA),[5] arguing that the dispute ought to be settled by the Energy and Petroleum Regulatory Authority (EPRA) and Energy and Petroleum Tribunal (EPT).

The Appellant contended that the ELC had rightful jurisdiction under Article 162(b) of the Constitution for disputes concerning the environment and the use and occupation of, and title to land.[6] As for KPLC's objection, the Appellant argued that the primary violation was the infringement of his property rights and the ELC had jurisdiction to enforce such rights.[7]

The ELC upheld the objections and directed the claim against KPLC to EPRA and EPT. Regarding environmental issues, the ELC recognized its jurisdiction but mandated the exhaustion of NEMA and NET's remedies before approaching it. Consequently, the petition was dismissed for want of jurisdiction.

Proceedings at the Court of Appeal (COA)

The COA aligned with the ELC in assessing whether the appellant exhausted dispute resolution mechanisms under the Environmental Management and Coordination Act (EMCA).[8] It was noted that NEMA should have initiated criminal proceedings against the 2nd and 3rd Respondents for non-compliance with the stop order. Issues related to NEMA's decisions on licenses and permits for miners were deemed within NET's jurisdiction.

Further, it was stated that under the Energy Act, the Appellant should have initiated the process with the EPRA for disputes related to the transmission of electricity, with the right of appeal to the EPT and further escalation to the High Court if dissatisfied. It was concluded that the Appellant failed to show inefficacy in the Energy Act's process, justifying the ELC's decision to decline jurisdiction.

The COA held that nothing prevented the Appellant from filing another suit, excluding the matters under EMCA and the Energy Act. It was concluded that the ELC's decision was not made spontaneously but was a valid determination based on its jurisdictional limitations.

Proceedings at the Supreme Court of Kenya (SCOK)

At the SCOK, the Appellant cited a breach of the Constitution and statutes in relation to jurisdiction, access to information, fair administrative action, fair hearing, and access to justice among other grounds of appeal. The reliefs sought included overturning the COA's decision and remitting the matter to the ELC for hearing, and other appropriate orders.

Appellant's submissions

The Appellant argued that the constitutional issues fell within the SCOK's

[3]Sections 3 (1), 10, 11 (e) (f) (i) (k) and (l), 23, 24, 36, 40, 42 and 224 (2) (e) of the Energy Act ,2019, together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations.
[4]Articles 159 (2) (c) and 169 (1) (d) of the Constitution of Kenya, 2010.
[5]Sections 9(2) and (3) of the Fair Administrative Act, 2015.
[6]Articles 23 (1) and 70 of the Constitution of Kenya, 2010.
[7]Article 162 (2) (b) of the Constitution of Kenya, 2010.
[8]Section 9(1), Section 118 of Environmental Management and Coordination Act, 1999.

appellate jurisdiction under Article 163(4)(a). He further alleged that the COA failed to correctly apply constitutional provisions[9] in relation to the Environment and Land Court Act (the ELC Act) and EMCA. The Appellant questioned the oversight by both the ELC and COA on the claim against KPLC, asserting it was beyond the Energy Act's scope when read with Article 40(2) of the Constitution. He contended further that the COA wrongly applied the reliefs test, ignoring the enforcement of Articles 35 and 47 within the context of rights under Article 42.

Additionally, the Appellant challenged the COA's order on costs, arguing it was punitive and contrary to the principles of public interest litigation. He urged the SCOK to allow the appeal and grant the sought reliefs.

Interested parties' submissions

Katiba Institute affirmed the SCOK's jurisdiction and criticized COA's misinterpretation of EMCA and its wrong attribution of jurisdiction to EPRA instead of ELC. It further highlighted COA's oversight of ELC's original and appellate jurisdiction. Additionally, it accused the COA of disregarding the precedence in *Benson Ambuti Case*[10] regarding multifaceted claims and further argued against costs, emphasizing the public interest nature of the matter.

Respondent's submissions

The Respondents argued that the appeal does not meet the Constitutional interpretation threshold and insisted that the ELC did not have jurisdiction and that no pronouncements were made on the constitutional breaches by the superior courts. They further submitted that the Appellant could have amended the petition if he heeded the preliminary objection and insisted that there was no question regarding the misinterpretation of the Constitution. It was also claimed that the petition was misplaced as the Appellant's right to be heard was unaffected and requested the petition to be struck out for want of jurisdiction with costs to the Appellant.

Issues for determination

The issues addressed by the SCOK included the proper invocation of the Court's jurisdiction by the Appellant; the requirement for the Appellant to exhaust alternative dispute resolution mechanisms before filing a Constitutional petition; the COA's stance on allowing petition amendments post a preliminary objection; the remedies available in multifaceted claims; orders to be issued; and the allocation of costs for the appeal.

SCOK's analysis and key takeaways from the decision

1. SCOK's appellate jurisdiction

The SCOK reaffirmed its appellate jurisdiction under Article 163(4) of the Constitution highlighting the necessity of appealable matters to involve the interpretation or application of the Constitution according to the ***Lawrence Nduttu case***.[11] It further emphasized that the matter must have been the subject of litigation before the High Court and the COA and then risen through the judicial hierarchy on appeal.

Further, the SCOK acknowledged the broader approach on what constitutes

[9]Articles 22, 23, 27(1), 70, and 162(2)(b) of the Constitution.
[10]Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR.
[11]Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Anor SC Petition No.3 of 2012 [2012] eKLR.

matters involving constitutional interpretation or application. Referring to the ***John Florence Maritime Services***[12] and ***Munya 1 cases***,[13] it suggested that the focus should extend beyond specific constitutional provisions to encompass the overall context and impact of the court's reasoning and conclusions. Additionally, it was stated that a determination of whether an appeal satisfies the criteria for invoking the SCOK's appellate jurisdiction is not governed by rigid principles. Instead, it is a power exercised by the SCOK on a case-by-case basis but within the confines of the Constitution and statutes.

The upshot of the above was that the appeal correctly invoked the SCOK's jurisdiction since it involved constitutional interpretation and application of provisions conferring jurisdiction on the ELC, the enforcement capacity of the NET and the National Environmental Complaints Committee (NECC), and the jurisdictional limitations on EPRA and EPT.

2. The principle of exhaustion versus a nuanced approach

The SCOK highlighted the conflicting perspectives on precedents on environmental matters before NEMA. One view suggests exhausting EMCA mechanisms before approaching the ELC,[14] that is, approaching NET and appeal lies to ELC. The other argument is that if the constitutional right to a clean and healthy environment is at stake, NET lacks jurisdiction and EMCA provisions are inapplicable to such claims.[15]

The SCOK agreed with the principle of exhaustion that where there is an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by the Constitution and must give deference to the dispute resolution bodies established by the statute with the mandate to deal with such specific disputes in the first instance.[16]

However, while agreeing with the exhaustion principle, the SCOK advanced to reject the argument that alternative mechanisms precluded access to the ELC, especially when the alternative remedies are deemed inadequate. Further, the SCOK underscored the importance of a nuanced approach while considering the nature of the dispute and the adequacy of the alternative forums on a case-by-case basis. It was stated in paragraph 105 that:

> *"The availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which*

[12]John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others; SC Petition No. 17 of 2015; [2019] eKLR.
[13]Gatirau Peter Munya v. Dickson M. Kithinji & Others SC Application No. 5 of 2014, [2014] eKLR.
[14]See Orata International Limited v National Environment Management Authority [2019] eKLR, Borbor & 2 others v National Environment Management Authority (Environment and Land Judicial Review Case 2 of 2022) [2022] KEELC 3947 (KLR) (28 July 2022) (Ruling), National Environmental Tribunal vs Overlook Management Limited & 5 Others [2019] eKLR and Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR.
[15]See Ken Kasinga v Daniel Kiplagat Kirui & 5 others [2015] eKLR and West Kenya Sugar Co. Limited v Busia Sugar Industries Limited & 2 others [2017] eKLR.
[16]NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) and R v National Environmental Management Authority, CA No 84 of 2010; [2011] eKLR.

a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court."

It was held that the Appellant had the right to file a claim before the ELC, and the failure of the ELC to address the merits of the case constituted an error. It was stated further that the COA failed to rectify the ELC's error in directing the Appellant to alternative forums.

3. Amending the petition after a preliminary objection

The SCOK found that the COA was misguided in holding that the appellant had the option to seek leave to amend his petition after the preliminary objections on jurisdiction were raised. However, the SCOK disagreed with this finding and emphasized that amendments to pleadings cannot be pursued once an objection relating to jurisdiction has been raised. Preliminary objections are raised on pure points of law which upon determination, the outcome would have a major bearing on the status of a claim.[17]

In this case, the Appellant framed his grievances as constitutional questions believing that his fundamental rights under the Constitution had been violated. The petition received a preliminary strike out for lack of jurisdiction. The SCOK stated that opting to appeal rather than amending pleadings or filing a new suit was a legitimate choice and that parties are entitled to choose the path of appeal or other legal strategies when confronted with objections. The SCOK further underscored the importance of allowing objections to be determined on their merits rather than evading them.[18]

4. Remedies available in multifaceted claims

The Appellant filed a multifaceted petition against KPLC and NEMA, seeking various declarations related to environmental rights and property violations. The SCOK considered Article 70(1) of the Constitution which granted the Appellant the right to file a constitutional petition before the ELC if he alleges a violation of the right to a clean and healthy environment. Further, the Appellant's claims involved constitutional violations, making remedies through NEMA and EPRA not efficacious and adequate.

The multifaceted nature of the Appellant's claims made the ELC the most appropriate forum for redress, despite other alternatives. The SCOK disagreed with the notion that the Appellant could have appealed decisions before two different tribunals as it found it impractical. The SCOK cited the *Benson Ambuti Case* to emphasize the importance of the appropriateness of reliefs in a multifaceted claim and the doctrine of judicial abstention, stating that the ELC should address all issues within its jurisdiction.

It was held that the issues raised were found to be within ELC's jurisdiction to determine and there was no reason to either reserve or remit any of them. Additionally, the court stated that:

"In concluding on this issue, it is our finding that it is upon a party to frame

[17]See Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696.
[18]See paragraph 113 of the judgment.

its pleadings as it deems fit but in doing so should not create such a disjointed case that a court has to struggle in the identification of each facet thereof. Elegant pleadings also ensure that the responding party has a clear case to answer to. A court on its part, must not descend to the arena of litigation but instead determine all contested matters judicially and in a multifaceted claim, address each issue within its jurisdiction including remitting parts of the claim to the relevant statutory body while retaining what is properly before it."[19]

5. Relief, costs and orders

The SCOK acknowledged the substantive constitutional violations raised in the Appellant's petition that required proper adjudication and declared that the ELC has the proper jurisdiction. It was ordered that the petition filed before the ELC should be determined on its merits, focusing on alleged violations of the Appellant's rights. Further, the SCOK ordered each party to bear their own costs at the ELC, COA and the SCOK. The appeal was allowed, and judgements of the superior courts were set aside. The matter was remitted back to the ELC at Kisumu for expedited hearing and determination.

Summary of SCOK's justification for the nuanced approach in environmental and energy litigation

The SCOK provided the following rationale:[21]

- While the FAA mandates exhaustion of internal dispute resolution mechanisms before a court reviews an administrative action,[22] it still provides an exception allowing the court to exempt exhaustion of administrative remedies in the interest of justice, upon application by the aggrieved party.[23] Therefore, despite the existence of internal mechanisms, a nuanced approach can be adopted to balance access to justice with the efficiency of alternative mechanisms of dispute resolution.
- The availability of an alternative remedy does not automatically bar one from seeking constitutional reliefs. The crucial determining factor is the adequacy and effectiveness of the existing alternative means of redress.
- This nuanced approach emphasizes a purpose-oriented analysis, considering the specific needs and rights of the litigant alongside the relief being sought. It suggests that the appropriateness of constitutional reliefs depends on the circumstances surrounding the case.
- A nuanced approach aims at balancing between access to justice and the efficiency and specificity

[19]See paragraph 125 of the judgement.
[20]Article 162(2)(b) and Section 13 of the ELC Act.
[21]See paragraphs 101-110 of the judgment.
[22]Section 9(2) of the Fair Administrative Action Act.
[23]Section 9(4) of the Fair Administrative Action Act.

that established alternative dispute resolution mechanisms can provide.

- It focuses on a case-by-case assessment and emphasizes the uniqueness of each situation. Factors such as the nature of the dispute and the effectiveness of the alternative dispute mechanism are crucial in determining the appropriateness of seeking constitutional reliefs.

Impact and import of the decision

1. It introduces a nuanced approach as opposed to the exhaustion doctrine, emphasizing the balance between access to justice and efficiency in statutory dispute resolution mechanisms to address the specific needs and rights of parties involved. While recognizing the importance of exhausting alternative remedies, it emphasizes that the availability of such remedies should not automatically bar constitutional relief.
2. The decision provides clarity on the jurisdiction of quasi-judicial bodies such as the NET, EPRA and ETA, and their intersection with the ELC in environmental and energy litigation. For example, it establishes that redress for constitutional violations is not within the mandate of the NET but the ELC.
3. The ruling is expected to curb the abuse of the exhaustion doctrine, particularly by entities like NEMA and KPLC which have been notorious for defeating claims against them using the exhaustion doctrine even when constitutional issues are raised. It also calls for efficiency and adequacy in bodies such as NET which has been criticized for its inefficiency. This puts a check on parties attempting to thwart environmental litigation efforts through procedural technicalities.
4. The decision revitalizes Article 70(1) of the Constitution, affirming individuals' right to file constitutional petitions before the ELC when alleging a violation of the right to a clean and healthy environment. This reinforces the constitutional importance of the ELC in addressing environmental grievances.
5. By endorsing a nuanced approach, the SCOK empowers litigants to seek adequate remedies without being unduly restricted by procedural requirements. This is particularly relevant in cases where quasi-judicial bodies may not provide timely or effective reliefs.

Conclusion

This is a welcome decision as it sets a guiding precedent, offering clarity, flexibility, and a balanced approach to environmental and energy litigation. It not only clarifies the jurisdiction of the ELC and other quasi-judicial bodies but also introduces a nuanced approach to the exhaustion doctrine, emphasizing the importance of assessing the adequacy of alternative remedies on a case-by-case basis. This decision further reinforces the role of ELC in addressing multifaceted claims. Additionally, it is likely to impact how future environmental and energy disputes are approached, providing litigants with a clearer understanding of their options for seeking redress.

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Of children who sue their parents: Extension of parental responsibility under Kenyan law

By Oyoo Wycklife

1.0 Introduction

The rights of the child have a constitutional and statutory underpinning. The Constitution is emphatic that the parents of a child are responsible for a child whether they are married to each other or not.

The Constitution and statute law place parental responsibility over a minor on the parents. Specifically, the Constitution decrees that every child has a right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.[1] The Children Act[2] on its part elaborates on what constitutes parental responsibility.

While the fact that each parent is by law responsible for a child is somewhat settled in our jurisdiction, who amounts to a child's parent for purposes of parental responsibility may not be readily discernible. Accordingly, in cases where the parentage of a child is disputed, assigning parental responsibility becomes an arduous task, sometimes involving judicial intervention.

Children rights refer to the fundamental rights and freedoms that every child is entitled to, regardless of their race, gender, nationality, religion, or other factors.

2.0 Parental responsibility

In the eyes of the law, it is the responsibility of the father and the mother to provide for their child whether they are married to each other or not and regardless of the circumstances under which the child was conceived and born. What then, in law, is parental responsibility?

[1]See Article 53(1)(e) of the Constitution of Kenya, 2010.
[2]No. 29 of 2022

Decisions and actions concerning children should always regard their best interests as a primary consideration.

In its preamble, the **Children Act** states that it is:

An Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.

The Act defines parental responsibility as the duties, rights, powers, responsibilities, authority which by law, a parent has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.[3] These duties, rights, powers, responsibilities and authority of a parent over a child are defined by law and may change depending on the changing capacities of the child. Section 32 of the Children Act prescribes the circumstances when parental responsibility attaches and to whom it attaches. The said section provides as follows in this respect:

> ***"Subject to the provisions of this Act, the parents of a child have equal responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock."***

Whereas the Constitution does not define the term 'parental responsibility', it is emphatic that ***"Every child has the right to parental care and protection, which***

[3]Section 31 (1) of the Children Act 2022.

Children have the rights to life and to develop to their full potential in a safe and healthy environment.

includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not."[4]

It is therefore the understanding in law that parental responsibility is tied to the parentage of the child. The Court in **Zak and Another v. The Attorney General and Another**[5] held that parental responsibility for children, whether born within or outside marriage, is the responsibility of both the father and the mother.

3.0 Extension of parental responsibility

In determining any matter that involves a child, Article 53(2) of the Constitution and Section 8(2) of the Children's Act[6] embodies the "best interest of the child" principle and provides that:

"All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to:

a) Safeguard and promote the rights and welfare of the child.

b) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."

The Constitution and the Children Act[8] define a 'child' as an individual who has not attained the age of eighteen years. The Children Act further defines the term 'parent' to mean the mother or father of a child and includes any person who is liable by law to maintain a child or is entitled to the custody of the child[9]. The Constitution and statute set out the rights of the child for which anyone with parental responsibility should fulfill. In this respect, Article 53(1) of the Constitution provides that every child has the right *inter alia*:

a) to a name and nationality from birth;
b) to free and compulsory basic education;
c) to basic nutrition, shelter and health care;
d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; and

[4]See Article 53(1) (e) of the Constitution of Kenya, 2010.
[5][2013] eKLR
[6]No. 29 of 2022
[7]Article 260 of the Constitution of Kenya, 2010.
[8]Section 2 of the Act.
[9]See section 2 of the Act. See the determination in the case of M N B v J N M & another [2019] eKLR

Children have the right to protection from all forms of violence, exploitation, abuse, and neglect.

> *e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.*

It bears meaning that whoever has parental responsibility over a child is by law obligated to ensure that the rights of the child are fulfilled. It similarly follows that legal parental responsibility ends as soon as an individual attains the age of eighteen years. How and in what circumstances then can parental responsibility be extended beyond the age of eighteen years? The provisions of Section 35 of the Children's Act are instructive in this respect. The said section is in the following terns:

> *"(1) Parental responsibility in respect of a child may be extended by an order of the Court after the date on which the child attains the age of eighteen years if the Court is satisfied, either of its own motion or on application by any person, that special circumstances exist with regard to the welfare of the child that would necessitate the making of such extension*
> *(2) The special circumstances referred to in subsection (1) include cases where the child is in need of extended parental responsibility by reason of special needs arising from severe disability or developmental disorder..."*

Further, section 111(2) of the Children's Act provides that a person or the guardian of a person who has attained the age of eighteen years may, with the leave of the Court, apply to the Court for a maintenance order to be made in his favour.

The foregoing provisions are a replica of the provisions of Sections 28 and 91(b) of the Children's Act No. 8 of 2001 (now

In many jurisdictions around the world, reaching the age of eighteen is considered the legal age of majority, which means the person is recognized as an adult with certain rights and responsibilities.

repealed). It is based on the repealed Act (and before the enactment of the current Act) that judicial intervention in this aspect was had. The succeeding analysis will therefore proceed on an examination of judicial attitudes in the interpretation of sections 28 and 91(b) of the repealed Children's Act. Section 28 provided that:

> *28. Extension of responsibility beyond eighteenth birthday*
> *(1) Parental responsibility in respect of a child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or of its own motion that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made: Provided that the order may be applied for after the child's eighteenth birthday.*

Section 91(b) on the other hand was in the following terms:

> *(b) a person who has attained the age of eighteen years may, with the leave of the court, apply to the court for a maintenance order to be made in his favour.*

Pursuant to the provisions of Section 28(2), an application for extension of parental responsibility could be made by the parent or relative of a child, any person who had parental responsibility for the child, the Director of Children Services or the child. The purpose of providing for extension of parental responsibility is to provide for special circumstances where the attainment of the age of majority would prejudice the welfare of a child already enjoying parental responsibility.[10]

[10]See the determination in the case of M N B v J N M & another [2019] eKLR

The understanding flowing from the above provisions of the law is that parental responsibility can only be extended where it existed in the first place. In other words, an application for extension of parental responsibility cannot be made against a person who did not have parental responsibility to begin with. In the case of JNT v. JWO & Another[11], a respondent aged 23 had been grante an extension of parental responsibility by the trial court. Muchelule J reversed the decision on the ground that there was no evidence that the appellant had catered for the respondent's education prior to becoming an adult.

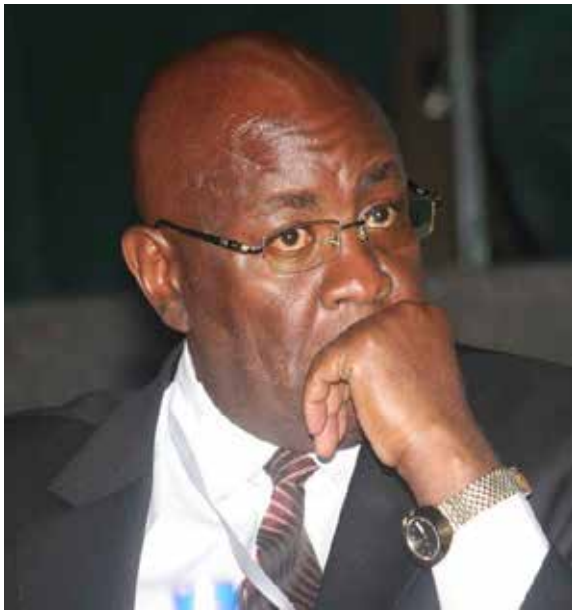
The pertinent question commending itself then is what are the special circumstances that would warrant extension of parental responsibility beyond an individual's eighteenth birthday. Section 91(b) would be a safe place to begin this inquiry. The said section provided that:

A person who has attained the age of 18 years may, with leave of the Court, apply to the Court for maintenance order to be made in the following circumstances;

> *(i) the person is or will be involved in education and training which will extend beyond the person's 18th Birthday;*
> *(ii) A person is disabled and requires specialized care;*
> *(iii) The person suffering from illness or ailment and requires medical care; and*
> *(iv) Other special circumstances which would warrant the making of the order.*

An applicant who was seeking under Section 28 of the Act that parental responsibility over him or her be extended beyond the eighteenth birthday must thus bring himself or herself within the special circumstances enumerated in Proviso (b) of Section 91 of the Act. The burden of demonstrating the existence of such special circumstances rests with the applicant. The standard of proof, as with other civil matters, is on a balance of probabilities. In determining such application for extension of parental responsibility, the Court has to consider whether the Applicant has a genuine need that cannot be met in any other way except through the order sought.[12]

Further, the application for extension of parental responsibility must be timeously made. As explained in the case of M N B v. J N M & Another [2019] eKLR, where an applicant is desirous of having parental responsibility extended beyond his/her eighteenth birthday, such application must be made within reasonable time, preferably before the attainment of the age of majority. An applicant cannot wait for long after becoming an adult and later turn up to seek



Justice Aggrey Muchelule

[11][2019] eKLR
[12]See the determination in the case of J M K & another v. E K M [2013] eKLR

that parental responsibility be extended. In the words of the Court ***"The appellant had an opportunity to move to Court prior to his attainment of the age of majority. This application is being made 7 years after the Appellant attained the age of majority and I find that the same is belated".***

The understanding in law is that extension of parental responsibility should only be sustained in cases where there is genuine need to continue catering for the needs of the applicant. In other words, the whole purpose for providing for extension of parental responsibility is to provide for special circumstances where the attainment of the age of majority would prejudice the welfare of a child already enjoying parental responsibility. It was never meant to apply to a situation when the applicant has long attained the age of majority nor was it intended to take care of adults who should fend for themselves. In DNR v. MMK [2020] eKLR, the Court explained as follows:

> *"Even in circumstances where there is admitted paternity, it would be a dangerous precedent to impose responsibility of a man aged 33 years upon his father. The Children's Act caters for children and not men and women who are of age and whom society expects to fend for themselves. That is why the order for continuous maintenance will be made where a programme a child is undertaking has not yet been completed."*

It follows that where parental responsibility has been extended for a particular purpose, for example the payment of college fees, once the purpose for which the order is made lapses, the person against whom the order is made bears no responsibility to continue providing for the applicant. Even where parental responsibility is extended for a particular purpose, it is not a blank cheque for children to unduly remain in a position of being maintained after attaining the age of 18 years. After attaining the age of majority, what a parent does for the child is a privilege, at the complete discretion of the parent.[13]

While the law is settled that an order for extension of parental responsibility can only be extended upon proof of existence of special circumstances, what constitutes special circumstances may sometimes not be easily discernible. In the case of education for instance, judicial attitude leans towards extending parental responsibility to cater only for basic education. In other cases, however, Courts have held that where the education in question is intricately linked to the basic education for which a parent was responsible, the interest of justice would weigh towards extending parental responsibility to cover for the further education.

In the case of J M K & another v. E K M [2013] eKLR for instance, an application was made for extension of parental responsibility to cover Kenya School of Law fees after completion of university education. In allowing the application, the Court opined thus:

> *"In my view, the Kenya School of Law education is not further education after the Law degree but is an integral part of legal education in Kenya. Why would the Respondent pay the Applicant's University fees and decline to pay for the Kenya School of Law when she is about to complete and instead relegate her to a mere legal clerk for failure to obtain a diploma from the School of Law? To qualify as an advocate of the High Court of Kenya, one must go through the Kenya*

[13]See the case of EMK alias A v. SSS (Family Appeal 49 of 2018) [2022] KEHC 154 (KLR) (31 January 2022) (Judgment) where the Court held that it is not proper to give an open cheque for children to stay in school as long as they want yet after age 18 years what a parent does for a child is a privilege which even the court can on its own motion grant or withdraw for good reason.

At the age of majority, individuals gain legal autonomy, meaning they can make their own decisions without parental consent. This includes decisions related to contracts, medical treatment, education, and more.

> *School of Law. I find the Respondent's arguments that the applicant should seek other options in order to pay fees for herself, to be absurd."*

The conclusion flowing from the foregoing is that in making or declining an order for extension of parental responsibility, the Court will make a case by case analysis of each application. The earning capacity of the parent, the nature of responsibility sought and whether parental responsibility existed in the first place are some of the determinative issues to be considered in such applications.

4.0 Conclusion

By constitutional and statutory edict, the parents of a child are responsible for the protection and care of the child, whether the parents are married to each other or not. In all matters concerning children, the best interest of the child is of paramount importance. Upon attaining the age of majority, however, a child is required to fend for themselves. If such a child is to continue enjoying parental maintenance, special circumstances must be proven to warrant an extension of parental responsibility, unless the parents of their own volition continue to maintain the child. The law frowns upon lazy adults who should fend for themselves but instead sit around and expect to continue being maintained by their parents.

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A new Kenya

By Wanja Gathu

Returning home after a short stint abroad, I am seeing Kenya through a new set of eyes! I see immense beauty all around. The sun is out, and the people are happy despite the economic hardships being felt countrywide.

This is in direct contrast to the atmosphere in my country of residence in North America where the chill especially this time of year sends some people into hibernation and many more into seasonal depression.

Seems to me that a trip abroad is necessary for every Kenyan to gain a new appreciation for our motherland. I say this because of the sheer amount of grumbling and disconnect expressed by Kenyans on and offline regularly. A newcomer would be forgiven for thinking that this country is hell on earth.

Far from it. I believe we all could benefit from a healthy dose of patriotism; the art of actively choosing to see our collective glass as a country as being half full and not half empty. Truth be told, there is more to be thankful for than to complain about in our beloved country Kenya and I would not trade this country for anything.

Take for instance the glorious coastline of Diani, where I spent a few days this December. The picturesque coastline qualifies to be named the 11th or is it the 12th wonder of the world. The Congo river,

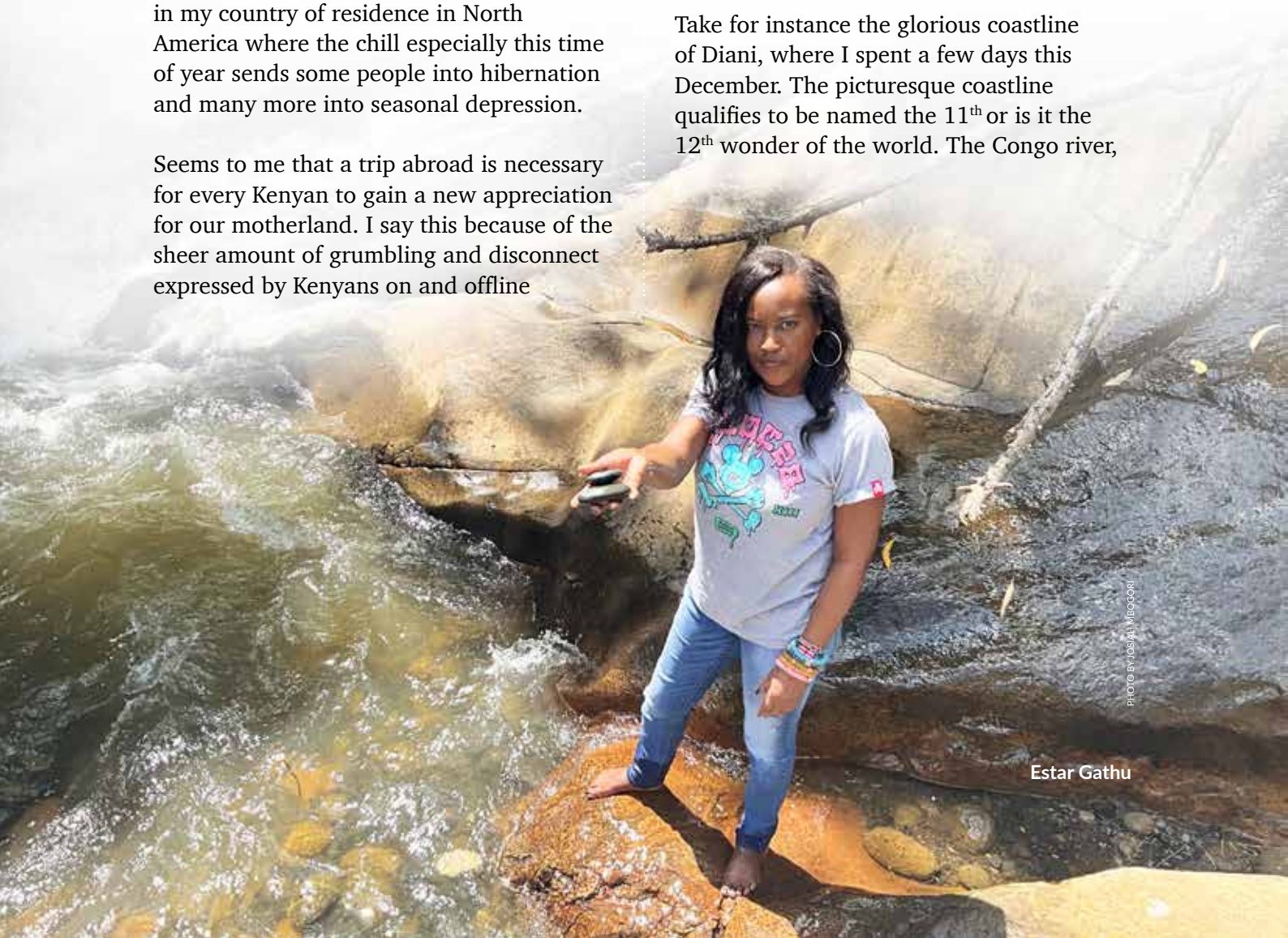


PHOTO BY JOSHUA MBOGORI

Estar Gathu

Water treatment plant on Chania river, supplying water to Nyeri and its environs.

PHOTO BY JOSIAH MBOGORI

which empties into the Indian Ocean at High tide and flows backward at low tide is found here and is a marvel to watch. The beaches are white, and the salty waters sparkle clean, bearing in their ebb and flow, unique healing powers, to which I can attest.

Visiting Central Kenya, one discovers the majestic Mount Kenya, visible from Nyeri, Meru and Nyandarua County, home to the Aberdare Ranges. I am awestruck by the thundering waterfalls of river Mutonga in Chogoria, Meru County and the voluminous Chania river in Nyeri County, which runs through the bewitchingly beautiful yet humble Ihururu village.

My heart jumps for joy when I hear the water slapping the rocks, dozens of feet below, from the comfort of my room within the home of a dear friend. The undulating landscapes of Ihururu village evoke in me such childlike joy, that I am tempted to go out and play in tandem with the birds and the crows of the nearby forest, wherein a Kenya Wildlife Service Camp, whose name Zaina, is at odds with the local Kikuyu dialect, which has no "Z" in its vocabulary. I am curious to know how the name came about but we are barred from venturing into the forest by armed Kenya forest service warders manning a toll gate for a flimsy reason which I cannot remember.

Further North, one discovers the dense Aberdare forest, with its rare bird habitat, home to Lake Olborosat, a marvel that sadly, is slowly dying and demands urgent action. I am sure every Kenyan wherever they are can attest to something awesome in their immediate surroundings. If that does not wow you, think about the big fives, the Nairobi National Park, and the world-famous Maasai Mara game reserve to name a few. Add to that the newly built Nairobi Expressway, the SGR, and the entire infrastructure development country-wide that has opened up new frontiers and allowed citizens to travel with ease, and which has put Nairobi on the global map, as the fastest growing and upwardly mobile city in Africa and the world.

But what is a country without its people? Everywhere I went, I saw the indomitable spirit, joy, and pride of the Kenyan people, in their diversity, each one, young and old, working hard to build the nation against all odds. Unlike many in North America and parts of Europe that I visited last year, the majority of Kenyans are warm, hospitable, and kind people. This is what sets us apart from the rest of the world. Our people power, great sense of community, and enterprise devoid of government support or social safety, is in my eyes, a rare gem. The very thing that makes Kenya a great place to call home.

Granted, many things could be better. Bad governance, corruption, and outright theft and plunder of public resources are a concern and so is the repugnant display of ill-gotten wealth by public servants starting with those who sit in the highest office in the land, while the majority of Kenyans languish in abject poverty. There is also the prickly thorn in our collective flesh, which is the incessant extra-judicial killing of innocent Kenyans by police and government agents, and the crippling over-taxation of Kenyans' service delivery by the government, among other social ills.

Begs the question, what can we as responsible citizens do to right these wrongs without besmirching the good name of our beloved country? What does it mean to be a patriot? Is it even possible to be a patriot and a critic of bad governance in the same breath?

To quote, “Patriotism is that feeling of love, devotion and a sense of attachment to one’s country. This attachment can be a combination of different feelings for the language of one’s homeland and its cultural ethnic and political or historical aspects.”

In my eyes, it is possible to be a patriot and a critic of the government. It is possible to love one’s country so much that one cannot keep calm when things go wrong at home and in the same breath, speak in a loud voice when celebrating and amplifying our achievements as a country. This is the stuff that great countries are made of.

God bless Kenya! God bless the people of Kenya!

Wanja Gathu is an award-winning freelance journalist based in Toronto, Canada. She is also a human rights and social justice advocate.

The defence of entrapment: The limits of undercover investigations

By Calystus Kisaka

This article examines the extent of the application of the defence of entrapment to criminal prosecution. The article supplies the definition of entrapment. In addition, the article discusses the instances in which the claims of entrapment were proved and were not proved. The article also discusses the rationale for excluding evidence obtained by entrapment.

Introduction

On 4th December, 2023, a seasoned Kenyan banker was arrested in the United States (Connecticut) for plotting to murder his wife for taking his children from Kenya to the US. He had requested his Uber driver to link him up with a hitman in this regard. The Uber driver reported the plot to the police. A police officer, while posing as the hitman, approached the man. They agreed that the hitman would proceed on a date with his wife and poison her when he was away in Kenya. In the process, he was arrested and charged with criminal attempt/intimidation of a witness and conspiracy to commit murder.[1]

Law enforcement agencies necessarily employ undercover investigations, as evident from the above anecdote, to obtain evidence for prosecution of a suspect. In this case the police could become the reporter and the witness or employ confidential informants. Covert investigations are necessary because it could be difficult to detect and prosecute crimes committed in private as there are no victims to report the crime or witnesses are unwilling to testify.[2] Undercover investigations are acceptable, legitimate and proper where the investigator assumes a passive stance during the investigation and exerts no influence on the suspect, thereby allowing the suspect to commit the offence as a willing participant.[3] The investigator assumes the character of an ordinary member of the public in the ordinary course of business to purchase test products or complete the transaction. Covert investigation is unobjectionable where the suspect had already formed the intent to commit the crime and the investigator merely provides an opportunity for the suspect to bring into fruition their criminal intent.[4] This may involve undercover agents or covert recordings.

It's important to note that the specifics of entrapment law can vary by jurisdiction, and legal definitions and standards may differ.

Defining entrapment

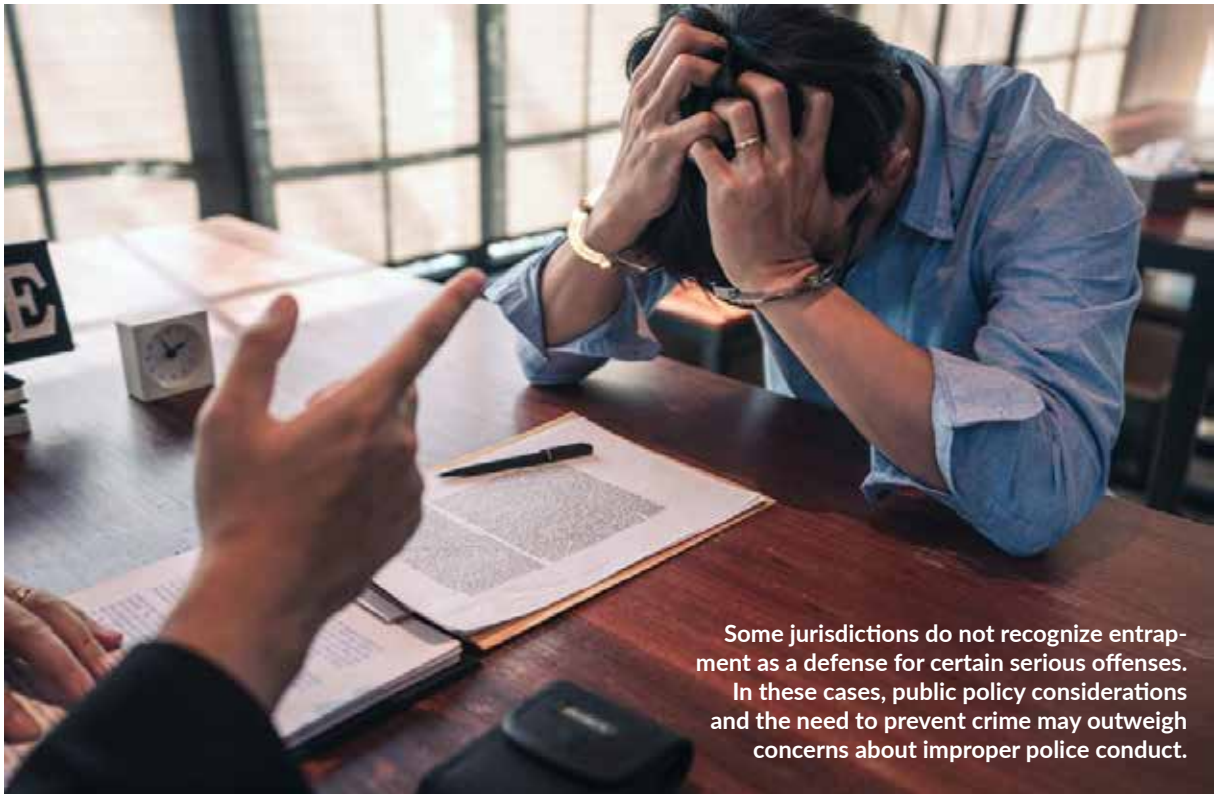
Covert recordings almost always elicit allegations of entrapment. The defence of entrapment may be raised by an accused

[1] https://www.standardmedia.co.ke/health/national/article/2001486950/inside-story-of-wealthy-kenyan-in-us-court-over-plot-to-kill-his-wife

[2] Regina v Looseley [2001] UKHL 53 ATTORNEY GENERAL'S REFERENCE NUMBER 3 OF 2000

[3] Nyamweya J in Lydia Lubanga v Inspector General of Police & 4 others [2016] eKLR PETITION NO 12 OF 2013

[4] R vs Loosey [2001] UKHL 53



Some jurisdictions do not recognize entrapment as a defense for certain serious offenses. In these cases, public policy considerations and the need to prevent crime may outweigh concerns about improper police conduct.

person in the criminal trial as such a court is competent to adjudicate on the issue.[5] Alternatively, the accused may opt to file an independent constitutional petition for declaring the evidence intended to be relied on by the prosecution was obtained by entrapment and accordingly seek exclusion of such evidence. The Blacks Law Dictionary defines entrapment as a law enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to cause a criminal prosecution against that person. The state agent in the entrapment is referred to as *agent provocateur*.
The Supreme Court defined entrapment as a state-created crime where state authorities, law enforcement officers or government agents provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that the person is already engaged in a criminal activity and where the authorities have a reasonable suspicion or act in the course of a bona fide inquiry, they go beyond providing an opportunity and include the Commission of an offence.[6]

Warsame J (as he then was) held that entrapment occurs if the action or the omission of the investigating officer in dealing with a person would likely induce a normally law-abiding citizen to commit a crime that he would not have committed if the normal and the requisite warning was administered.[7] It follows that entrapment would be committed where persistent action of a state agent induces the person into committing the crime.[8] Entrapment would also exist where a private person

[5]Justus Atieri Malunda & another v Ethics and Anti – Corruption Commission & 4 others [2015] eKLR para 45
[6]Supreme Court Petition No. E001 of 2023: Hon. Justice Said Juma Chitgembwe v The Tribunal Appointed to Investigate into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court para 127 & 128.
[7]Mohamed Koriow Nur v Attorney General [2011] eKLR PETITION NO.181 OF 2010
[8]Mugambi, Chief Magistrate (as then was) Republic v John Njoroge Chege [2020] eklr anti-corruption case number 5 of 2013

Blogger Cyprian Nyakundi

makes a report to the police and thereafter starts planting a criminal intent in the mind of the person.

Instances where entrapment was proved

Entrapment is proved where the actions of the police were so overbearing and extreme as to constitute the idea and impetus for the crime.[9] It is also proved where the confidential informant promises a reward for committing a crime which influences the person to commit a crime he would otherwise not have committed.[10]

In 2007, the Kenya Anti-Corruption Commission (KACC) was investigating a case of land grabbing by a private developer, which land was meant for Racecourse Primary School in Nairobi. The investigation officer agreed to meet with the private developer, Mohammed Nur. The investigation officer tape-recorded their conversation during the meeting. The investigation officer sought to know how Mohammed Nur wanted to be helped. Mohammed Nur offered Kshs. 1 million with a deposit of half so that the investigator could write a good report of the investigation. On the day of the first instalment, five officers from KACC arrested Mohammed Nur and he was subsequently charged with offering a benefit contrary to the law. He instituted a constitutional petition for a declaration that the audio recordings were obtained through entrapment and to quash the criminal charges.[11] Warsame J (as he then was) agreed and held that this was entrapment since Mohammed Nur was enticed into committing the crime, without appropriate warnings, the investigation officer participated in the crime and there was no investigation against him for a corruption offence.

Cyprian Nyakundi, in a petition, persuaded Mrima J that the evidence intended to be used against him in a charge of extortion of the Chief Executive Officer (CEO) of Victoria Commercial Bank (VCB) contrary to section 300(1)(a) of the Penal Code was obtained by entrapment.[12] In this case, in January,2020, the Petitioner published a blog about the CEO of VCB. The CEO then contacted a police officer at DCI for advice. The police officer advised him to bring the Petitioner to the table. This advice led to negotiations between the said CEO, third parties and the Petitioner which culminated in an agreement that the Petitioner be paid Kshs. 17.5 million to pull down the blogs in a meeting held at offices of VCB fitted with DCI secret cameras. It was further agreed

[9] https://www.justia.com/criminal/defenses/entrapment/
[10] https://www.hmichaelsteinberg.com/understanding-the-defense-of-entrapment.html
[11] Petition No. 181 OF 2010.
[12] Cyprian Nyakundi & another v Director of Criminal Investigations & 2 others; Victoria Commercial Bank (Interested Party) [2021] eKLR constitutional petition no. E284 OF 2020

that the Petitioner would be paid Kshs. 1 million as first instalment. The petitioner was arrested on the day he was to receive the first instalment and charged with extortion. The court held the video evidence as having been obtained by entrapment because of the involvement of the police officer in guiding the events that unfolded.

Felix Kombo, SPM, found that an investigator who instructs a complainant to negotiate with a police officer who has asked for a bribe of Kshs. 20,000/= so as not to be charged goes beyond providing an opportunity to commit the crime.[13] The negotiation prompted the accused to make a counter-offer and enabled the complainant to steer the conversation in a manner designed to secure an arrest. As a result, the investigator was incapable of conducting an independent investigation as he was mired and clouded by the dust of the complaint.

Instances where entrapment was not proved

However, the defence of entrapment would be unavailing to a person if a private individual induced them to commit the crime without the involvement of a state agent.[14] This is so where the private citizen induces the person to commit an offence before the citizen reports them to the police because such an action can be traced to the state.

In 2016, Nyamweya J (as she then was) dismissed a Petition seeking to quash charges of receiving a bribe based on alleged entrapment of a Land Valuer at Kajiado Land Registry. The Land Officer

In some jurisdictions, even if there is government inducement, the defense of entrapment may fail if the defendant is found to be predisposed to commit the crime.

[13]Republic v Jeremiah Kimutai Ng'etich [2019] eKLR anti-corruption case No. 18 OF 2016
[14]Republic v John Njoroge Chege [2020] eKLR anti-corruption case No. 5 OF 2013

It is important to note that the specifics of entrapment law can vary by jurisdiction, and legal definitions and standards may differ.

had solicited and received a bribe of Kshs. 30,000/= to undervalue land. She referred to it as a token of appreciation. However, it is the giver of the bribe that had reported the solicitation of the money to the Ethics and Anti-Corruption Commission (EACC). The EACC investigator merely fitted the complainant with a recording device and recorded or documented the receipt of the money and they did not incite, instigate or lure the Petitioner. The Petitioner willingly participated in the receipt of the money. The Petitioner would have solicited and received the bribe even without the involvement of the EACC officers. The Court declined to interfere with criminal proceedings and held that the criminal court was constitutionally mandated to determine the admissibility, correctness, merit, sufficiency, truthfulness and veracity of the evidence.[15]

Nyakundi J held there is no entrapment where a man who has wildlife trophies such as elephant tusks and intends to sell them and police arrest him as undercover agents.[16] The man was charged and convicted of being in possession of a Wildlife Trophy Contrary to Section 95 of the Wildlife Conservation and Management Act, 2013. Bwonwonga J held that the police acted on a tip off from an informer to pose as buyers of six pieces of elephant tusks and in the process of negotiations in respect of the price they arrested the accused and thereby provided an opportunity and incentive for the appellant to produce the six pieces of elephant tusks.[17] The informer need not be disclosed or to come to court as a witness unless the informer is crucial in establishing the innocence of the accused

[15]Lydia Lubanga v Inspector General of Police & 4 others [2016] eKLR PETITION NO 12 OF 2013
[16]Kazungu Karisa Yeri v Republic [2021] eKLR CRIMINAL APPEAL NO. 57 OF 2019
[17]Tiapukel Kuyoni & another v Republic [2017] eKLR CRIMINAL APPEAL NO 25 AND 25A OF 2017 para 13

and the police officer need not to disclose the communication they had with the informer.[18]

Kimaru J (as he then was), dismissed a claim of entrapment by a military officer dismissed from office on account of being in possession of ammunition and selling them to robbers in Huruma estate.[19] The court was not satisfied that the ammunition was planted on the military officer because he was found in possession.

PJ Otieno J held that there is no entrapment where a police officer solicits for a bribe in order to investigate an offence and the person from whom the bribe is solicited makes a complaint to the EACC who then fit the complainant with secret cameras in a sting operation leading to the eventual arrest and charging of the suspect.[20] This is so because the complainant merely reported an ongoing arrangement between himself and the police. There was no evidence that the complainant worked with the EACC officers from the word go. Further, the complainant was not an agent of the state.

Similarly, there is no entrapment where a participant in a crime monitors activities by a tape recorder supplied by the police. The accused persons conspired to murder a Magistrate who had sentenced one of the accused to prison. One of the participants reported the case to the police and was fitted with a tape recorder and surveillance cameras were fitted at the Magistrate's home and when the assassin rang the bell, the door flang open, policemen emerged, overwhelmed the man, pinned him down and the gun went flying into the air.[21]

Former Nairobi Governor, Mike Sonko

The Supreme Court dismissed claims by Justice Said Chitembwe that the audio recordings which the Tribunal used to indict him of violation of Code of Conduct and Ethics for judicial officers were obtained through entrapment. The former Governor of Nairobi had in a series of meetings with the Judge and others secretly recorded the conversation of the meetings in the Judge's house at Mountain view estate. The recordings indicated the judge prevailed upon parties to withdraw an appeal from the succession cause he had determined because he had an interest in one of the pieces of land of the estate to enable the sale of the land. The Judge also advised Mike Sonko on possible grounds of appeal against the Judgment of the High Court that

[18]section 3C of the Witness Protection Act, section 132 of the Evidence Act and *Bishen Chand Mahindra v. Mathira Dass* (1941) 19 (2) LRK 67
[19]Thomas Katiku v Republic [2017] eKLR COURT MARTIAL NO.7 OF 2016
[20]Omondi v Republic (Criminal Appeal 24 of 2020) [2022] KEHC 15386 (KLR) (9 November 2022) (Judgment) CRIMINAL APPEAL 24 OF 2020
[21]S vs Ismail and Others (SS88/2002) [2004] ZAWCHC 39 (6 December 2004).

Courts may also consider public policy concerns when evaluating entrapment claims. The goal is to deter unlawful police conduct while ensuring that individuals who are genuinely predisposed to commit crimes are held accountable.

upheld the governor's impeachment where the Judge was the presiding Judge.

Video and audio recordings covertly recorded are admissible in evidence if a participant in the conversation and not a third party recorded them, if the recordings were of a conversation between parties who were privy to the truth of the matter they were discussing and were freely talking about it, the court or tribunal has direct evidence or testimony of the participant who made the recording and the recording is of great probative value. Anyone seeking to challenge the integrity of such electronic evidence, must produce expert evidence to show that such evidence was doctored or edited.[22]

Evidence from undercover investigations is admissible where the law enforcement agency provided an unexceptional opportunity for the person to commit a crime.[23] Unexceptional opportunity refers to the conduct of the police that is expected of an ordinary participant in the transaction. The unexceptional opportunity provided should be based on a reasonable suspicion. The reasonable suspicion is hinged on the past conduct of the accused which should indicate that he was predisposed to commit the crime and that it was not the design of the law enforcement officer who planted the criminal intent in the mind of the person.

[22]Supreme Court Petition No. E001 of 2023 para 130.
[23]Lord Nicholls of Birkenhead in R V. Loosely, [2001] UKHL 53 at para 23 quoted by Warsame J(as he then was) in Mohamed Koriow Nur v Attorney General [2011] eKLR

A person's criminal predisposition is evident where they readily accede to a suggestion to commit the crime.[24] The person would commit the crime without hesitation, after minimal persuasion or after none at all. This would lay bare a pre-existing criminal intent whose execution awaited an opportunity.

Rationale for excluding evidence obtained by entrapment

Undercover investigations should not be used to test the virtue of citizens.[25] The police must be acting in good faith and not out of malicious vendetta against the person. The inducement provided by the police should be proportional in the circumstances, the police overtures should not be forceful, persistent or use threats, trickery, fraud, deceit or reward and the police should not exploit human emotions such as compassion, sympathy and friendship.

Where the police officer goes beyond providing an opportunity by committing a crime, it would be deeply offensive to notions of fairness to convict the person on that basis since he only committed because he had been incited, instigated, persuaded, pressurized or wheedled into committing it by a law enforcement officer. Where entrapment exists, the motive to secure a conviction may override honesty.[26]

Where entrapment is proved, the court will not consider the criminal antecedents of the person, nor will it consider the character, conduct, intent or criminal history of the person. The Court does this to enforce the rule of law, prevent abuse of the court process and misuse of the coercive power of the state, disregard illegally obtained evidence and to ensure skilful, professional and scientific investigations. The evidence is excluded for having been obtained in violation of rights and fundamental freedoms in the bill of rights that would lead to unfair trial and would be detrimental to the administration of justice.[27] This is in realization of the right not to self-incriminate, fair trial and to privacy because an individual has a right to a private enclave, where he may live without overbearing investigatory invasion or crypto-coercion.

Conclusion

Entrapment is a defence to a criminal prosecution which when established may persuade a court to exclude the evidence to be relied on by the prosecution. Such evidence is excluded on the basis of having been obtained in violation of the right to privacy and the right not to be a witness against oneself. Exclusion of the evidence obtained by entrapment present a challenge to the prosecution in proving the case to the required standard. However, when mounting a defence of entrapment, the accused has to satisfy the court that the police went beyond merely providing an opportunity to commit the crime and that they are ordinarily not predisposed to committing the crime.

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[24]Republic v John Njoroge Chege [2020] eKLR ANTI-CORRUPTION CASE NUMBER 5 OF 2013
[25]Mohamed Koriow Nur v Attorney General [2011] eKLR
[26]S vs Ismail and Others (SS88/2002) [2004] ZAWCHC 39 (6 December 2004) p.38.
[27]The Constitution of Kenya, 2010, Article 50(4).

The fallacy of public participation in Kenya

By Kevin Wakwaya

The Constitution of Kenya, lauded as one of the most robust instruments in Africa, introduced with it several ideals that ought to govern a democratic society. Public participation is one of these principles. Government receptiveness to citizen needs is guaranteed through public participation. Additionally, it increases the validity of decisions as the public is involved in the making of the decisions. Confidence and trust in public institutions is improved through perceived participation in rule-making.

A cursory search of 'public participation' on the Kenya Law case search database shows numerous decisions of the court touching on the subject. Most recently, the Court in the notable cases of *Matindi & 3 others v The National Assembly of Kenya & 4 others; Controller of Budget & 50 others* (Interested Parties) (Petition E080, E084 & E150 of 2023 (Consolidated)) [2023] KEHC 19534 (KLR) (Constitutional and Human Rights) (3 July 2023) (Judgment) (with dissent - HI Ong'udi, J) (challenge on the establishment of the Office of Chief Administrative Secretary (CAS)); *Law Society of Kenya v Attorney General & 3 others* (Environment & Land Petition E001 of 2023) (challenge on the lifting of the ban on Genetically Modified Organism (GMO)); *Law Society of Kenya v Attorney*

General & 3 others; Katiba Institute & 6 others (Interested Parties) (Environment & Land Petition E001 of 2023) [2023] KEELC 20583 (KLR) (12 October 2023) (Interim Judgment) (decision on the lifting of the ban on logging activities) and Petition No E181 Of 2023 as Consolidated With Petition Numbers E211 of 2023, E217 of 2023, E219 of 2023, E221 of 2023, E227 of 2023, E228 of 2023, E232 of 2023, E234 of 2023, E237 of 2023 and E254 of 2023 *Okiya Omtatah Okoiti v the Cabinet Secretary for the National Treasury and Planning* (case challenging the Finance Act 2023) talked of, among others, public participation.

The meaning of what public participation is and has largely been settled. In *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR, Justice Odunga (now Judge at the Court of Appeal) while discussing this ideal, was of the view that the public must be pushed to participate in the process of enactment of laws. The public is invited to participate through the use of as many avenues as possible, including churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations, and any other avenue where the public is known to converge. The reason for this widespread use of all available media is to spread information regarding intended legislation, enabling as many interested persons as possible to present their views. Accordingly, it is not proper to use select mediums and leave the public scavenging for information. The judge was convinced that a 'one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation'.

From this decision, it is evident that proper sensitization of the public is key in establishing the principle of public

Justice Odunga

participation. All demographics of the society must be considered in disseminating the information necessary to enable them to participate. This therefore requires the use of multiple media over a period of time and sometimes in more than one language depending on the literacy levels. In summary, in public participation, information should be readily available to the public, rather than the public foraging for the information.

The Court of Appeal reaffirmed the position of the High Court in the case of *Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR. In the appeal, the County had challenged the decision of Judge Odunga. In dismissing the appeal, the court held that public participation was held to include three key components. These are dissemination of information, invitation to participate in the process and consultation on the legislation. The Court proceeded to suggest the enactment of specific legislation to guide state actors and the public on aspects

Providing the public with relevant and accessible information about policies, projects, or decisions is a crucial first step. Transparent communication ensures that individuals are well-informed about the issues at hand.

of public participation. Such legislation is yet to be passed, though there is currently a Public Participation Bill, 2023.

In 2019, the Supreme Court in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR set the guidelines for public participation. Public participation should not be cosmetic or a public relations exercise but must be meaningful; it should provide adequate notice and reasonable opportunity; the mode, degree, scope and extent of public participation was to be determined on a case-to-case basis; there must be clarity of the subject matter for the public to understand and enable them give their informed views; structures and processes (medium of engagement) of participation should be clear and simple; opportunity for balanced influence from the public, in general, must be provided; the agency should be committed to the process; ensure inclusive and effective representation from stakeholders; guarantee integrity and transparency of the process; create capacity to engage on the part of the public, including that the public must first be sensitized on the subject matter.

Despite the somewhat settled understanding of public participation, there are still some contestations on some aspects of the 'how' in public participation. One of the issue is the weight to be given to the views expressed during the public participation exercise. The prevalent

position is that these views do not necessarily have to prevail as 'there is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government' *(Merafong Demarcation Forum and Others vs President of the Republic of South Africa and Others). In Constitutional Petition Nos. 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* [2015] eKLR the High Court considered that public participation should not appropriate 'technical or democratic role of the office holders'. Rather, public participation is meant to 'enrich' the position of these office holders. Thus, the fundamental purpose of participatory decision-making is not to replace representative democracy.

This position is interesting. On the one hand, the public is told they must be given an opportunity to participate in the enactment of legislation, rules or policies. On the other, the same public is told that the views they express are not binding and may be disregarded 'after consideration'. In *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 Others* [2017] eKLR, it was held that consideration of public view and other factors relating to the legislation is sufficient evidence of public participation. It was not of concern if the views did not carry the day. Many other decisions from the courts speak to "public view must not necessarily prevail" and "due consideration of the public view before they are dismissed".

Essentially, what the courts are saying is that due consideration must be made to public comments before they are disregarded or rejected. With this comes another conundrum, what is 'due consideration'? Concomitantly, what evidence should be produced to satisfy the requirement of due consideration? In a litany of decisions, the courts have found public participation to have been satisfied when a state agency produces proof of invitations to the public to present their views and minutes of meetings. Most of the time, these minutes will only show attendance and views given by the public. Rarely is evidence produced on the deliberations made to the public views and how the public views influenced the final position.

Is public participation, then, only a synonym for public information? Public

Engaging with communities directly affected by a decision or project is essential. This involves understanding the needs, concerns, and priorities of the community and incorporating their perspectives into the decision-making process.

participation, if understood from this point, is in the realm of misleading 'participatory' action. It is meant for nothing but to inform the public, rather than seek their influence in the formulation of the policies and rules. All an agency would need to prove public participation is that they invited the public to present their comments, the comments were made and the comments were 'considered' and rejected.

The general position of the weight to be given to public comments would appear contradictory to the Constitution. Article 1 of the Constitution speaks to supreme power belonging to the people. This power may be exercised directly or through democratically elected representatives. It is also donated to several organs of the State, to be exercised on behalf of the people and in accordance with the constitutional principles. By treating the people as a distinct body from the elected government, the Constitution provides a form of veto to the elected/appointed government. The sovereignty of the people is an additional check and balance to ensure there is no monopoly of power.

From this perspective, where elected representatives come back to the holders of supreme power to seek their comment or view through public participation, shouldn't the public's view prevail? If the sovereign power belongs to the people, shouldn't their concerns when sought during public participation hold sway, and in fact be binding? Is this not what the Court in *Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) calls 'partnership in decision making' and the Court of Appeal refers to

as an opportunity to influence the decision *(Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR)? Again, taking this position would lead down another rabbit hole: the place of referenda in public participation.

Partnership or influence in decision-making has the meaning, at least, that the public must have a say and sway when their input is sought. Public participation, as the courts keep saying, is to be reasonable and meaningful, not illusory or a PR exercise. This then leads to another difficulty. To what extent must the state agency respond to public views? The majoritarian position is that not all views must be considered. But the question is, what standard or mechanism does the state agency use to pick and choose which views to address and which ones not to? All these issues have not been addressed in the decisions by courts.

As currently construed and understood, public participation is more of public information as opposed to deliberation. Most of the time, there is no process of give and take and joint problem-solving. It is the agency informing the public, inviting comments, 'considering' the comments and rejecting them, leaving the agency in the same place as if it did not seek the comments. Public participation is a fallacy. When overwhelming feedback by the public is simply ignored or rejected, there is a perception created that the public's views are not relevant, contrary to the democratic principles of rulemaking. Frustrations will result from this. Such participatory model would be seen as sanitizing the monopolistic decisions of the state agencies.

What then can we do to effectively employ and utilize public participation?

First is proper information dissemination. This will require relevant agencies to make sure the information relating to the policy, rule or law to be passed is made available to the public in a language that the key stakeholders understand. Also, the information should be shared in good time and allow ample time for the public to interact with the information and have enough time to give feedback. Where decisions have countrywide ramifications, every citizen should be considered as a key stakeholder and given the information and time necessary to facilitate their participation. By doing this, the public will not only be sensitized on the relevant law, rule or policy, but they will give informed input or feedback.

Second, the meetings to collect public views need to be consultative as opposed to informative. The relevant state agency ought to communicate the reason for the law, policy or rule and the public is heard on how the law, rule, or policy will affect their day to day lives. This approach will benefit the decision making as it will be enriched by the key stakeholders.
Third, feedback from public participation and how the feedback has influenced the final product should be made known to the public. This way, the public will be assured that their comments were not collected in vain. Additionally, where the comments or feedback are disregarded reasons should be given for the rejection.

A large state as ours cannot rely on the convening of a large number of electorate to vote on all matters of public importance. The participatory arrangement as outlined would address the need for public involvement in decision-making reminiscent of democratic societies, as well as the concern of representative government where a select few elected or appointed to represent the many may fail to represent the interests of the people.

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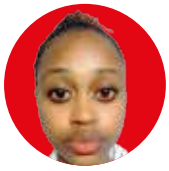
Beyond the Torrens system

"…a title document is not sufficient proof of ownership where that origin of title has been challenged. The holder of the title must go beyond the title and demonstrate that the process of acquisition, from inception, was legal….In the immortal words of Abraham Tucker, an English country gentleman, "forewarned is forearmed." If you are not careful, you risk being left holding a pie."[1]



By Terry Moraa

1. Introduction

Land is a fundamental factor of production which is central to the economic pursuits of our country. The arduous history of land in Kenya makes it emotive. Land grabbing epitomised the mischiefs of the political culture, political institutions and politicians themselves. These are the exact people who were entrusted with being guardians of public land and safeguarding it. The mischiefs became evident through the 2004 Report of the Commission of inquiry into irregular and illegal allocation of public land (commonly identified after its Chairperson Paul Ndiritu Ndung'u as the Ndung'u Report). The report remains a commanding documentation of illegal and irregular land allocations in Kenya. Even though the Constitution before 2010 had a Bill of Rights, the provisions were irrelevant, as Okoth Ogendo described as 'Constitutions without constitutionalism'.[2]

The Ndung'u Report revealed far-reaching grabbing of public land that could be made available for the public's benefit (such as roads, schools and hospitals). The report brought to light complex links between Kenya's apprehensive election past and matters relating to land, noting the significant rise in public land allocations momentarily afterwards the 1992, 1997 and 2002 multiparty general elections.[3] This signaled that public land was allocated, through misallocation, to private individuals, as a political incentive or support.

Land in Kenya is governed by various laws and regulations that define ownership, use, and management.

As Rodger Southall, precisely put it, 'the systematic way in which established procedures, designed to protect the public

[1]Terry Ombati, 'The bona fide purchaser conundrum and the validity of property titles: Insights from the Supreme Court of Kenya',<https://kabarak.ac.ke/klrb/the-bona-fide-purchaser-conundrum-and-the-validity-of-property-titles-insights-from-the-supreme-court-of-kenya> on 03 January 2024.
[2]H.W.O Okoth Ogendo ,'Constitutions without Constitutionalism: Reflections on African Paradox', in Douglas Greenberg et al. eds, Constitutionalism and Democracy: Transitions in the Contemporary World (Oxford University Press, 1993), 74.
[3]Report of the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land (Ndung'u Report), 2004, 82.

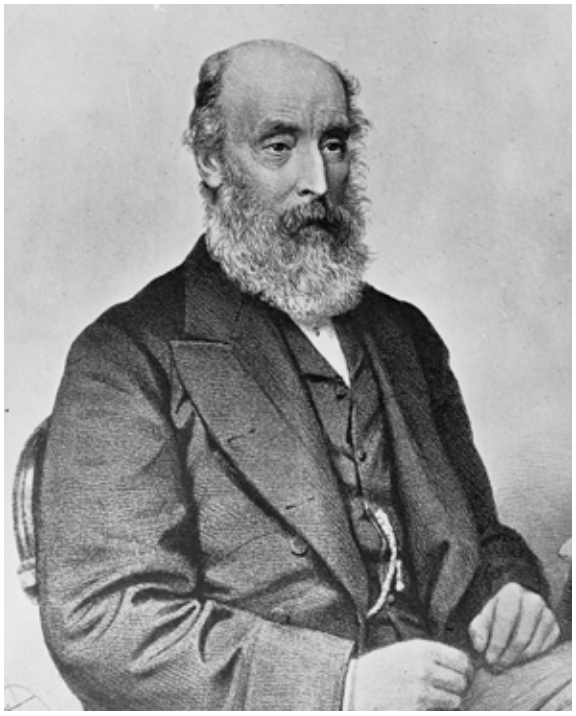
Kenya has undergone various land reforms to address historical injustices, promote equitable access to land, and enhance sustainable land use.

interest were perverted to serve private and political ends'.[4]

The Ndung'u Report encapsulated key processes employed by leaders in irregularly allocating public land as well as direct allocation by the President and, or, the then Commissioner of Lands, allocation of riparian sites and reserves and invasion of government and trust lands and subsequent allocation of titles to it.[5] Local authorities, including chiefs, who were delegated with the obligation of the administration trust land on behalf of their communities dealt with land as if it was their own private property, with no regard whatsoever to considering the interests of the community members.[6] The Ndung'u report was a convincing influence for the extremely required changes to deal with the such historic land biases.

Taking into account this problematic history of land in Kenya, it is not astounding that many of the demands for change were associated with land during the procedure of drafting the Constitution. Land became a fundamental deliberation in the constitutional discussions, borne by collaborative endeavors by civil society organisations and struggles by the citizenry. This was made evident by the stimulus of the Kenya Land Alliance's draft National Land Policy document on the negotiations of the Constitution of Kenya Review Commission.[7] In 2009, a wide-ranging National Land Policy was published. The policy preceded the 2010 Constitution and

[4]Roger Southall, 'The Ndung'u Report: Land and Graft in Kenya', Review of African political economy, Volume 32 No. 103, Imperilaism and African Social Formations (March 2005), 143.
[5]Report of the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land (Ndung'u Report), 2004, part IV.
[6]Ibid, 14.
[7]Sessional Paper, No.3 of 2009, National Land Policy, 2009, ix, 8, 9-18.



Sir Robbert Torrens

was with given great consideration because all constitutional drafts from 2002 till 2009 called for the setting up of a National Land Policy. The principles of the National Land Policy were successively incorporated into the 2010 Constitution.[8]

Among the concerns of land struggles in Kenya, was specific interest on the politics of land administration, the 'norm' of politicians misallocating, grabbing public land and converting into theirs. The Constitution of Kenya was promulgated in 2010 steering in momentous revolutions to land governance and tenure. A new body was then formed by the 2010 Constitution- the National Land Commission, whose among other functions, is to manage public land on behalf of national and county governments.[9] The Constitution created private, public and communal tenure of land ownership.[10] The recognition of community land and additionally the assigning of rights in communities are significant to the subject of illegal and irregular allocation of land. This is for the reason that illegal and irregular allocation of land encompasses unregistered land. The non-existence of a title deed is a vehicle through which illegal and irregular allocation of land is done given that there is no proof of ownership of the particular land in question. As a result, this suits laid-back grabbing or misallocation of land. Besides, the Constitution, notably, recognised the necessity to deal with historical land injustices.[11] The 2010 Constitution enshrines in its Bill of Rights the right to property which does not extend to illegally obtained land (such as, through fraud or illegality).[12] This exception under Article 40(6) of the Constitution, to the right to property, had to resolve the conflicts apparent in constitutional deliberations- to acknowledge and guard property rights and contrariwise, to deal with the enduring illegality and irregularity with respect to land in Kenya.[13]

It is against this brief historical context that situates the drafting of Article 40(6) of the Constitution in the context of remedying the dark past of land improprieties. This constitutional provision has been recently interpreted by the Supreme Court in settling the long contradictory doctrine of the *bona fide* purchaser of land and in its holding that the right to property cannot be protected where the root of title has been challenged.[14]

[8]Ibid, 2. See also Constitution of Kenya (2010), article 60
[9]Constitution of Kenya (2010), article 67(2)(a).
[10]Constitution of Kenya, articles 61-64.
[11]Constitution of Kenya, article 67(2)(e).
[12]Constitution of Kenya, article 40(6).
[13]Sessional Paper, No.3 of 2009, National Land Policy, 2009, 10.
[14]Dina Management Limited v County Government of Mombasa & 5 others, (Petition 8(E010) of 2021), Judgement of the Supreme Court (2023), eKLR, para 111.

The year 2023 turned out to be momentous for the Supreme Court concerning matters of land rights and ownership. These subsequent sections discuss the Torrens system of land registration in Kenya, the Supreme Court decisions on the *bona fide* purchaser, whether the decisions offend the Torrens system and what this means for prospective purchasers of land going forward after the recent apex court jurisprudential decisions.

2. Torrens system of land registration

The principle of 'indefeasibility of title' is the basis of the Torrens system of land registration. The distinguishing aspect of this system is that it is 'not a system of registration of title' but a 'system of title by registration'.[15] The system has its beginnings in South Australia in 1858 where it was founded by Sir Robbert Torrens.[16] Torrens underpinned that a land register should show the real state of ownership instead of mere provision of evidence of ownership. This system found its way in Kenya through the repealed Registration of Titles Act of 1920 and in the Act, 'a certificate of title was conclusive proof of ownership of title'.[17] Kenyan affirmation of the system appears to have been derived from the Privy Council's logic in *Gibbs v Messer* which held along these lines:

> *"The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title".*[18]

Callinan J in *Black v Garnock* also noted that the aim of this system is to streamline conveyancing and present a grander assurance of the certainty of title.[19] The Torrens system consists of three principles. Firstly, the mirror principle implies that the register is meant to reflect (mirror) exactly the title to land, including its interests. Secondly, the curtain principle encompasses the finality of the land register meaning that one does not need to go behind the title to land as it has all information in respect of the land. This principle was elucidated in *Attorney General vs. Kenya Commercial Bank Limited & 3 others (2004) eKLR* which held:

> *"It would be a bad precedent where parties to a transaction in land would not only have to satisfy themselves that the land in question is registered but also trace the history of the land to establish whether or not the title to the said parcel of land was legitimately acquired. It would also make nonsense of the title deeds issued and guaranteed by the Government in respect of parcels of land owned by individuals."*[20]

Lastly, the indemnity principle requires that in the event of any inaccuracy in the land register, anyone who has suffered loss as a result should be put in the same

[15]Breksvar v Wall (1971) 126 CLR 376, 385 (Barwick CJ).
[16]Moerlin Fox, 'The Story behind the Torrens System' 23 Australian Journal 489 (1950).
[17]Repealed Registration of Title Act, CAP 281, section 23.
[18]Gibbs v Messer (1891) AC 248, 254.
[19]Black v Garnock (2007) 230 CLR 438, 461.
[20]Attorney General v Kenya Commercial Bank Limited & 3 Others, Civil Suit No. 260 of 2004, Judgement of the High Court (2004) eKLR.

position by way of indemnification as if the register were correct. These principles are manifested in the Kenyan law. The Land Registration Act provides under Section 26(1) that the certificate of title issued under the Act is *prima facie* evidence that the person named as the proprietor of the land is the absolute and indefeasible owner connoting that a certificate of title is the conclusive evidence of proprietorship.[21] It further provides a caveat that such a title shall not be subject to challenge with the exception of cases of fraud, misrepresentation and where the title is illegally acquired.[22] Section 81 of the Land Registration Act, as well, provides for the right to indemnity in respect of an error in the register.[23] Such is the sanctity of title on which the Land Registration is based.

3. The settled position on the *bona fide* purchasers

Bona fide purchaser is "one who buys something for value without notice of another's claim to property and without actual or constructive notice of nay defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claim."[24]

Before the landmark decision of the Supreme Court in Dina Management, there have been conflicting decisions on the position of a bona fide purchaser. Preceding decisions had trailed in dissimilar positions concerning this subject. For example, the Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* established the existence of fraud from the first owner and struck down the titles that were passed to the bona fide purchasers. It applied the *nemo dat quod non habet* (no one gives who possesses not) and eventually held that the frauds did not acquire good title to pass on Arthi Highway Developers Limited (bona fide purchasers) and the ensuing purchasers of the land subdivisions were also null and void.[25] This decision by the Court of Appeal was at apparent odds with its former decisions in *Permanent Markets Society & Others v Salima Enterprises & Others* where it held that where it was proven that prior titles to land were acquired illegally, the title of the last *bona fide* purchaser was indefeasible.[26] This decision was also allied to the same court's decision in *Tarabana Company Limited v Sehmi & 7 others (2021)* where it held the appellant to be a bona fide purchaser. Whilst the title to the property was illegally acquired, it was indefeasible as it was acquired before the appellant surfaced into the picture.[27]

Dina Management Limited v County Government of Mombasa & 5 others (2023)

The Supreme Court has now settled the above contradictory positions on a bona fide purchaser in the landmark judgment of *Dina Management Limited v County Government of Mombasa & 5 others (Dina Management Case)* and in *Torino Enterprises Limited v Attorney General (Torino Enterprises Case)*. In *Dina Management* case, the dispute therein resulted from the ownership of MN/1/6053

[21]Land Registration Act, No.3 of 2012, section 26(1).
[22]Land Registration Act, No.3 of 2012, section 26(1).
[23]Land Registration Act, No.3 of 2012, section 81.
[24]Black's Law Dictionary, 9th Edition.
[25]Arthi Highway Developers Limited v West End Butchery Limited & 6 others, Civil Appeal 246 of 2013, Judgement of the Court of Appeal (2015)eKLR.
[26]Permanent Markets Society & Others v Salima Enterprises & Others, Nairobi Civil Appeal No. 185of 1997, Judgement of the Court of Appeal (1997) eKLR.
[27]Tarabana Company Limited v Sehmi & 7 others, Civil Appeal 263 of 2019, Judgement of the Court of Appeal(2021)eKLR.

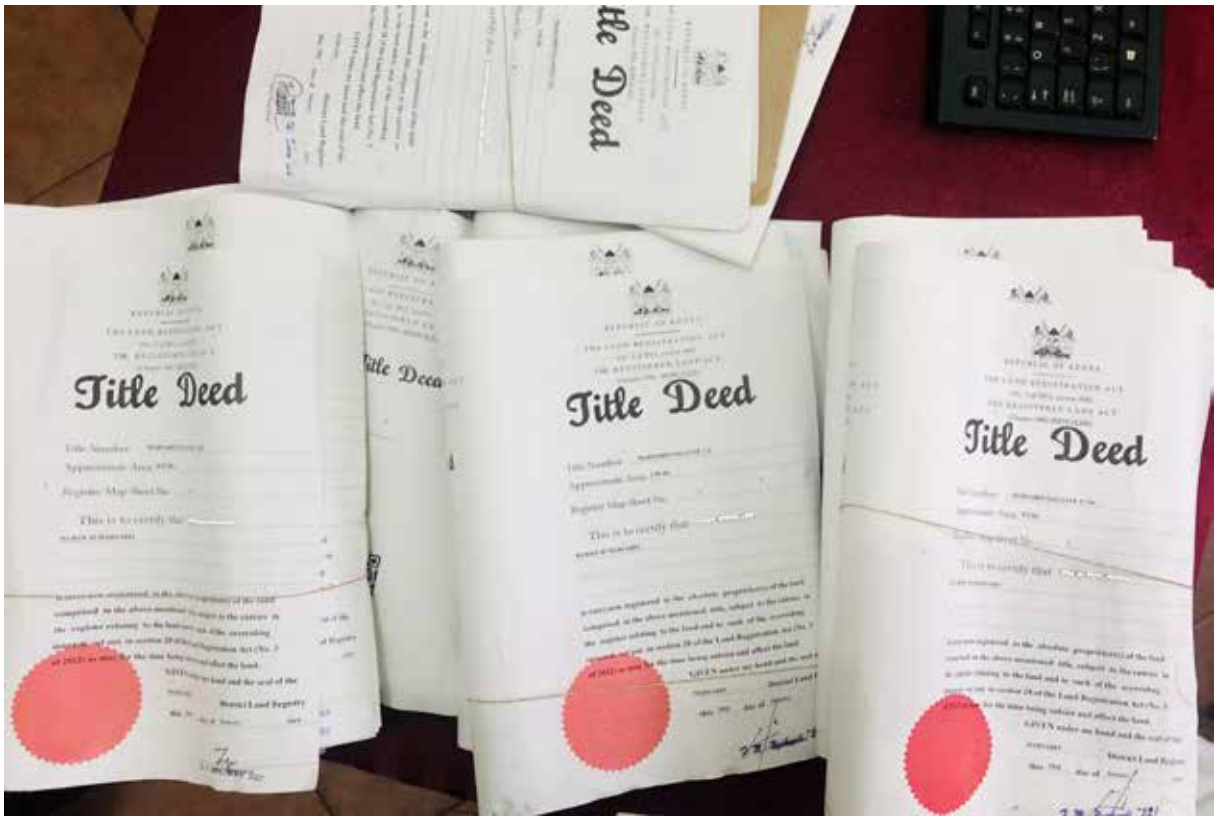
(suit property) located in Nyali Beach in Mombasa County. The suit property was allocated and afterward, a freehold title over the suit property was handed out to the first registered owner in 1989 by the Commissioner of Lands. It was thenceforth sold to the ensuing purchaser and in due course sold to Dina Management Limited (Dina). Dina contended that on diverse dates in September 2017, the County Government of Mombasa (County Government) entered the suit property, without the aforementioned notice, and damaged the perimeter wall to create a road leading to Nyali Beach. The County Government, on the other hand, maintained that the initial owner had irregularly obtained the property in 1989 and therefore the claim by Dina that it could be protected under the doctrine of *bona fide* was void, as their subsequent acquisition was. This claim by the County Government was upheld by the Environment and Land Court.[28] Aggrieved, Dina appealed to the Court of Appeal which held that Dina could not be protected much as it was an innocent purchaser since the property was unlawfully acquired.[29] Aggrieved yet again, Dina appealed to the Supreme Court maintaining its claim of being a *bona fide* purchaser. The Supreme Court affirmed the decisions of the Environment and Land Court and the Court of Appeal. It noted that whilst Article 40 of the Constitution entitles every person to the right to own property, the right is conditional upon Article 40(6) which limits the right as against any property unlawfully acquired.[30] The Court found the allocation of the suit property to the first owner to be illegal since no documents had been produced to show that it was lawful and as such it could not be protected under Article 40.[31] Accordingly, no good title that was able to be transferred was obtained by the first owner or the consequent purchasers, including Dina. The root of the title having been challenged, the *bona fide* purchaser doctrine was not applicable to Dina because it did not acquire a valid title at the outset.[32] The Court referred to, with approval, the decision in *Funzi Development Ltd & Others v County Council of Kwale* which held:

> *"…a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of sanction on illegality or gives its seal of approval to an illegal or irregularly obtained title."*[33]

Torino Enterprises Limited v Attorney General (2023)

The Supreme Court, additionally, reinforced its position on the *bona fide* purchaser in this case. This instant case concerned a controversial parcel of land in Embakasi (suit property). The land was initially allocated on 21 February 1964 to Kayole Estates Limited. It was afterward passed on to the Nairobi City Council. In 2011, Torino Enterprises Limited (Torino) placed an assertion to the suit property contending that their purchase from Renton Company, for a 99-year term beginning in 2000, was regular. Torino sustained its argument that they were the legitimate owners alluding

[28]Dina Management Limited v County Government of Mombasa & 5 others, Civil Appeal 150 of 2019, Judgement of the Court of Appeal(2021) eKLR, para 1-5.
[29]Dina Management Limited v County Government of Mombasa & 5 others, Civil Appeal 150 of 2019, Judgement of the Court of Appeal(2021) eKLR.
[30]Dina Management Limited v County Government of Mombasa & 5 others, (Petition 8(E010) of 2021), Judgement of the Supreme Court(2023) eKLR, para 111.
[31]Ibid, paras 106-112.
[32]Ibid, para 111.
[33]Funzi Development Ltd & 2 Others v County Council of Kwale, Civil Appeal 252 of 2005, Judgement of the Court of Appeal (2014) eKLR.



The Land Registration Act governs the registration of land titles in Kenya. The Act provides the legal framework for land registration and establishes the procedures for obtaining and transferring titles.

to a certificate of title that was issued on 26 April, 2001.[34] The Attorney General, in his response to Torino, contended the lack of due diligence by Torino to find out that the land was already occupied and, that the Commissioner did not even have the power to alienate the land.[35] One of the issues determined by the Supreme Court was whether the letter of allotment issued to Renton Company was satisfactory to grant Torino valid land ownership. The Court held that the letter of allotment fails to be offered as legal title with regard to the land ownership and, one cannot transfer property under the allotment letter to a third party as it is simply an invitation to treat which does not grant any interest in land.[36] Another issue of determination by the Supreme Court was whether Torino Enterprises was an innocent purchaser. It held this issue in the negative, holding that the obligation is on an innocent purchaser to inspect the suit premises before purchase and in this case, Torino, which could have conducted due diligence, done site visits and being warned by the military installations on the suit premises.[37]

The Supreme Court has settled, with finality, the disturbing position of the *bona fide* purchaser. It has given emphasis that one must go to the root of the title to satisfy oneself as to its validity.[38]

[34]Torino Enterprises Limited v Attorney General, (Petition 5(E006) of 2021), Judgement of the Supreme Court(2023) eKLR, para 48.
[35]Torino Enterprises Limited v Attorney General, (Petition 5(E006) of 2021), Judgement of the Supreme Court(2023) eKLR, para 30.
[36]Ibid, paras 58-60.
[37]Ibid, para 64.
[38]Dina Management Limited v County Government of Mombasa & 5 others, (Petition 8(E010) of 2021), Judgement of the Supreme Court(2023) eKLR, para 111.

Whether the *Dina Management and Torino Enterprises* Supreme Court decisions upset the Torrens system of land registration.

> *"Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible.…"*[39]

In *Dina Management*, the Supreme Court held that a title document can be invalidated if established that the initial allocation process was irregular.[40] Correspondingly, it was held in *Torino Enterprises* that the appellants therein should have gone to the root of the title to substantiate whether the land was as advertised.[41] This, in simple terms, implies that holding a registered title document is not conclusive proof of ownership. The two above discussed judgments of the Supreme Court present a departure from the Torrens system of land registration. The system gives assurance that whenever a search is done at the land registry, the certificate of title issued is conclusive evidence of ownership. On needs not go behind the land registry to ascertain the real owner of the land. Therefore a prospective land purchaser needs to just do a search.

The Judgments upset the Torrens system of land registration. They bring up a new duty, not available in any other Torrens system, to investigate the root of the title; beyond searching in the land registry.

What the *Dina* and *Torino* decisions mean for future prospective land purchasers

The Supreme Court decisions now call for increased due diligence on prospective purchasers of land. They should not conduct a search but investigate the root of the title to demonstrate that the acquisition process, from the beginning, was lawful and regular. Due diligence can be carried out by conducting customary searches at the lands office, requesting for allotment letters and checking whether the land in question was named in the Ndung'u Report on irregular public land allocation and other steps.

An innocent purchaser who has been tricked into buying land that bears no good title will have to count his losses and seek compensation from the fraudulent party as Justice Kiage rightly puts it in *Kenya National Highway Authority v Shalien Masood Mughai & 5 others:*

> *"I therefore agree, as has been suggested by Waki J.A, that a party offended by the misdeeds- be they fraudulent or negligent- that have the effect of making his otherwise good title of no effect is at liberty to seek appropriate compensation. In this case, I would think the person or persons responsible for the misrepresentations and/or misdeeds that led to a hollow title ought squarely to bear that blame."*[42]

Surely, in the remarkable words of Abraham Tucker, "forewarned is forearmed". If you do not do proper due diligence as a prospective land purchaser, you risk being left holding a paper rather than a title to land.

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[39]Ibid, para 110.
[40]Ibid, para 111.
[41]Torino Enterprises Limited v Attorney General, (Petition 5(E006) of 2021), Judgement of the Supreme Court(2023) eKLR, para 64.
[42]Kenya National Highway Authority v Shalien Masood Mughai & 5 others, Civil Appeal No. 327 of 2014, Judgement of the Court of Appeal (2017) eKLR.

Accelerating the call for inclusion in the extractives sector

Female miners may face challenges related to gender stereotypes, unequal opportunities, and workplace discrimination. In some cases, there may be limited access to training, education, and career advancement opportunities for women in the mining sector.

By Furaha Charo

In February 2024, the Alternative Mining Indaba (AMI) will be convened in South Africa themed; *"Energy Transition Minerals: Putting Communities First for an Inclusive Feminist Future*". Leaders, activists, policymakers, industry experts and communities will converge for rigorous dialogue on the mining context in Africa aimed at highlighting the role of transition minerals in transforming society.

The AMI 2023 called for resolute action against the structural gender imbalances and the skewed gender relations inherent in mining economies. The platform is anticipated to accelerate this call, with a positive response to the question of inclusivity and firmly place the feminist agenda within the progressive discourse. The 2024 convening shall be locating African communities in the ongoing development and debates of energy transition minerals.

The conversation comes at a time when Africa is gearing up for its role in powering the global energy transition. A transition that has triggered a substantial increase in demand for basic, precious, and rare earth metals which will continue driving demand and competition for critical resources such as cobalt, lithium and nickel, copper, bauxite, chromium, high purity iron ore, platinum group metals and rare earth metals. Thus, rural communities reeling from the deeply broken trust as a result of wanton negative environmental and social impacts, within resource-endowed countries with weak governance structures, will host these projects.

In 1979, the United Nations (UN) established the 1979 Convention on the Elimination of all forms of Discrimination against Women (CEDAW) (United Nations, 1979) which provides women with equal representation in all sectors of the global economy. Equally, African States have adopted several legal instruments that demonstrate their commitment to enhancing inclusion. These include the 2015 Sustainable Development Goals (SDGs) and the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Furthermore, the African Mining Vision

In some mining communities, women are involved in artisanal and small-scale mining (ASM) activities. They may engage in activities such as panning for gold, gemstone mining, or processing minerals.

advocates for a sustainable and well-governed mining sector that is both gender and ethically-inclusive. However various studies conducted by the World Bank suggest gender disparities in the extractives sector, an indication of the violation of the right to development.

Mining responsibly can make an important contribution to achieving the Sustainable Development Goals (SDGs) like energy access and sustainability (SDG 7); economic growth and employment (SDG 8), creating more resilient infrastructure (SDG 9), combating climate change and its impacts (SDG 13).

Strengthening extractives sector governance

The discovery and subsequent extraction of a wide range of extractive resources in Kenya has propelled the country's extractive industry to prominence. The exploitation of extractive resources offers significant revenue opportunities and potential contributions to our GDP growth. The sector contributes an estimated 4.2% of the national GDP, and 3% of national export earnings, and is forecasted to account for up to 10% of GDP by 2030. In anticipation that this industry would be an enabler for the country's economic growth and development, it has now been included in the country's development blueprint, the Kenya Vision 2030, as the seventh pillar.

This target can be achieved with a renewed government focus to strengthen the inclusion of women and host communities in the extractives value chain, and access to justice for harmful social and environmental impacts of the extractive industry.[1] Despite the existence of legal and policy frameworks to promote inclusion in the Extractive Industries (EI), systemic structural gender inequality within the sector continues to undermine women's rights and the development potential of the sector.[2] Gender-blind policies and practices in community consultation and decision-making processes give rise to the systematic exclusion of women and silencing of women's perspectives, agendas, and interests concerning EI projects.

Global initiatives such as Extractive Industry Transparency Initiative (EITI) provide an accountability benchmark for the extractive industries. Worldwide, 54 resource endowed countries have signed up for participation in the EITI process. Out of these, 24 African countries, which is almost half of the global total, have also committed to participation in the EITI.[3] The EITI recently added another layer of monitoring to its framework. The standards require participating countries to provide employment figures disaggregated by gender, as well as provide information on how they intend to implement gender equality and social inclusion. Owing to Africa's centrality in the energy transition, it is important that African countries including Kenya commit and undertake implementation of mechanisms that foster inclusion and gender equality.
The Haki Madini Coalition hosted the National Mining Conference in Nairobi in November 2023, during which pertinent concerns on inclusion in the energy transition were raised. For instance, fundamental questions on systemic inclusion gaps in extractive value chains, demonstrated by statistics from recent research conducted by the Institute of Public Finance and Oxfam Kenya[4] exposed glaring gaps in the inclusion of women in

[1]Millicent A. Ochieng', Women in the Extractive Industry in Kenya: Opportunities and Challenges (2023)
[2]Oxfam International, Position Paper on Gender Justice and the Extractive Industries (2017)
[3]EITI International Secretariat, "The Global Standard for the Good Governance of Oil, Gas and Mineral Resources" Edition 1, 17 June 2019.p.6

Efforts are being made globally to promote the inclusion and empowerment of women in the mining industry. This includes initiatives to break gender stereotypes, provide training programs, and create a more inclusive work environment.

mining value chains. With the recent partial lifting of the moratorium on issuance of new mining licenses and permits in Kenya, the Alternative Mining Indaba presents an opportunity for various practitioners in the extractives sector to leverage on regional partnerships that we hope will escalate conversations on inclusive resource governance while rallying more countries, including Kenya to join the EITI.

Globally, there is a transformation of the "soft law" of business and human rights under the United Nations Guiding Principles (UNGPs) on Business and Human Rights and Organisation for Economic Development (OECD) Guidelines into hard law, replete with penalties and enforcement mechanisms, legal mandates, and responsible business requirements. It is therefore crucial that companies recognise the history of the extractives sector especially drawing experiences from communities; acknowledge community distress attributed to social, economic and environmental impacts; especially considering most of these communities are living in rural arid and semi-arid areas thus already reeling from the impacts of climate change. This way, companies can lead by supporting and adopting an inclusive approach of being part of the solution, focusing on leaving a positive footprint on people and the planet.

It should be clear that no amount of philanthropy, corporate social responsibility or the bringing of a useful product into the market can erase the profound harm companies can do when they fail to respect the rights of the communities. It would be tragic irony if by addressing one problem, we exacerbate another!

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[4]Oxfam Kenya and Institute of Public Finance, Review of Gender Equity in the Mining Sector's Fiscal and Trade Regulation Framework (2023)

Kenyans are a patient lot, but should not be taken for granted

By Wanja Gathu

Kenyans are a patient lot, but they should never be taken for granted. This trait becomes evident when, travelling on the Sunday train from Nanyuki-Nairobi in the company of my younger son, in the first week of January, 2024.

We arrive at the Narumoru station at 9.30 a.m, to find the station teeming with people waiting to board the train, many of them carrying an assortment of bulky goods. I wonder how many of us the train can take, but nothing could have prepared us for the congestion inside the entrapment that comes chugging down the line at exactly 10.05 a.m.

I say entrapment because the train is rickety, old, and filthy on the inside and the ride is not smooth but more like a series of lurches, shakes and clunks along the way. We are travelling first class at a cost of Kshs. 1000, while regular passengers pay Kshs. 300 to get to Nairobi from Nanyuki town. Thanks to our cubicle we think we have been spared the worst of it until I step out to go to the lavatory. There are bodies everywhere! Men, women, and children in various states of desperation are seen standing sitting or hanging on the rails at the door for dear life. The narrow passage connecting our cubicle to the lavatory is crammed and jammed with people and bags strewn all over the floor. To get to

the lavatory I am forced to jump over legs, children, and cargo but it is when I reach the lavatory that the desperate situation is made evident. There are people, men, boys, and girls standing inside the toilet, their baggage lining every inch of the cubicle. I politely ask them to leave so I can use the loo! When I am done, I want to take photos to show how bad the situation is, but I hesitate to photograph people at their most vulnerable and without their consent. It is just as well because, when we exit the train at the Nairobi Railway Station terminus, I find regular police with guns, confiscating phones belonging to passengers found taking photos. Apparently, this is a protected area but there is no sign in my immediate vicinity to show this and neither is there a sign displayed inside the train warning passengers against photography.

Going back to my cubicle is a battle against bodies and bags. I am dismayed by this situation. I do not understand why human beings should be made to travel in such inhumane conditions and pay dearly to do so. The situation is worsened by the rude and insensitive Kenya Railway staff who insult, harass, and intimidate commuters, who in turn, suffer this indignity in absolute silence. They do not protest the unsavoury behavior of the conductors and ticketing agents, who have allowed the entire train to be packed to the brim with people and cargo and are still allowing more people on board at every stop. To add insult to injury, any regular passenger found sitting inside a first-class cabin is fined heavily.

Introduced during the Covid-19 pandemic, the Nanyuki-Nairobi train serves numerous towns along this route, including Narumoru, Chaka, Karatina, Maragua, Kenol, Thika, Ruiru, Dandora, Githurai, among other towns before arriving in Nairobi, taking at least 7 hours to cover 97 kilometers. The scenery along the route is breathtaking and conversation with my young son stimulating so time passes quickly.

The train which, plies this route twice a week, Friday, and Sunday is a godsend to many commuters but evidently, demand far outstrips supply. Begs the question why Kenya railways, has failed to increase the number of trains on this route or at least their frequency this time of the year when demand is high. Granted the train is cheaper than the regular matatus plying this route, which charge upwards of Kshs. 500 but, passengers who contribute millions to Kenya Railways' coffers every year, should not be expected to forfeit their dignity and comfort to travel affordably.

The Constitution of Kenya guarantees every Kenyan the right to be treated with dignity. Travelling in relative comfort and safety is a right, that should be accorded every Kenyan regardless of their economic status.

The callous attitude displayed by Kenya Railways staff in their interaction with regular passengers, is shocking, disrespectful and unnecessary. From the relative safety of my first-class cubicle, I could hear staff haranguing commuters for the smallest of infractions. In one instance, an irritated passenger could be heard saying, *"Wewe Mzee! Muache apande pole pole, hii sio prison! Acha kelele!"*. The angry man was protesting the mishandling of his partner by a conductor, the same one who, a while back, unleashed the police on two hapless passengers who in their desperation to find some wiggle room for themselves, had strayed into an empty first-class cabin. The conductor demanded Kshs. 1500 from these commuters and confiscated their belongings, then called the onboard police when they failed to raise the money. Eventually, the defenseless commuters are forced to part with an extra kshs. 300, over and above the regular fare, a fortune in these hard economic times. This extortion racket is conducted in concert with Railway police on board the train and very loudly for the benefit of everyone within ears short, with the admonition, "*Ili iwe funzo kwa wengine!*".

If this incident is anything to go by, Kenya Railways staff could benefit from training in customer service and common etiquette at the very least, when dealing with customers, the very people who pay their salaries.

This being a first-class carriage, separate from the rest of the train, regular passengers allowed to get on board find themselves in a hostage situation, without room to sit or stand comfortably and chastised and fined heavily if they stray into a first class cabin in their desperation to find a foothold, while those like the young woman and man I found standing inside the toilet, surrounded by luggage are loudly shamed for being in the toilet together. Clearly, Kenya Railways is guilty of extortion, exploitation and gross mistreatment of hapless commuters and must take immediate action to improve the commuter experience and guarantee their safety. Put differently, the monolith is guilty of reckless endangerment of Kenyans and should not be allowed to continue doing so.

In my experience, this situation would not be allowed to occur in the so-called developed countries where human life is highly valued and the people's right to dignified and fair treatment is respected. Kenya, as a middle-income country, can do better in this regard.

The fact that Kenya Railways has been allowed to exploit, abuse, and mistreat commuters in this manner is an indicator of the breakdown of the rule of law, permeating everything from the highest office in the land to the very lowest member of Kenyan society. At the very least, Kenya Railways is operating in contravention of traffic rules which at the bare minimum forbid overloading of passengers on public transport vehicles. One wonders whether Kenya Railways operates above the law. If the monolith, a government parastatal is allowed to operate in total disregard of the law, who then can be expected to protect the citizenry from maltreatment? Where is the public defender while this happens and why are commuters silent?

Travelling across the country, this holiday season I see a public resigned to their fate no matter how grim, perhaps because they know only too well that nobody cares about their welfare; no one in authority will lift a finger to protect them. This is an indictment on the Kenya government, for its failure to provide a safety net for the most vulnerable members of the public and failure to enforce existing laws that require public service transport operators to put commuter safety first. Going by the premise that every life is sacred and that every Kenyan regardless of their socio-economic status deserves to be treated with dignity, Kenya Railways, and by extension, the Kenya government is in violation of fundamental human rights laws and should be held liable.

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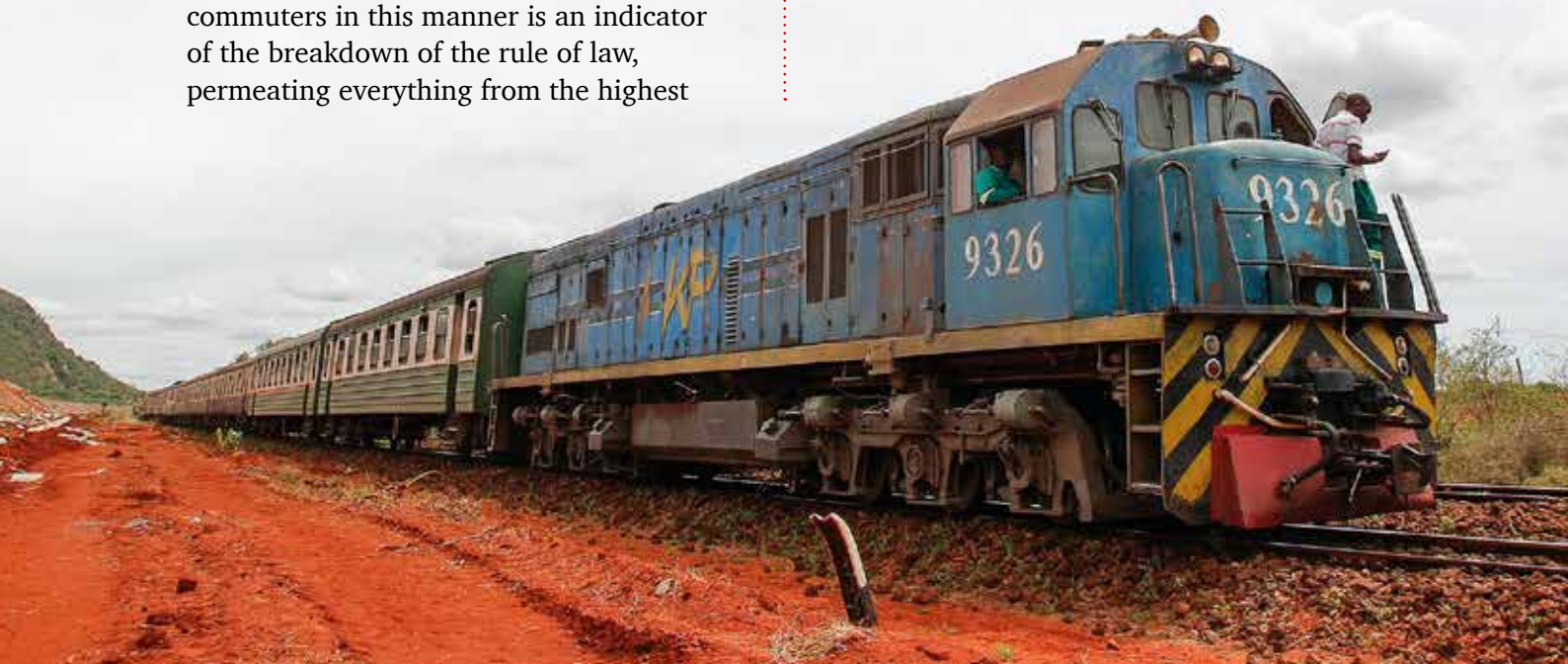

The *amitu* system of the Maasai community as an effective way of solving land disputes in Kenya

By Linet Sampeyian Nkarabali

Abstract

This article explores the transformative impact of the amitu system as a means of dispute resolution, specifically land ownership disputes as for this paper. Its significance within the legal landscape of Kenya. ADR in clarification is the alternative dispute resolution focusing on the element of mediation which is referred to as amitu system among the Maasai community. Each year Kenya is faced with numerous land disputes that often escalate to harmful practices like murder, this system explores the use of the amitu system in the maa community and how it is effective in solving land disputes. It further shows how the courts can adopt the system in solving the increasing land disputes as contemplated in Article 159 of the Constitution.[1] The community finds the system fair as they listen to the parties in an open forum, community members are also welcome to participate, unlike judicial processes which are typically adversarial. Therefore, it is the objective of this paper to assess the use of amitu in solving these land disputes to reduce such cases as the curve is increasing day in and day out in Kenya. The paper will exemplify by use of a case study; Olkaria Maasai v the Kikuyu.

Keywords: land disputes, Maasai, *Amitu*

Maasai culture is rich and distinctive, with unique customs, clothing, and ceremonies.

Introduction

The maasai community believe in polygamy type of marriage, in various circumstances chaos arises in such familys, many a times these disputes are concerning the ownership of land, although these cases are taken to court in recent times. Due to[2] a misconception by the colonialists , prejudice against the *amitu* system and introduced the western ideals such as the court system. The land disputes majorly on ownership of land has been a traumatizing issues among the maa community since time immemorial. The community has relied on the traditional methods to resolve these land disputes in

[1]Article 159 (2) of the (2010) Constitution.
[2]Kariuki Muigua, PhD, FCIArb, October (2017) traditional conflict resolution mechanism and institutions.

The Maasai have various ceremonies and rites of passage, such as initiation ceremonies for young boys (circumcision) and girls. These ceremonies are important cultural markers.

gain of upholding justice. Such disputes have been solved through the *amitu* system which yielded satisfactory solutions.

The *amitu* system is extracted from origins of the Maasai values and traditions,[3] historical in Africa's communities. Afterward, offering the system an alternative legal framework for resolving the disputes. The system proves to be a strong tool when it comes to inclusivity of the people since[4] the goal then is not to get the parties to accept formal rules to govern their relationship but to help them free themselves from the encumbrance of rules and accept a relationship of mutual respect that will enable them to meet shared contingency without the aid of formal prescription laid down in advance.

This paper critically examines this *amitu* mechanism in the context of making a case for the enhanced use of traditional dispute resolution in land ownership dispute management today.

Background on the *amitu* system in solving land disputes

The *amitu* system ensured a sense of ownership and promoted lasting solutions abiding to Article 159(2) (a) (b) (c).[5] Justice shall be done to all, irrespective of status through application of alternative dispute resolution including mediation mechanism, which is brought forth as *amitu* by the maa people shall be promoted. One of the principles of land policy as envisaged in the Constitution encourages communities to apply such mechanisms.

[3]A statement from the historical allusion.
[4]Lol L.Fuller mediation –*its form and function*.
[5]Article 159 (2) (a) (b) (c) of the (2010) constitution.

The system involved the laibon, who acted as the elder, he took the lions share in solving the disputes, the role of laibon is brought forth as the capitalist. One of the prominent laibon known in his real names as Mbatian Ole Supeet was the greatest of all,[6] Mbatian tenure marked a period of tranquility, prosperity, expansion and great unity among the maasai people. *Amitu* system has managed to unite maa communities that previously did not see eye to eye, united the linkisongo living in present Tanzania and parts of Kenya with ilpurko living in Narok and Kajiado.

Furthermore, the community achieved mutually agreeable solutions while[7] it protects cultural and economic interests, this bounded with Article 11 of the Constitution that recognizes culture as the foundation of the nation. As this paper shows how effective *amitu* is, it dwells on adversarial ownership of land disputes.

Effectiveness of the *amitu* system

The ownership of land without a title is not a fathom jargon, this is confusing with the knowledge that the person with land title remains the legal owner of the land, although legal ownership is undefeated with few exceptions. The Maasai community believed in communal ownership of land, however, this was cut down when the colonist took in steps into their lands as some were made squatters in their own land.

The departure of the colonist did not ease the situation instead other colonist in Africans form emerged. Since then, land ownership disputes arose gradually, despite the application of traditional disputes resolution that showed promising results but was slowly replaced by the court system.

The cross-cutting and long existing land disputes largely need the intervention of customary law which the Maasai is fully enriched.

Kenyan courts[8] are considerate in that it often remains passive in acknowledging alternative disputes resolution, *amitu* system in this case due to different preferences of the society. Thus gives the answer why courts only act on a matter taken before them and has no authority whatsoever to usurp jurisdiction in every matter.

The *amitu* system despite being acknowledged as a combination of traditional disputes resolution mechanism, in Article 159(2) (c)[9] of the Constitution remains less utilized in land related disputes.[10] The rights of ownership and possession of the people concerned over the lands which they traditionally occupy shall be recognized. This is stated in the Indigenous and Tribal Peoples Convention of the UN International labour office.[11]

The *amitu* system shows some traces as applied in the case study: Olkaria Maasai, inside Hell's Gate National Park[12] near Lake Naivasha the Maasai are confronting land acquisition and the Kenya governments and parastatal energy company, KenGen , which began operating in the hells gate in

[6]Mbatian; the story of the great maasai laibon, national museum of Kenya Nairobi (2019)
[7]Article 11 of the (2010) constitution
[8]https://www.cradvocateesllp.com/the-irony-of-land-law-acquisation-of-land-through-adverse -possession/
[9]Article 159 (2) (c) of the (2010) constitution.
[10]John G munei kimpei Ole Galaty, maasai land law and dispossession, https://www.culturalsurvival.org/publications /maasai-land-law-and dispossession
[11]Tomei,Maneda and Lee Swepston (1996)indigenous and tribal
[12]Laura A .Young and Korir Sing'Oei,land,livehoods and identities: inter-community conflicts in East Africa, report

The Maasai face challenges related to modernization, land rights, and conservation efforts. Encroachment on traditional grazing lands, changes in lifestyle, and educational access are among the challenges affecting the community.

1962 and national parks were established in 1984. The national park affects the Maasai settlements including 20,000 people. The Maasai are also in conflict with the neighboring Kikuyu community over land ownership of parts of the land.

In 2009, the Olkaria Maasai in Maiella won a court decision recognizing their traditional claim to the land they occupy on the border of Hells Gate. The court ordered that the land be individually allotted between Kikuyu and maasai families. The Maasai elders have come forth to intervene in the act on behalf of the community by use of the *amitu*, although this exercise is facing challenges like the elders coming from Narok to speak with government officials in Naivasha. However, the administration in Naivasha most of whom are non-Maasai ignore these elders, the laibon.

The Olkaria Maasai case is ongoing, it should be acknowledged in conjunction with Article 67(2)[13] of the Constitution which requires the National Land Commission to encourage the use of traditional dispute resolution in land disputes.[14] Furthermore, these statutory frameworks enacted under the transformative Constitution of 2010 which provide for the resolution of disputes by use of traditional dispute resolution mechanisms, in which the *amitu* system is included. In the early beginning of this case[15] of the twenty-first century a great deal of time was spent preaching peace

[13]Article 67 (2) of the (2010) constitution
[14]Francis Kariuki ,customary law jurisprudence from Kenya court :Implications for traditional justice system

and co-existence, the local administration and council of elders from both sides spearheaded peace forums which centered on intergroup dialogue. The elders brought the parties together as mediators do for a consensus. The *amitu* act led to trust between the Maasai and the Kikuyu and also began to take root however, some of these cases solved by the TDRMs have not been widely documented in formal legal systems.16

The further effectiveness of the *amitu* is established in the case of a young widow (who was the youngest wife) and her son who was violently disinherited from claiming land rights by the eldest wife's grown-up sons after 22 years, elders from both sides were able to restore the young widow's right by proving that she had been properly married. The elders from the boy's fathers then divided his father's land into two halves and granted each widow her rightful piece.

The recommendations

The paper notes that traditional dispute resolution mechanisms provide some hope in resolving land ownership disputes through the application of *amitu* system. Some of the recommendations could be:

- The ensuring of access to legal aid for appealing decisions made through *amitu* to safeguard individual rights.
- The support of mediation mechanism by involving professional mediators to complement the elder's wisdom.
- Appreciation of the traditional dispute resolution mechanism within the legal framework and ensuring their enforceability

Conclusion

To sum up, it is essential to recognize that while the *amitu* system has successfully resolved many land ownership disputes, the modern legal frameworks and institutions may be necessary for more complex cases that require infrastructural changes or legal documentation. The *amitu* system operates within cultural and social context of the Maasai community, complementing legal systems to promote harmony. Harmony is recognized by society as the need to balance peaceful co-existence while appreciating intrinsic human nature.

The *amitu* system of the Maasai community from the illustrations above, stands as a remarkable example of how traditional practices can coexist with modern legal systems. Among the Maasai in Kenya, the *amitu* system has positively transformed the resolution of legal issues catalyzing justice community cohesion, and cultural preservation. By recognizing and supporting the *amitu* system, Kenya can channel its effort to build a more inclusive and effective legal framework for all its citizens. Therefore, there is a need for courts to develop and generate appropriate and relevant customary law jurisprudence that will aid in the growth and promotion of the traditional justice system as exemplified by the *amitu* system.

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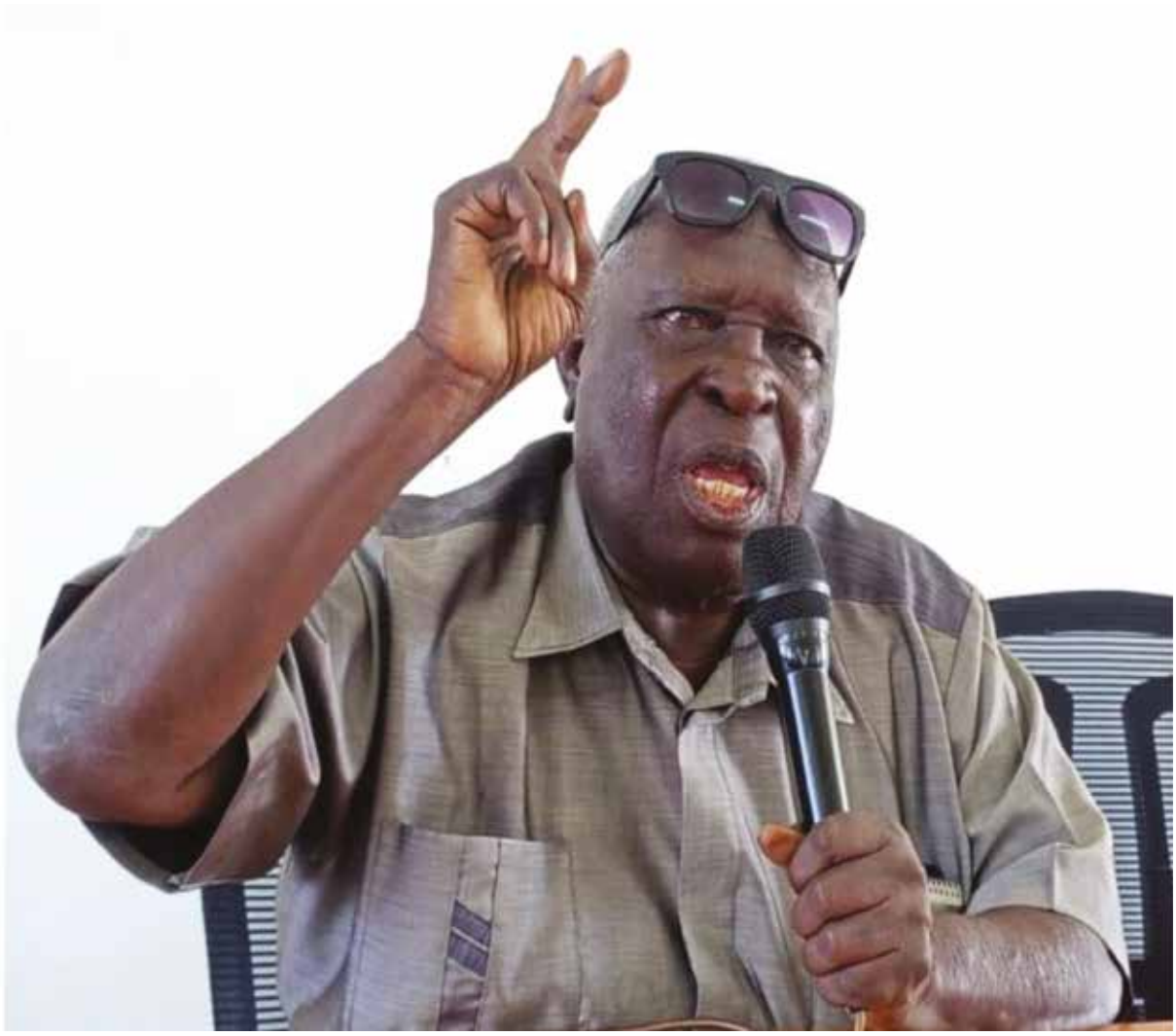
[15]Erick Mutisya https://www.jstor.org/stable/44982220?searchText=traditional+disputes+resolution+among+the+maasai&-searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dtraditional%2Bdisputes%2Bresolution%2Bamong%2Bthe%2Bmaasai&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly- default%3A6dadbe0c16eddb0fc57d23a4ac25aefa&seq=
[16]Erick Mutisya Kioko,conflict resolution and crime surveillance in Kenya (2017)

Commemoration of the 54th anniversary of the Kisumu massacre: Confronting five decades of sustained state brutality and negative narratives

A project of the Nyanza dialogue initiative a heritage and memorialisation collective



Mzee Onyango Radier - Former aide to Jaramogi Oginga Odinga and also former Kisumu Deputy Mayor

Executive summary

This report is a crisp articulation of the first ever public dialogue forum in Kisumu convened with the singular purpose of reflecting on some of the worst memories of historical antecedents that Kisumu in particular and the former Nyanza region in general has contended with for over five decades. Pitched on the back of one of the earliest massacres in Kenya's history, it was disturbing how the events of 1969 at the launch of the Russia Hospital has defined by some rather bizarre twist of fate, the collective fortunes of Kisumu city and her people wherever they may be in the four Nyanza Counties. Decades of sustained state brutality and negative narratives have led to widespread disillusionment and surrender, and a feeling of hopelessness among the majority population, of the Luo Nation with the consequence that the history of past and justified struggles for justice and democracy have been smothered by false and distorted narratives. This has undermined inter-generational dialogue, knowledge management and documentation of the various community efforts, often quickly dismissed as "subversive" or "anti-government". In the process numerous transitional justice questions remain spectacularly overlooked.

Victims of state abuses have never been acknowledged, as tensions between victims and their tormentors continue to simmer, creating dangerous divisions and fault lines that manifest in Kenya's electoral cycle with near 100% certainty. The refusal by state authorities to demonstrate respect and acknowledge the past only makes matters worse. Led by Oloo Janak, a small team of concerned citizens under the banner of Nyanza Dialogue Forum conceived this memorialization project to start a series of conversations that could help establish a record of history, and that will prevent the recurrence of abuse. This background constitutes the first part of this report. In the second part the report delves into the discussions, debates, memories and reflections that took place at the day long emotive conference at which the first truly inter-generational conversation was made possible. In the third and last part the report looks at this time tomorrow, what can be done and, on whose back, should each responsibility rest.

Chapter One
Introduction

Nyanza region state brutality in context

Kenya's four successive elections have been hotly contested. Each has left sections of the Kenyan community reeling and hurting having been brutalized and dehumanized from electoral conflicts before and after elections. Results conflicts have been fierce, and unrelenting often causing loss of lives that pit supporters of the two mainstream parties. The August 2022 one, muted community conversations in Nyanza and the future of the region in relation to the national level politics and the people have gone into analyzing their struggles, and recounting the pain and losses of human lives arising form from those efforts, through state brutality and other factors. Nyanza lost dozens of people during the recent Opposition organized demonstrations against the high cost of living, electoral justice and other demands. The brutality against the population was witnessed across Nyanza- in Kisumu, Siaya, Homabay, Migori, Kisii and Nyamira. Many people were killed in cold blood, some pulled from their houses long after the demos had ended and many others were maimed and injured. The net effect of these state actions is the addition of a layer of resentment, depression and trauma to a region that has suffered since independence. One of the most important episodes that define the region's history but which is on the verge of being erased and completely forgotten is what has come to be known as the "Kisumu Massacre" of October 25, 1969.

The incident is part of a string of events emerging from the ideological split of the nationalists within Kanu and related developments between 1964-1969. Jaramogi Oginga Odinga, a prominent son of the region was hounded out of government in 1965 and though he formed an opposition party, Kenya People's Union (KPU) that year, the state frustrated him and his compatriots in the party during the "Little General Elections of 1966", confining the influence of KPU to Nyanza. The region became a pariah after that and was alienated from the national development and consenting and meaningful political representation at the national level. On January 29, 1969, a prominent politician from the region, CMG Argwings Kodhek died in a suspicious car accident in Nairobi. Six months later, on July 5, 1969, Tom Mboya, the then Minister for Economic Planning and also from the region was assassinated in the streets of Nairobi. The two deaths caused massive outrage and violence in Nairobi and Nyanza that added to the already built up tensions arising from the hounding of Odinga and his colleagues from the then ruling party Kanu, and state brutality against him and his KPU supporters from 1966 onwards. Amid these tensions and hostility, President Jomo Kenyatta visited Kisumu on October 25, 1969 to officially open the Nyanza Provincial Hospital ("Russia") now named Jaramogi Teaching and Referral Hospital, which was built with aid from the Soviet Union, which Odinga was regarded as ideologically leaning towards. Aid to build the hospital had been secured through Odinga's influence when he was in government. The event, meant to officially open the hospital degenerated into violence and in the process, state security opened fire on unarmed civilians as Kenyatta was evacuated out of Kisumu through the Kisumu- Ahero –Kericho road, killing over 100 people, including children. The figures from this incident

have remained minimized to date. Nyanza henceforth became ostracized from national government development programs and Odinga and his KPU team of officials were hauled to detention without trial and his KPU party banned. The people and region were equally treated to deliberate suffering and discrimination thereafter. The events after the abortive coup of 1982 in which many officers from the army and air force were court-martialed and either jailed or hanged added to the sense of frustration and resentment to the state. Kenya, then a de facto one party state was made a one party state by law after the coup.

Even after their release from detention two years later, Odinga and team were not allowed to rejoin elective politics as they could not be "cleared" to run on a Kanu ticket. This suppressed competitive politics in the region until Kenyatta's death on August 22, 1978. There have been subsequent developments, including the arrests, jailing and killing of leaders from the region, including the former Gem MP Horace Ongili, and his predecessor Otieno Ambala, former Minister Robert Ouko, University don Chrispine Odhiambo Mbai, among others. These have contributed to the sense of outrage and rebellion that manifests every election cycle. From 1969- 1992, MPs representing the region were largely handpicked or elected through manipulated processes that created additional resentment and built the sustained resistance to the state that continue to be witnessed in Nyanza and has defined the ongoing struggles against state brutality and its other excesses on, especially, the Luo community.

Conception of the Kisumu memorialization project

The foregoing historical account defines Kisumu as we know it and Luo politics as we have seen nationally but it is tragic that the current generations may never know how the polarities that manifest in our politics started if spaces are not created to curate these defining moments that make the totality of what has become known as Luo phobia by other communities and state maltreatment of Luo lives or even the sense of entitlement that some communities bear towards political leadership at the expense of other communities deserving no less. This concern is what led to the decision to consider the recreation of a first of its kind inaugural community dialogue space to map and document the historical episodes but anchor them initially around the 1969 Kisumu Massacre but as part of remembering and celebrating all the other struggles that have defined the region for the last 5 or more decades. Kisumu was proposed to host this first dialogue space. First it was important to appreciate that different Kenyan Communities each have their own history of struggle for human rights and have thus in different ways contributed to the social, economic and political transformation of the Kenyan state, from the pre-colonial and into the post- independence period. These struggles continue to date through generations, in response to emerging challenges created by the repressive nature of the post – independent state and regimes. One of the most important challenges that undermine the capacity of communities to sustain the struggles is the lack of consistent dialogue, documentation and transmission of those heroic narratives from one generation to another. The traditional methods of knowledge management and socialization are collapsing rapidly due to a number of factors, including rural urban migration, western education, breakdown of the social fabric and state inspired distortion and suppression of any residual community efforts at internal dialogue. There is also the active recruitment of a team of pliant community members and outsiders to not only distort but to completely erase unpleasant episodes that challenge the powers that be or remind the communities of the excesses of the state and even repressive forces within those communities.

In Nyanza, decades of state brutality have undermined inter-generational dialogue, knowledge management and documentation of the various community efforts, which are often seen as "subversive" or "anti-government". A huge gap exists on inter-generational interaction, documentation and information sharing that threaten to wipe out significant memories of the struggles and efforts at expanding the civic space over the last 5 decades or more. Yet the inspiration from the past heroic struggles and the people who were on the vanguard of the various forms of resistance to restrictive environments or violation of human rights and other forms of deprivation is critical for now and the future of the region and Kenya. Kenya Correspondents Association(KCA) has been working with a number of local initiatives and community formations in the regions on civic related engagements that bring together journalists, local non state actors, community groups and opinion leaders to promote discourse on a number of issues.

Between September 2022 and March 2023, KCA worked with local stakeholders including local citizens' assemblies – Bunges- to promote discourse on human rights, governance and the elections, with a focus on inter-communal dialogue through a project: Crisis Communication, which was also implemented in Kibera, Nairobi. The project aimed at building community resilience against violation of rights, debunking false narratives, disinformation and misinformation and generally building the faith and resilience of the communities to not only recognize and defend their rights, but to also tell their own stories – of struggle and desire for social justice and progressive transformation. The initiative set up a local community platform, Kisumu Crisis Communication Chapter, which has continued to engage with local stakeholders. It is within this context that KCA and its local partners in the region agreed to scale up consistent community dialogue through public forums within town halls or community spaces. This was aimed at helping the communities in Nyanza link their struggles with the broader national demands for social, economic and political reforms. Decades of sustained state brutality and negative narratives had increasingly led to disillusionment and surrender, and a feeling of hopelessness among the population, with the consequence that the history of past and justified struggles for justice and democracy are being smothered by false and distorted narratives. This initiative was broadly intended to create opportunities for sustained community dialogue within Nyanza to map out the receding memories and histories of the struggles and to not only document them for posterity but use them to inspire the current and future generations to appreciate that the fight for change and social justice is not in vain. The initiative was also expected to raise sufficient consciousness and a cadre of community voices that can continue with the fight and sustain demands for justice in all past and future cases of state inspired violations in different forms.

Inaugural commemoration of the 54th Anniversary of the Kisumu Massacre

From the KCA experience with the Kisumu Crisis Communication, intense conversations with an online community of professionals from Nyanza under the Nyanza Dialogue Forum, consultations with political leaders and Luo elders and a group of concerned 'Junior Elders' who have been worrying about the quest for deeper inter-generational connection in the community, Oloo Janak was mandated to spearhead the convening of the first community dialogue forum, a one-day event, that would bring together elders with the historical memories, representatives of CSOs, the religious sector, various citizens/ community organized groups, women, youth, academicians from the local public universities and colleges and local political

leaders to start the Kisumu Memorialization Project.

The Organising Committee approached the Kenya Human Rights Commission together with other well- wishers, some of whom requested anonymity to bring together more than 100 delegates to the Mama Grace Onyango Social Centre to reflect on and commemorate the 54th Anniversary of the Kisumu Massacre. The event was streamed online to include those that were unable to attend physically. This was essentially the start of a series of such community dialogue sessions as more are expected to be held periodically with the aim of sustaining this as a long term initiative and feature of community activity that will be replicated in all the counties in the region. The aim is to urgently and continuously map out the rich memories and document them in books and other forms, for posterity. A team of resourceful elders and other community leaders with the historical memory and knowledge were identified and engaged to offer their knowledge and accompany this memorialization project. Specifically, the following were the objectives of the event:

Objectives of the Forum

a) Reflection on the Kisumu Massacre of 1969 and subsequent antecedents
b) Pathways to transitional justice led by HR Defenders/Community peace Actors
c) Importance of community Dialogue & reflection to memorialize the past and honor the victims
d) Sustaining the community well-being
e) Stakeholders responsibilities, state's duty to protect and acknowledge historical wrongs & respect to victims of brutality.

Forum proceedings

The meeting kicked off 9:00 am with prayer from Bishop David Kodia of the ACK Church, who also graced the occasion as a key note speaker.

Key Note Speech: "our Problem is those in Leadership", Bishop Kodia

The Bishop recalls the declaration of a curfew after the 1969 event and the trauma that affected everyone. He noted, however that the massacre would have been avoided and observed that the vocabulary of massacre is non-existent in the Luo dialect. Luos abhor the act of killing and always only suffered in acts of self-defense. The real reason why the massacre took place was inflammatory language following the spat of disagreement between the two leaders who had 'disagreed in public'. "Had Jaramogi not been moved by emotion, and acted wiser" the Bishop intones without completing his thought process, to suggest that what happened could have been avoided. The Bishop reflected on the interventions NCCK had been involved with in Sondu border clashes to drive his point. How come Busia and Siaya who border each other do not fight? Why Sondu? He asked. To suggestions by some observers that Luos should make arrows, he noted that Luos only used arrows for hunting and never owned arrows to kill. Arming our youth would have the negative effect of multiplying the killings. The Bishop believed that the people we should address are our leaders who sometimes incite the youth to negative actions. The Bishop ended by telling the convention that we must diagnose the problem now as we reflect on the problem then.

Noting that he was the first in 1997 to suggest that the Luo Nation should secede, it is now apparent that we are incapable of managing ourselves, for example the Governor of Siaya cannot agree with his Deputy. There is so much corruption, land is being grabbed, titles to land are being

rendered useless with people falsifying documents at the land office. When he admonished one MP from the region by telling him that 'udhi marach" given the MPs' double speak about not recognizing Ruto as President during the day and meeting with him at night, he may have been misunderstood but in sum the leadership of Luos and the community in general was not strategic and realistic and did not know how to deal with the government of the day. Kenyatta, he observed died without setting foot again in Kisumu. He urged us to give people the right information and to find a way of working with the government noting that "Ka lang'o ok kunie". Leaders must stop using derogatory language with respect to one another.

Welcome: Commemorating October 25th 1969 Massacre, our first moment of reflection, Oloo Janak

Mr. Oloo Janak the Convener of the First-ever Reflection forum on the Kisumu massacre thanked the Bishop for honoring the invitation and for making his gracious remarks. If the Kenyan state would recognize, uphold and appreciate the dignity, justice, respect of right to life of the Luo people, as the Bishop had noted, Luo prosperity would be fostered and Luo Leadership would serve it's people diligently. Janak welcomed all honorable members to the forum and asked all to share their reflections freely. He then asked Zack Gaya to conduct the conversations.

A section of the crowd at the reflection forum at Mama Grace Onyango Social Center in Kisumu

Chapter Two
Discussion and Debates

Mzee Onyango Radier: Jaramogi's aide and Kisumu's town KPU Secretary

Mzee Radier felt elated about the reality that this moment presented a chance to retrace our steps. "Looking back is a very useful process as we search for lessons of the past in order to go forward" observes Mzee as he announced that "In 1969 I was there!" in reference to the troubled event. "I am 83 years old, was born in Uyoma and I first set foot in Kisumu when I was only 9 years old, stayed for one year, then went back to Uyoma until I was 20 years old is when I came back to Kisumu." It is at that age of 20 that Onyango Radier joined politics and became Jaramogi's aide. That also happens to be the year 1953 a time period when independence was in the air.

"Luckily for me, I was awarded a two-year scholarship to go and study public administration in Russia, an opportunity I took up immediately after Kenya was given its internal self-government by the colonists. It is also during that time period that Odinga's right hand man Adala Otuko was appointed the ambassador of Kenya in Russia", Mzee Radier recalled with nostalgia. It is during Radier's stay in Russia that Odinga visited and together with Adala the Kenyan delegation visited him at the college and asked that he accompany them on the visit with Russian officials. It is on this occasion that Russia offered Kenya a 200-bed hospital at a location of Odinga's choice. Mzee Radier remembers that Russia resisted requests from Kenyatta's administration that the funds be given to Kenya so that the country build the hospital and insisted that they would do the design to Russian standards, build and hand over a completed facility, a decision that may have miffed Kenyatta whose administration was already showing signs of corruption.

By the time Mzee Radier came back there was already discord among the nationalists and the country was awash with propaganda that, "those who went to Russia were sent to come and overthrow Kenyatta", as a consequence, "we could not get jobs" Radier notes with regret. The discord in KANU reached fever pitch when the party's constitution was changed to elect 8 vice presidents to the chagrin of Odinga. As all this was happening the Russians completed the project and as expected Kenyatta came to open the facility. "As Chairman of the Health Committee as the Kisumu County Council I went to the ceremony and as expected, Odinga our leader was present. Suddenly the noise outside became louder as Kenyatta and his guards arrived. Soon after the Russian ambassador spoke, a visibly angry Kenyatta speaking directly at Odinga, castigated Odinga's supporters describing them as poor." This angry exchange degenerated in to an ugly orgy of violence from the President's men whose first victim was the only son of Abdul Daya, a Nation Newspaper agent who lived close to where present day Avenue Hospital. His only child was shot dead by the police through the window while in the house. Mzee Radier added that, 'Up to 100 people lay dead by the time the presidential guard left Kisumu." On accusations that KPU sponsored its youth in full party colours to heckle the President, Mzee Radier refutes this assertion, "I was the party secretary of KPU is Kisumu town. I did not know of any such plan. Raila, Jaramogi's son had just come back from Germany and his kid sister,

known then as 'baby' (Ruth Odinga) had also accompanied Jaramogi. If Jaramogi had planned chaos, how could he expose his family to such risk?" he wondered. Mzee Radier found it curious that by the time Kenyatta reached Kericho he announced a curfew in Kisumu and when he got to Nairobi he banned KPU and a few months later he blocked KPU leaders and party from participating in elections. These could not have been coincidences but carefully choreographed decisions that only the state was capable of doing.

Mzee Radier acknowledges that while it is true that Kenyatta's people were the first to reject colonialism, by starting the Mau Mau war and really paid a heavy price, it is also true that the Luo fought for Kikuyu recognition by both the colonialists and the nationalists at the forefront. Oginga did the lobbying and the boardroom negotiations. It must also be remembered, he noted that by the time Jaramogi was going into politics as a member of the Legislative Council (Legco), he had already launched the Luo Thrift and Trading Corporation, Kenya's first public liability company and the Luo Union that gave him a very solid base in terms of power politics. As Kenyatta soon found out, kicking him out was not an easy task and so for defending him as our leader we the Luos suffered collective punishment on his behalf.

Mzee Radier adds in conclusion that, "When Moi took over, which Odinga did not contest, he, Moi decided to appoint Odinga to the Chair of the Cotton Lint and Seed Marketing Board, a position he did not hold for long because he castigated Kenyatta at a meeting in Mombasa which prompted Moi to dismiss him immediately." Ultimately Mzee Radier believes Kenyatta saw Oginga as a threat. He concluded the stunning historical account by declaring that "Piny Olal (the world is lost)" that today elected politicians are buying voters, it was unthinkable for anyone to be proud that their father was a thief, our joy and excitement stemmed from stories of conquest, our "sunga (pride)" was really a product of the exploits of our "thuondi (heroes)" and not what we see today of leaders who steal, grab, kill and destroy society. God gave us unity which we should forever be grateful. "I exit the scene proud that I stood for justice, equality, dignity and the unity of our people." Mzee Radier ended his powerful address to the forum.

1.1 Mzee Adhiambo Lomo: A cooperative officer cum KPU youth

Mzee Lomo was the second elder to take to the podium. Mzee Lomo begun by sharing a story of his life as a boy at Kisii High School. "I was in form 3 when I became the students' council chair," Lomo offers, 'we went on strike, that resulted in the expulsion of Aggai Koyier then the school captain together with others. Strikes are very effective when you don't break anything. We did not break a pencil and because of our organization. Not even powerful government officials then Chief Musa Nyandusi, Paul Mboya, the PC then Maj. Lake among others could break our strike. We succeeded to remove the Principal a Mr. Glensby whom we wanted removed for cruelty." Mzee Lomo made it known to the inter-generational forum that he was part of a group that started a political party in March 1960 known as KANO and they were shocked when a few years later KANU was started. Mzee Lomo later became a Cooperative Officer in Nandi but despite being a civil servant did not stop meeting with KPU officials. "I was taken to Nyandarua where I worked before being transferred to Muhoroni and I do remember on October 25 the fateful day I joined the KPU youth after parking the government vehicle at the police station in Kisumu. We then went to pick Jaramogi from his house to proceed to Russia. While heading to Russia a part of me hesitated and when I made this known to me colleagues I was dropped off before the vehicle got to Russia. I then took a bicycle back to Kano a journey

that saw a food can, hurled at us but which we were lucky to escape unhurt as it fell just before the bike." the elder shared to palpable anxiety in the mixed audience.

Mzee Lomo believes Kenyatta planned to destroy KPU so that they can go to elections that year (1969) without KPU because the party was strong in the region and was increasingly gaining popularity in the country. It is interesting according to Mzee Lomo that the president's entourage arrived through Kiboswa and not the usual Ahero road. It was also curious that none of the KPU so-called youth in KPU regalia who heckled the president were shot. It is possible that these were hired youth who were adorned in KPU uniforms to then blame the KPU as the inciters. "Who can bring their children to a chaotic environment that they have planned - if as they claim, it was true that Jaramogi planned the chaos? As a KPU youth who accompanied several others, we all did not adorn green colors, how could the plan be ours?" Mzee Lomo wondered. "To those among us today who keep pushing the narrative that we should have taken power when the colonialists made the proposition to Jaramogi instead of rooting for Kenyatta under his slogan 'No Uhuru without Kenyatta,' "my response as Lomo is that we were not fools, when we agreed to back Kenyatta, there was order and unity at the time and nobody expected that Kenyatta would turn against Jaramogi".

Those who ask this question and suggest that Jaramogi should have grabbed power according to Lomo are heirs of the seed of greed that Kenyatta planted. The community has lost many sons and "we suspect Oruko Makasembo, Ojino Okew Jaseme and Otieno Oyoo, wuod Kano, were all killed. Time has come for us to say enough is enough" Mzee Lomo added. Joluo according to Mzee Lomo, "love peace so much, that we don't know how to shoot arrows or throw spears. We can succeed with dialogue. I remember Sondu police station was in Nyanza when I went to Kisii High School just like Sondu market. We must remove money from our politics, it is the reason we now have jojuogi in our leadership ranks." Mzee Lomo ended by urging Joluo, "Wan wawe pesa, to jomoko wa kwer owe tribalism" "Victoria ne min ng'a? he asked arguing that time had come for us to change the name of Lake Victoria.

Plenary deliberations I: "Until When?" Asks Abade Milewa

The session was then opened for the members of the public participants at the forum to make their contributions and reflections under the guidance of Zack Gaya. There was a cross section of honorable delegates who spoke passionately about the need to put a stop to Luo collective punishment by successive regimes. In the words of a former Cllr fromKanyankago in Migori, Patrick Abade Milewa: "Until when?" Killing luos should elicit serious response. Why should we behave as if it is normal that luo lives can be snuffed out and everything goes on business as usual.

- Until when should we allow the corruption that goes on in the 4 Luo counties that is responsible for the underdevelopment and social ills affecting our people? Until when should we allow bad Leadership which embraces bribery, violence, nepotism, clanism and bad governance to continue destroying our future? Until when shall we watch our institution collapsed to name a few like Kicomi, Muhoroni Sugar, Chemelil Sugar and the fishing industry due to poor leadership?
- Until when will Luo sons contribute to the Kenyan struggle from independence to the post-independent transitions only to be kicked out or duped without anything of consequence to show in the lives and lived reality of the people of Nyanza?

Plenary deliberations 2: John Obure, Luo Elders have lost their mojo

John Obure, a human rights activist based in Kisumu, had a number of issues regarding the institution of the Council of Elders as the weakest link in the Luo crisis. There was an urgent need for elders to sit "e tie ng'owu, or opok" to speak candidly about the 3 pillars that govern us. Politics, culture (kitwa gi timbewa) and the church are interacting The Luo Elders have been rendered incompetent by the political class, they can't challenge the status quo and they enjoy the political funding that serve their needs and greed and quest for personal benefits at the expense of community wellbeing. Politicians are liars, or politics is about lies so ideally the church exists to rebuke the devil and his lies and so we expected the church to push back on politicians but that is not happening. The elders who should tell politicians off are divided as they serve the interests of politicians who service their needs. In the political scene Luos have always voted 6-piece, but in the puzzle only the 6th piece fails and in this last election once that happened a group of politicians claiming to have seen the light, 'joluo mowar' emerged and have decided to work with the UDA government in order to 'bring development'. Some elders and church leaders have joined them.

Obure reminded the audience about Luos being political animals that have made huge contribution to the county/country politics. He echoed the analogy of three stones which are essential to the cooking place, but we the people have preferred to have two cooking stones. For this we have experienced enormous problems thinking it's other peoples making yet it is us our own problem when we vote 6 piece without interrogating the candidates well. We do so with open hands and pockets to be bribed to vote. This is the reason we won't receive the preferred development even if we pay more tax if we continue with this tradition. If we can't think for ourselves and continue to wait for the political class to show the direction yet they have misled us for decades, our problems will not go away. "These issues cannot be ignored if we are keen on dealing with our past, we must face the devil at home" he concluded.

Plenary deliberations 3: Audi Ogada, HRDs Can help with documentation

Mr. Audi Ogada, another human rights defender based in Kisumu, projected a presentation of the documented injustices perpetrated by the police in Kisumu during the protests and in Sondu following the community clashes. He as a human rights defender and peace actor has curated how these atrocities have been manifesting in the past decades. As HRDs they had achieved considerable success in pushing for change but faced insurmountable hurdles on the road ahead. This showed the power of documentation and relevant actors remain steadfast on social justice and political sanity

Plenary deliberations 4: Cornelius Oduor, "As KHRC we hear Kisumu's cry!"

Mr. Cornelius Oduor, Deputy Executive KHRC appreciated the commencement of the Nyanza Dialogue Series and lamented how much we have lost in the decades for not fostering such incredible and important session for community transformation. He gave his commitment as part of institution to support the victims get justice and also need to research, document and show case the findings.

Plenary deliberations 5: Betty Okero, women's role must be appreciated

Madam Betty Okero of the CSO Network spoke as a woman leader in the CSO and community about the role that women have played and are still playing, the most devastating prospect on political realm being the fact that the sector in our region politics does not appreciate the dignity, equality, equity and respect for all. The level of violence and negative propaganda on women on the political scene and on social media is embarrassing and dehumanizing for women citizens who are sovereign and payed a price to have the republic. Can we change our narrative to amplify the voices and be a united people? Who can defend the hopeless and shame the perpetrators without fear? The need to tell those who insulted us as the community they are wrong than celebrating them when they pay a visit and make heroes out of them.

Plenary deliberations 6: Youth conference, the place of inter-generational dialogue

- Joseph Oduor, a youth leader, Activist & Governance Enthusiast spoke as a youth champion and underscored the role of the youth in the Country's prosperity. The role of youths in peace & security, democratic governance and misinformation or fake news should concern Kenyans. He apologised for the role which young people played in contributing to insecurity and asked the youths to be fore front for social change and development through various spaces such as public participation and voting process.

- Youth were blamed for allowing themselves to be used as goons and gangs for politicians and were

responsible for the violence and deaths that occur in our politics including destruction of property. This violence is what forces good leaders to shy away from politics and, it's time we change and bring sanity to our politics to allow just and dignified leadership.

- There is a need to leverage on the skills of Luo expatriates after studying, working and living abroad not to forget that while serving prestigious corporates and development partners the community should enjoy this rich knowledge, experience and expertise here at home.

- Ukombozi Library based in Nairobi offered to enrich our people with credible and factual knowledge for transformation by establishing a similar library in Kisumu provided there is a public space and volunteers who are willing to keep the space active and available.

- We had few scholars in the house who have been working to put our history and attributes in ink. Jaduong Magayi Jonyo with his book tracing the history of the Luo for the last 100 years and beyond invited those interested to seek his book for rich information on history of the community and her politics.

1.2 Plenary deliberations 7: Obat Masira, Mama Grace Onyango Center invites you all

The Director of the Mama Grace Onyango Social Centre announced plans to host series of events to commemorate Leaders or individuals who had made notable contribution in various spheres within the Kisumu fraternity. Nominations to the Kisumu Hall of Fame was ongoing and the event was expected to take place on 9th November 2023 at the center. The Center will also host World Creative Festival on 25th-29th November 2023 and the African Festival of Arts- FESTAC in . 2024. Thank you the Center for opening the doors to community activities in KISUMU and Nyanza.

Chapter Three
Recommendations and conclusion

Recommendations

1. For the community to heal from the trauma of brutality while maintaining unity to forge ahead, there is need for a public hearing commissioned by the Kenya National Commission on Human Rights (KNCHR) with support from Kenya Human Rights Commission to give the families, survivors and victims of past atrocities across the breadth of the Nyanza region a chance to speak for a proper record to be curated and perpetrators be given a chance to face the people they tormented in order to find appropriate remedies and have the community forge ahead and achieve its aspirations.

2. There is a need to research, document and show case the findings of the Luo history, heroes, injustices and innovation/creatives through a multi-disciplinary research project that could be hosted by Mama Grace Onyango Center in partnership with the academy (e.g. Tom Mboya Labour College) and human rights organizations under the leadership of the Nyanza Heritage and Memorialization Collective that can source support for funds, scholarships, fellowships and study circles to enjoin students of different disciplines to research the massacre of 1969, trace victims, document assassinations and victims of police brutality as well as suggest appropriate remedies and memoriams befitting these histories.

3. The Nyanza Heritage and Memorialization Collective working closely with the elders and the Luo Ker should cause the 4 Counties to set aside spaces for celebrating and remembering the heroes and heroines through tangible and intangible heritage, murals, monuments so that the history of triumph and shame are etched in the lives of future generations so that we never forget even if we forgive.

4. In consultation with Kenya Human Rights Commission, the Nyanza Heritage and Memorialization Collective should urgently move the people of Nyanza to petition that the name of Lake Victoria be changed immediately to reflect the language and culture of our people, as Victoria is unknown in our culture. It is suggested that the renaming of the lake be a consultative process with communities inhabiting the lake region, including in Tanzania and Uganda.

5. There is need to strengthen the Luo Council of Elders to become a full-fledged council which is an institution with structured Leadership and departments that is funded and has a voice that speaks for everyday people and their prosperity with a sharp focus on food sovereignty, education as a fundamental pillar of community prosperity, invested in the power of organizing, educating and celebrating its best as well as advocacy for good politics and preservation of our culture and heritage.

6. The Nyanza Heritage and Memorialization Collective should work with our youth to mould responsible

Soft spoken Mzee Adhiambo Lomo Speaks to the Conference

citizens who can take up their junior eldership responsibilities to ensure that inter-generational equity is guaranteed and achieved so that resources are not used wantonly now at the expense of the citizens of the future. The youth should capture public spaces and curate the few public spots that have not been grabbed in all our counties.

Conclusion

The meeting ended at 5:00 pm after the youth session moderated with Patrick Ochieng of Ujamaa Centre. The youth were very happy with the forum and many were grateful for the opportunity of learning from their seniors. Mr. Oloo Janak appreciated all for coming and promised many more meaningful dialogue sessions for the people and urged the youths to be their best at the community growth to make a positive history and shy away from violence, crime, societal ills and participate diligently always even if not paid.

The mysterious disappearance of the stay hearing

By Gautam Bhatia

Earlier this week, the International Court of Justice held a two-day hearing on "provisional measures" in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel). The hearing - which took place twelve days after South Africa first instituted the case against Israel - focused on South Africa's request for various provisional measures that would protect the rights of the parties in the interim period leading up to the final hearing and determination of the case.

But to an Indian constitutional lawyer, these proceedings might have been a little bewildering, given their disappearance from our domestic scene. Consider two recent, prominent cases. In December, the Lok Sabha expelled Mahua Moitra MP from Parliament. Moitra immediately moved the Supreme Court challenging her expulsion.* The Supreme Court took up the case for hearing on January 3, on reopening after the winter break. On that day, it issued notice to the Lok Sabha secretariat, and after giving parties time to file their replies and rejoinders, set a date for hearing the case in March. A prayer for interim relief - in the form of allowing Moitra to sit in Parliament during the Budget Session, without voting privileges - was declined. With the Budget Session due at the end of February, and the

Lok Sabha elections due soon after, even if the case is heard in March, it would already have become infructuous with respect to Moitra.

The second case is the constitutional challenge to the Election Commissioners Act, which had also been passed in the winter session of Parliament. The Act sought to get around the Supreme Court's judgment in Anoop Baranwal by creating a selection committee for election commissioners that gave a decisive majority to the union executive. When the challenge came before the Supreme Court, it issued notice, and listed the case for hearing in April. A request for a stay was declined, on the ostensible ground that the State had not been given advance notice. It is important to note that the next vacancy in the Election Commission is in February, before the Lok Sabha elections due two months later. The Court's April date, therefore, means that the composition of the Election Commission for the Lok Sabha elections will have been done under the impugned law.

Both cases were heard by a bench presided over by Justice Sanjiv Khanna, who is next in line to be the Chief Justice (and therefore, serve as likely harbingers of more to come once his tenure commences in November this year). What is striking about both these cases is that they involved constitutional challenges in extremely time-sensitive contexts, and in both cases, the dates for hearing set by the Court took the case beyond the period of time where a judgment by the Court would make a significant difference.

Now, taken by themselves, these dates are not unreasonable: setting a case for hearing three (or even four) months after the institution of proceedings is par for the course, given that parties will need to file replies and rejoinders (it is a different matter whether the case will actually go ahead on the stipulated date). However, that is precisely why there exists a mechanism in the toolbox of constitutional judges in time-sensitive cases: that is, a hearing on the limited issue of whether or not to stay the legislation/State action that has been challenged (or to grant other forms of modulated relief). In such a stay hearing, the petitioners will attempt to persuade the Court - among other things - that not granting a stay would cause irreparable harm or injury. The State will argue otherwise. But there will be an argument.

It is in this context that the Supreme Court's treatment of these two cases is surprising. The bench categorically ruled out granting a stay, or any other kind of interim relief, on the day these cases came up for notice. Fair enough. However, the bench also appeared to believe that having said that, there was nothing else to do until the cases came up for hearing in the ordinary course of things. This is evidently not the case: the most logical thing for the bench to have done was to fix a date for a hearing on the limited issue of stay/interim relief.

One doesn't even have to look as far as the International Court of Justice to understand how normal such a course of action is for a court. On this blog, we have recently discussed the constitutional challenge to Kenya's Finance Act. The Act received Presidential assent on 26th June 2023; on 10th July 2023, after a detailed hearing, the High Court granted what, in Kenya, is called a "conservatory order" and what we would understand as an "interim stay." (see here and here). The State carried this in appeal, and the Court of Appeal, after another detailed hearing, lifted the stay (see here). The case was ultimately heard on merits, and a judgment partially striking down the Act was delivered in late November 2023.

While the State ultimately "won" on the question of a stay, this chronicle is an example of how constitutional courts can act in time-sensitive constitutional challenges: that is, pending final determination, to hold a full-fledged hearing on the question

of a stay, where both parties will present their arguments, and then to deliver a reasoned judgment, applying established constitutional standards. This is in stark contrast to the approach in the two cases discussed above, where the Court was not only dismissive about granting a stay, but did not even appear to consider the possibility of hearing arguments on the question.**

On this blog, we have previously discussed the concept of "judicial evasion": a situation where the Court waits years before hearing a constitutional challenge, allows the executive to accomplish a fait accompli, and thus "decides (in favour of the executive) by not deciding". The cases discussed above are not instances of judicial evasion, but they - equally - have the effect of facilitating executive impunity by allowing impugned laws or State action to accomplish their core objective (which itself is under challenge), without facing judicial scrutiny.

While not directly relevant to this post, it is, I think, profitable to compare the Court's approach to constitutional challenges with the Court's approach to personal liberty. Again, two recent cases stand out: the bail orders of Mahesh Raut and Gautam Navlakha, in the Bhima-Koregaon cases. Consider the case of Mahesh Raut. After spending many years in jail without trial under the UAPA, Raut was eventually granted bail by the Bombay High Court, on merits, in September. While granting bail, the High Court stayed its own order for a week, allowing the National Investigative Agency to appeal to the Supreme Court. Now, this is bewildering enough in its own right: a pre-emptive "self-stay" by a court below is sometimes understandable in a case where a statute has been struck down for unconstitutionality, and one does not wish to create irreversible consequences until the appellate court has at least had an opportunity to consider the appeal once; but why on earth would a court grant a pre-emptive "self-stay" on a bail order, keeping a person in jail just to allow the State to appeal that order (after all, we have been assured that "one day's deprivation of liberty is one day too many," but let us keep that aside).

Be that is it may, when Mahesh Raut's case came to the Supreme Court, the Court - without giving any reasons - extended the stay until the time it would get around to hearing the appeal. Consequently, despite having a detailed bail order in his favour, Mahesh Raut has been in jail for many further months, because the Supreme Court hasn't had time to hear the State's appeal, and the "pre-emptive self-stay" that had been granted to give the State the bare minimum time it needed to file an appeal, has transmogrified into an ever-extending, open-ended, limitless "stay." Exactly the same thing happened in Gautam Navlakha's case (with the difference that Navlakha is not presently in jail, as he was granted house arrest for medical reasons).

One can only wonder at these very different approaches of the Court to the question of a stays in cases challenging the State, and cases of personal liberty. Indeed, as the Court has neither held a hearing on stay in the Motra and Election Commission cases, or provided reasons for extending the pre-emptive "self-stay" in Raut or Navlakha's cases, critique or discussion is impossible: only wonder is left.

*By way of disclosure, the present author is one of the counsel representing the ex-MP.

**In the Moitra case - which the present author witnessed - the Court made it clear that it simply wasn't interested in a stay, and no purpose would be served by pressing for one.

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