

Ruinous Judicial Activism: What a Solemn Scrutiny of the Ruling of Justice Mumbi Ngugi in the *Moses Kasaine Lenolkulal* Case Reveals

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Abstract

Return to office or removal of a public or state officer when charged under the Anti-Corruption and Economic Crimes Act (ACECA) has become and remains one of the active questions in Kenyan courts after renewed energies on the part of the government to 'fight graft'. This question has generated debates whose terms seem to be very different following a decision that was issued by Justice Mumbi Ngugi over a revision application by the Governor of Samburu County, Moses Kasaine Lenolkulal in a case he had been charged. This article is an attempt at critically analysing the said ruling which has been hailed not only as being progressive but also as showing that Kenyan courts are treating corruption with the phobia it deserves. The analysis demonstrates that despite the noble ideas behind judicial support for war against graft, judicial officers need to be more careful not to venture into what can be described as ruinous activism as the Moses Kasaine Lenolkulal ruling has now revealed.

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1. Introduction

Courts in hybrid regimes, also denoted as authoritarian constitutional regimes, are at times known to appear independent from ruling political elites and do in fact occasionally rule against them.¹ Yet they are also known to be sensitive to the priorities of those regimes.² With the profiling of Kenya as a hybrid regime,³ it is unsurprising that the Chief Justice Maraga-led courts have been overtly subtle to the Jubilee regime's agendas and to President Uhuru and contrary to previous practices of Chief Justices, Maraga has even been a frequent attendee of public-political- events. The priorities of the Jubilee government, in its second term, have been to 'fight' corruption. At the centre of this fight is the Judiciary which is intended to consider culpability and endorse imposition of legal punishment or otherwise. What Maraga CJ has so far proclaimed is that courts will render their decisions on the basis of evidence brought before the courts in the wake of rhetoric more so by the Director of Public Prosecutions (DPP) that has thrust the blame towards the courts.⁴

The media in Kenya has picked up the primacies of Jubilee and literally most criminal proceedings about corruption and especially plea taking sessions are aired. This, together with the sentiments of leading political figures, has stifled the exercise of discretionary remedies meant for accused persons and in some cases has made the involved judicial officers join the media and the public rhetoric with a corresponding resolve. This has been particularly witnessed in the context of bail and bond for suspects charged with corruption and related offences. The tempo of the courts is that corruption is calamitous to the economy even more than a crime

¹ Mark Tushnet has observed about courts in those regimes as follows:

Courts are reasonably independent and enforce basic rule-of law requirements reasonably well. Although judges, especially those on higher courts, are likely to be sensitive to the regime's interests because of the judges' training and the mechanisms of judicial selection and promotion, they rarely take direct instruction from the regime. Sometimes, indeed, they might reject important regime initiatives on rule-of-law or constitutional grounds. See, Mark Tushnet, *Authoritarian Constitutionalism*, 100 *Cornell L. Rev.* 391 (2015) at 450.

² *Ibid.*

³ Alina Rocha Menocala, Verena Fritz with Lise Rakner, Hybrid regimes and the challenges of deepening and sustaining democracy in developing countries (2008) 15 (1) *South African Journal of International Affairs* 29. See also Freedom House Statistics, at <https://freedomhouse.org/report/freedom-world/2018/kenya> 15 August 2019.

⁴ Sam Kiplagat, 'Uhuru, Haji accuse Judiciary of slowing down anti-graft war' 2 January 2019, *Daily Nation*, available at <https://www.nation.co.ke/news/Judiciary-accused-of-derailing-anti-graft-war/1056-4917948-15jv0riz/index.html> 15 August 2019.

of passion like murder and a magistrate has confessed that it could be worse.⁵

The magistrate remarked in an interview that:⁶

A corrupt individual takes everything for himself and in the process leaves others to die. A murderer will kill only one person but someone who steals from a hospital causes much trouble. People will lack basic needs... It has reached a point where people in charge of public funds are paying themselves in their names. That is a serious thing. Anyone handling corruption matters must speak loudly and clearly.

He is not in the minority and a prosecutor in a case involving one of the chairpersons of a constitutional commission named conspiracy and abuse of office offences as crimes against humanity in the course of objecting to a bail application.⁷ The synergy between courts and the prosecutors is obviously visible.

One of the problematic issues that have arisen in the context of bail and bond – other than imposition of astronomical figures as cash bail- has been whether public officials who have been charged with offences relating to corruption should be removed from office.⁸ This has been easy for public officers other than state officers whose terms of removal are set out in the Constitution. For the latter category, ACECA prescribes under section 62(6) that they should not.⁹ This provision, which is essentially a proviso, concerns elected Members of Parliament, Governors, Judges and Members of Independent Commissions. Virtually each of these groups has been reached out to by the DPP in the wake of renewed war against corruption and the question as to whether they should step aside or be removed if the fight is to be treated seriously continues to generate debate. In response, judicial officers have, out of their innovation, determined in legion rulings that though indicted state officers to whom section 62 (6) of ACECA applies should not step aside, such officers are not to access their offices except under certain circumstances. Several High Court judges have considered this issue and had in the past held in favour of

⁵ See Douglas Ogoti Interview with Susan Muhindi, The Star Newspaper, 'Corruption equal to murder, maybe even worse', says magistrate Ogoti available at <https://www.the-star.co.ke/news/2019-04-04-corruption-is-equal-to-murder-maybe-worse-says-magistrate-ogoti/> 15 August 2019.

⁶ Ibid.

⁷ See Paul Ogemba 'Swazuri to stay out of his office as court issue tough bail terms' Standard Digital, 14 August 2018, available at <https://www.standardmedia.co.ke/article/2001291812/swazuri-to-stay-out-of-his-office-as-court-issue-tough-bail-terms> 19 August 2019.

⁸ Kevin Cheruiyot 'Implicated public officers should step aside – Kalonzo' The Star Newspaper, 5 August 2019, also available online at <https://www.the-star.co.ke/news/2019-08-05-implicated-public-officers-should-step-aside-kalonzo/> 19 August 2019.; Protus Onyango, To step aside or not to, that is the question for graft suspects Standard Digital, 30 July 2019, also available at <https://www.standardmedia.co.ke/article/2001335921/to-step-aside-or-not-to-that-is-the-question-for-graft-suspects> 19 August 2019.

⁹ S. 62 (1) and (6), Anti-Corruption and Economic Crimes Act.

state officers, presumably not out of choice, but in a bid to enforce the law as set out under sections 62 (6) of ACECA and the presumption of constitutionality that it enjoyed. Through Criminal Revision No. 25 of 2019, *Moses Kasaine Lenolkulal v Republic*,¹⁰ (hereinafter “*Lenolkulal case*”) it was Justice Grace Mumbi Ngugi’s turn.

2. The Antecedents to the *Lenolkulal Case*

The *Lenolkulal Case* was not the first of its kind that courts dealt with in the wake of the rehabilitated fight against graft. Prior to the case, several persons to whom section 62 (6) of ACECA applies -had been charged and the question of not accessing office had been addressed. The first prominent case closer to *Lenolkulal*’s was *Republic v Sospeter Ojaamong & Others*¹¹ that concerned the governor of Busia, Sospeter Ojaamong (hereinafter’ “*Ojaamong Case*”).¹² In the *Ojaamong* case, the prosecution had opposed the release of the accused person on bail on several grounds including that he was likely to interfere with witnesses.¹³ Hon. Ogoti, before his newfound pleasure of imposing astronomical figures, dismissed the claim maintaining that the primary object of bail and bond is to secure the attendance of an accused person in court.¹⁴ *Ojaamong* was released on a cash bail and was able to attend to his office in spite of the case. Related to the *Ojaamong Case* is a much hyped one that concerned a sitting governor, Okoth Obado who was charged not with an offence relating to corruption, but murder. Obado was incarcerated for a few weeks as questions about his bail/bond were addressed but he was ultimately released on bail.¹⁵ Though initially there was a restriction imposed on his access to office, his circumstances were not determined on the basis of section 62 of ACECA.

A case where the issue of access to office or removal of a state officer received direct consideration of the High Court was *Muhammad Abdalla Swazuri & 16 others v Republic*,¹⁶ which involved the Chairperson of the National Land

¹⁰ [2019] eKLR.

¹¹ Anti-Corruption Case No. 23 of 2018.

¹² Sam Kiplagat, ‘Governor Ojamong’, 3 officials on graft charge out on bail’ Daily Nation, 6 July 2018, also available at <https://www.nation.co.ke/counties/busia/Court-frees-Ojaamong-on-Sh1m-bail/3444872-4649902-3u0030/index.html> accessed on 19 August 2019.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Simon Ngonga, ‘Obado released on a cash bail of Sh5m as two co-accused remain in custody’, 24 October 2018, Capital News, also available at <https://www.capitalfm.co.ke/news/2018/10/obado-released-on-a-cash-bail-of-sh5m-as-two-co-accused-remain-in-custody/> accessed on 20 August 2019.

¹⁶ Criminal Revision No. 13 of 2018,

Commission- an independent Commission- Professor Muhammad Swazuri (hereinafter, “*Swazuri Case*”).¹⁷ Swazuri was charged under ACECA¹⁸ around August 2018 in *Republic v Muhammad Swazuri & Others*.¹⁹ He was released on bail on several conditions one of which was that he was not to access his office unless written authorisation was given by the investigating agency, the Ethics and Anti-Corruption Commission (EACC).²⁰ Such an approval was not granted nor was it forthcoming in spite even of several contempt of court applications that were thought could trigger necessary action and return Swazuri to office. In the end, Swazuri applied for revision of the trial court’s order on the grounds that the decision of the trial court amounted to his “effective” removal from the office.²¹

In a ruling delivered on 1 November 2018, Justice Ong’udi in the *Swazuri Case* revised the order of the trial court and in effect allowed Swazuri back to office only on condition that he was to undertake not to interfere with witnesses.²² Part of her ruling read as follows:²³

I appreciate this concern by the trial court but add that the securing for this credibility must be done within the confines of the Law and Constitution...39. What happens if any of these two parties refuses to have the authorization given? It would mean the Applicant does not go to the office.... the investigating agency (EACC) could be seen to be controlling the affairs at the NLC yet both EACC and NLC are independent commissions....Assuming for a minute that the Applicant wanted to be in his office every day would it be practical for the Secretary/CEO EACC and the EACC to be consulting and issuing authorization on a daily basis? The answer is NO...I therefore find that section 362 CPC is applicable in the circumstances of this case. This is for the purposes of making it practical for the Applicant to carry out his official duty and not earn a full salary for doing nothing.

Justice Ong’udi’s ruling flamed new rhetoric on the question of access to office by state officers.²⁴ The DPP filed an application for ‘stay of the ruling’ of the

¹⁷ *Muhammed Abdalla Swazuri & 16 others v Republic* [2018] eKLR.

¹⁸ via ACECA No. 33 of 2018.

¹⁹ Ethics and Anti-Corruption Commission, Professor Swazuri Charged with Graft, 13 August 2018, available at <http://www.eacc.go.ke/professor-swazuri-charged-with-graft/> accessed on 20 August 2019.

²⁰ Terms are summarised *Swazuri case* above.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*, para 39.

²⁴ Editorial, daily Nations, Let public officials step aside if accused 22 November 2018, also available online at <https://www.nation.co.ke/oped/editorial/Let-public-officials-step-aside-if-accused/440804-4862362-94171az/index.html>.

High Court pending hearing and determination of an intended appeal.²⁵ That too was disallowed. In a local TV event almost at the same time, the DPP invited courts to impose high bail terms and to remove state officers charged with corruption-related offences from office.²⁶ He cited the Chapter on Integrity and Leadership in the Constitution noting that it offered a constitutional basis for courts to remove governors and other officials that had been charged with corruption-related offences.²⁷ The sentiments of the DPP were made just after the ruling of the Court in the *Swazuri case*. After the *Swazuri case*, then came the *Lenolkulal case*.

3. The Moses Lenolkulal Situation

Lenolkulal, just like *Ojaamong*, was charged as a sitting governor under ACECA through *R vs. Moses Lenolkulal and 13 Others*.²⁸ A trial court fully immersed in the war against graft mood imposed bail on terms and conditions that included restriction on access to office.²⁹ It imposed a Kshs 150 million with one surety of a similar amount as bond and a cash bail of Kshs 100 million as an alternative.³⁰ Following a revision application, his cash bail was reduced to Kshs. 10,000,000/= and his bond to Kenya shillings thirty million (Kshs 30,000,000) and one surety of a similar amount. But those were not the only conditions imposed by the trial Court. The trial court also prescribed that:³¹

That since the Samburu County offices is where the crime took place, it is a scene of crime. The Governor is hereby prohibited to access those offices till the application to be directed to be filed is heard and determined.

An interim order was therefore effectively granted that prevented his access to office and the DPP did file an application where he essentially wanted the charged governor to be restrained from accessing his office pending hearing and determination of the entire trial. The trial court ruled as follows:³²

²⁵ Jeremiah Wakaya 'DPP appeals against order allowing Swazuri access to office', 5 December 2018, Capital News, available at <https://www.capitalfm.co.ke/news/2018/12/dpp-appeals-against-order-allowing-swazuri-access-to-office/> accessed on 20 August 2019.

²⁶ Lilian Mutai 'DPP wants State officers facing charges to step aside' The Star Newspaper, 21 November 2018, available at <https://www.the-star.co.ke/news/2018-11-21-dpp-wants-state-officers-facing-charges-to-step-aside/> accessed on 20 August 2019.

²⁷ Ibid.

²⁸ ACC No. 3 of 2019.

²⁹ *Moses Kasaine Lenolkulal v Republic* [2019] eKLR, <http://kenyalaw.org/caselaw/cases/view/172583/> accessed on 20 August 2019.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

The 1st Respondent who is the Governor of Samburu County is barred from accessing the Samburu County Government Offices without the prior written authorization from the CEO of the Investigative Agency (EACC) who shall put measures if any in place so as to ensure that there is no contact between the 1st Respondent with the prosecution witnesses and preserve the evidence until further orders of this Court.

Lenolkulal was aggrieved by the ruling and filed a revision at the High Court in a separate revision.³³ The core case that the Governor made included that he was constitutional office holder and by virtue of section 62 (6) of ACECA, the order of the trial court amounted to his removal or suspension from office.³⁴

Seized of the request, Justice Mumbi Ngugi issued a ruling where she tried to ‘distinguish’ the *Swazuri* case and effectively held that she was not satisfied that she needed to revise the order of the trial court that had barred Lenolkulal from accessing Samburu County Government Offices.³⁵ Certainly, that ruling addressed the lamentations of the DPP and in all measures is seen to establish a new zeal on the part of the Judiciary to ‘fight’ graft along the Jubilee regime’s priorities. In the section that follows, I offer a critique of the ruling and explain why the same should be understood to be ruinous judicial activism.

4. The Problematics of the Ruling

Though the term ‘judicial activism’ embodies an assortment of concepts, it is generally understood to be mean a variety of judicial actions which include striking down of legislation, departure from accepted interpretative methods or even ignoring precedent.³⁶ Judicial activism is not necessarily a bad thing and the judicial protection of minorities has been hailed on this accord.³⁷ In the context of transformative constitutionalism, judges also have been justified when they proceed

³³ *Moses Kasaine Lenolkulal v Director of Public Prosecutions* [2019] eKLR, <http://kenyalaw.org/caselaw/cases/view/178331/> accessed on 20 August 2019.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 *Calif. L. Rev.* 1441 (2004); Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 *YALE L.J.* 255, 276 n.106 (1992); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 *VAND. L. REV.* 395, 401-06 (1950). Greg Jones, *Proper Judicial Activism*, 14 *REGENT U. L. REV.* 141, 143 (2002).

³⁷ See, Cover, Robert M., “The Origins of Judicial Activism in the Protection of Minorities” (1982). Faculty Scholarship Series. 2704. https://digitalcommons.law.yale.edu/fss_papers/2704.

differently for the sake of changing societal conceptions about the relationship between the state and its citizens.³⁸ There are, however, several reasons why the *Lenolkulal Case* embodies judicial activism that does not advance constitutionalism and which deserves to be discouraged.

Prior to the *Lenolkulal Case*, binding precedent — to the lower courts — had already been established- in the *Swazuri Case*, which favoured a restriction on the power of courts to set the prerequisites for 'return' to office. In the *Lenolkulal case*, there was an effort at expanding this scope by casting doubt of the legal norms that limited the ability of criminal courts to restrict applicability of sections 62 (6) of ACECA particularly when these initiatives constitute effective removal. In her attempt at distinguishing the *Swazuri Case*, the learned judge held:³⁹

25. The Swazuri case, to my knowledge, is the first case in which the High Court has been called upon to consider the situation of a holder of a constitutional office charged with a corruption offence under ACECA, and the application of section 62(6) of the Act...26. As I understand it, the court in the Swazuri case was concerned that the investigating agency is the EACC, and the court had directed that its CEO gives authorisation for the Chairperson of the NLC to attend to his office, after due consultation with the EACC. The court was further concerned that there would be a problem if these two parties refuse to give authorisation, in which case the applicant would be unable to go to his office. The court further found a problem with the operationalization of the orders of the trial court. It expressed the view that should the applicant wish to be in his office every day, it would be impractical for the CEO of the EACC and the EACC to be consulting and issuing authorization on a daily basis. The court therefore found that the trial court had not considered the practical implications of its order and proceeded to set aside the orders requiring prior authorisation before the applicant went to his office at the NLC.

The Judge continued that:⁴⁰

27. To some extent, I agree with the findings of the High Court in the Swazuri matter. The applicant before me is a holder of a constitutional office. He is the Governor of Samburu County and would thus appear to be exempt from the provisions of section 62(1) of ACECA and protected by section 62(6) thereof as the grounds for his removal are set out in the Constitution. Further, by requiring that he seeks authorisation from the EACC and its CEO, he is, to some extent,

³⁸ See for instance Karl E Klare, commentary on *Makwanyane*, in Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 S AFR J ON HUM RTS 146.

³⁹ *Moses Kasaine Lenolkulal*, at 25.

⁴⁰ *Ibid* at 27.

subordinated to the EACC. There may also be, as the court in *Swazuri* found, some practical difficulties in the manner in which the authorisation is to be given. It is thus notable that the concern in the *Swazuri* case was with respect to the interests of the applicant, the accused person, who also happened to be the Chairperson of an independent constitutional commission.

The point of departure for Justice Ngugi in this case, was however the view expressed as follows:⁴¹

29. There is another perspective from which I believe the question of the applicant's access to his office must be considered, a perspective that looks beyond the interests of the individual holder of the constitutional office and considers the wider public interest. This perspective speaks to the question of what Mr. Nyamodi termed 'political hygiene,' and is a perspective that raises serious concerns that require judicial consideration with respect to section 62(6) of ACECA.

In addressing the question that had been posed to her, I contend that Justice Ngugi posed a wrong conceptual framework for assessing the application before her in the first place. Justice Ngugi saw the answer to the question that had been posed towards her as contained in "the rationale behind suspending public or state officers who have been charged with corruption."⁴² This framework could not certainly lead to the correct sort of answers because the issue at hand was not about suspension of officers but rather the restriction on state officers to access office, knowing that section 62 (6) supplied a qualification to the general requirement that public officers charged under ACECA stood suspended pending the determination of their cases. The proper question to be posed should have focused on the rationale behind section 62 (6) and not behind section 62 (1). It was incorrect for the judge to find out the reason behind suspension of public officers and juxtaposing that reason as the answer to the problematics of accessing office during pendency of trial for state officers whose mode of suspension or removal is entrenched in a Constitution.

But assuming it was the right framework, she returned misleading pointers. Section 62 (1) is not meant to soothe the public or the ruling regime. The fairly convincing reason behind the suspension of state officers appears to be the need to preserve evidence that could be within the office where the accused works or to protect witnesses from being intimidated.⁴³ Part of this rationale is rarely

⁴¹ Ibid at 29.

⁴² Ibid at para 49.

⁴³ See the observations of Ong'udi J in the *Swazuri* case above.

interrogated with vigour considering that most cases under ACECA are investigated for a considerably long period of time and by the time a charge is preferred, the DPP is satisfied that he has all the information that can presumably secure a conviction. In practice, most of these cases are investigated by the EACC and then forwarded to the DPP who (ostensibly) independently reviews the files and either sends them back or commences prosecutions. If cases under ACECA were mostly similar to say murder cases such that an accused person is apprehended after an *actus reus* and investigations commence post the arrest, the need not to restrict access to the 'scene of crime' would be a reasonable compelling reason. In fact, the phrase scene of crime as used in rulings that protect scene of crime in cases under ACECA is distorted because the presumption made is that a white collar crime is normally designed and executed at one place, the office where the accused works. This can be quite unfounded.

The other rationale which is easily poised as the reason behind these measures is the need to prevent interference with witnesses. Unfortunately, this is not also a laudable explanation if interrogated energetically for a number of reasons and in fact Hon. Ogoti downplayed it in the *Ojaamong Case*.⁴⁴ First, the idea that if an accused person is allowed in his office he will, by that fact, interfere with witnesses after such witnesses have written their statements is not problematic to discount. It has not been shown — in previous cases — that witnesses were recanting their statements to embolden such broad suspicions. Second, the mere fact that an order not to access office is made does not imply that the informal connections between accused persons and their friends or colleagues stand disestablished or that those connections cannot be exploited outside the office situation. Some of the witnesses sought to be protected could be persons that were appointed by, say, the Governor himself and their loyalty cannot be whisked away by a formal court order requiring him not to be seen near his office. Third and most importantly, this approach is a less inventive measure of ensuring integrity of a trial when compared to that which can be offered by the Witness Protection Act which is:⁴⁵

An Act of Parliament to provide for the protection of witnesses in criminal cases and other proceedings...

It is observable that in most cases before the court where the question of access to office has been a subject of commentary, the applicability and adequacy

⁴⁴ See, Sam Kiplagat (n 12 above).

⁴⁵ Cap 79, Laws of Kenya.

of the Witness Protection Act have never been a subject of serious review and Justice Ngugi did not bother or venture into these. Under this legislation, a raft of measures is proposed which if invoked by the DPP and courts towards the vulnerable witnesses, one would imagine, the aims pursued could be realised with reasonable proportionality. These three realities, call for a heightened scrutiny of fears that witnesses are likely to be interfered with particularly when those fears are fronted as the basis for countermanding constitutional intentions.

But the failure to look at the issues at hand under the proposed lanes is not part of the indiscretions of Justice Ngugi in her ruling. A smaller problem with the Justice Ngugi ruling is the wide-ranging intuitive assumptions she makes which are presumably influenced by the desire to feed the public with an assurance that the Judiciary is together with the DPP on the fight against graft. The particular assumption stands out in the impression she creates that if someone is charged with an offence, it follows that he/she is most likely culpable. She says, for instance, that the accused person whose case was before her was “charged with basically enriching himself at the expense of the people of Samburu County who elected him and whom he is expected to serve.”⁴⁶ She also observes pejoratively that “the applicant is charged with a criminal offence; he has been accused of being in ‘moral ill-health.’”⁴⁷ These sentiments bespeak judicial engagement with criminal law under a scenario that fosters the impression that presumption of innocence is a secondary issue, subordinate to what the public needs to consume. Yet such comments, emanating from a superior court of record, can and indeed did influence the meander of a lower court and its commitment to enforcement of laws.

Besides, Justice Ngugi clearly stayed away from thinking about the possibility that criminal proceedings have often been inspired by other motives other than an honest enforcement of criminal law. In the wake of the fight against graft, the DPP himself, who is meant to exercise his powers independently has been seen to execute the instructions of the President Uhuru which is contrary to the constitutional contemplation.⁴⁸ When prosecutions are informed by the need to inspire confidence in the public that the executive is fighting corruption or so that an appropriate legacy for a president can be profiled when his tenure comes

⁴⁶ Para 48.

⁴⁷ Para 41.

⁴⁸ See e.g. Wanjohi Githae ‘We’ll not spare anyone in anti-corruption war’ says Uhuru, Daily Nation, 23 March 2019, available at <https://mobile.nation.co.ke/news/Uhuru-will-not-spare-anyone-graft-war/1950946-5037896-wyu7ynz/index.html> accessed on 20 August 2019.

to an end as has been said,⁴⁹ the institution of criminal revision needs to be more sympathetic towards accused persons. With the dispositions like the one adopted by Justice Ngugi though, the exact opposite is attained and courts are seen to forlornly settle for enforceable contents of constitutional safeguards that sit well with the priorities or motives that influence prosecutions whether they are improper or not.

An apparently activist component of her ruling is the portion where she veers into what is to happen in the event that a governor is unable to access his office. She decreed as follows in this regard:⁵⁰

Under the provisions of the County Government Act, where the Governor is unable to act, his functions are performed by the Deputy Governor. This is provided for in section 32(2) of the County Governments Act.... The Governor in this case is not being 'removed' from office. He has been charged with an offence under ACECA, and in my view, a proper reading of section 62 of ACECA requires that he does not continue to perform the functions of the office of governor while the criminal charges against him are pending. However, if section 62(6), which in my view violates the letter and spirit of the Constitution, particularly Chapter Six on Leadership and Integrity, is to be given an interpretation that protects the applicant's access to his office, then conditions must be imposed that protect the public interest. This is what, in my view, the trial court did in making the order requiring that the applicant obtains the authorisation of the CEO of EACC before accessing his office. In the circumstances, I am not satisfied that there has been an error of law that requires that this court revises the said order, and I accordingly decline to do so.

Accordingly, Justice Ngugi creates easy possibilities for existence of unwarranted legal predicaments by commenting that a Deputy Governor can perform the functions of a governor under circumstances such as the one that *Lenolkulal* found himself in.⁵¹ To present it in a more staking way, that section 32 (2) of the County Government Act had missed the attention of judicial officers prior to the *Lenolkulal* case. The assumption she makes again is that all County Governments will have a deputy governor at all times who will be in proper form to run the county for as long as the criminal trial is ongoing. In a situation where both the Governor and his or her Deputy are charged, it means that the Speaker of the County Assembly will assume the role of the both the Governor and his

⁴⁹ Rael Ombuor 'Kenya's War on Corruption: Lasting Legacy or Political Theatres?' Voice of Africa, 15 August 2018, available at <https://www.voanews.com/africa/kenyattas-war-corruption-lasting-legacy-or-political-theater> accessed on 20 August 2019.

⁵⁰ Para 58.

⁵¹ See para 58 and 59.

Deputy under circumstances that the Constitution does not also envisage. Now imagine what happens if, say, four judges of the Supreme Court are charged under ACECA and told, under this inspiration, that they must not access their offices! Look again at the case she had at hand. She argued that a Deputy Governor would be in charge as has been the case. What happens, as it is reasonably foreseeable, if a Deputy Governor is also subsequently charged or if he dies? Will the Speaker of a County Assembly take over for six months and then an election conducted for a Deputy Governor? And assuming we say that an election is not necessary, as they have not been removed, does it not defeat constitutional intentions to have a Speaker of County Assembly run a county for 2 years without a popular mandate?

The activism that is nonetheless apparent from a reading of the *Lenolkulal Case* is that she ventures into a declaration or somewhat commentary upon unconstitutionality of sections 62 (6) of ACECA when the question of section 62 (6) placement within Chapter Six was not an issue for her determination. This is unrewardingly innovative because courts have been reluctant to strike down legislation, even if there are compelling reasons to, if the issue of their constitutionality is not raised- in the proper form. For instance, when the Supreme Court was confronted with a tempting situation once upon a time, it remarked as follows: ⁵²

The petitioners did not at the very first instance, through their pleadings, indicate their intentions to declare Section 23 to be unconstitutional. [332] The rule of the thumb has always been that parties must be bound by their pleadings and especially in a case such as this where the petitioner is asking the Court to address its mind to the possible unconstitutionality of a legal provision. For proper consideration therefore, and especially in order to do justice to both the parties and the greater public interest, we cannot afford to lock our eyes to the disadvantage placed upon the 3rd respondent especially who had no benefit to bring his thoughts into this cause. [333] In the circumstances, we are unable to find that Section 23 is unconstitutional. Let the matter be addressed in the right proceedings in the right circumstances.

Yet, overcome by a desire to strike down section 62 (6), Justice Ngugi ventured into a comment of unconstitutionality, unfortunately without explaining the specific provision of Chapter Six that it contravened. Her comment on unconstitutionality is based on pitching section 62 (6) to a nebulous idea: the “spirit” of Chapter 6. No submissions were made by parties on the question of the constitutionality of that provision and it was never pleaded, one can assume.

⁵² *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR.

In any view, it would seem that that provision is not unconstitutional even if it had been an issue. The provision was inserted after the 2010 Constitution to section 62 (1) as a proviso in view of protections that the 2010 Constitution offered to persons that had been vetted and found suitable to occupy some independent or judicial offices and elected political office holders. In this view, section 62 (1) whose philosophy guided the entire ruling was not inserted into ACECA in a bid to implement Chapter Six. The provision [62 (6)] was interleaved to reconcile the purport of section 62 (1) with the Constitution which in seeking to protect the security of certain office holders, prescribed for elaborate criteria that must be met if their offices are to be vacant. For the sake of elected leaders, this was to reconcile the need to preserve aftermaths of democratic exercises from potential improper deployment of criminal law.

The DPP is arguably an arm of the executive responsible for enforcement of criminal law in collaboration with the Directorate of Criminal Investigations or in the case of corruption-related offences, the *Ethics and Anti-Corruption Commission*. Through criminal law, de facto institutional independence and security can be ripped off from the so-called constitutional commissions. With this kind of pronouncements, independent commissions need be careful to pursue personal friendship with the presidency, who is also an apparent de facto controller of the DPP. In effect, persons working in such commissions will have to dance to the tune of either the EACC or more particularly the presidency which is against the intentions of the Constitution or the notion of rule of law. The activist ruling of Justice Ngugi thus does not sit well with the aims of the Constitution, and creates a potential for proliferation of awkward situations that were meant to be cured by section 62 (6) of ACECA. It also justifies what can stand as an unjustified encroachment of courts on outcomes of democratic processes and mandates.

5. The Aftermath Before Appeal

The Governor for Kiambu County, Ferdinand Waititu found himself on the same side of the aisle as Lenolkul immediately after this problematic pronouncement. Waititu was also arrested and charged under ACECA.⁵³ Though the DPP did not object to the grant of bail to Waititu, terms similar to those that

⁵³ Joseph Muraya, 'Waititu, his wife and 8 others charged with corruption', Capital News, 29 July 2019, <https://www.capitalfm.co.ke/news/2019/07/waititu-his-wife-and-8-others-charged-with-corruption/> accessed on 20 August 2019.

had been imposed on Lenolkulal were also levied on Waititu.⁵⁴ In the wake of the ruling, Waitutu's Deputy, Nyoro, placing reliance on the *Lenolkulal* ruling, proclaimed his ascendancy into power as Governor. This initiative triggered unnecessary tensions within the county management much as it also exposed the possibility of Deputy Governor's prompting ACECA prosecutions as a means of addressing the differences between themselves and their bosses.⁵⁵

Waititu was irked by the bail terms and doubtless by what seemed to be an avowal by his Deputy that the vacancy created by the criminal trial had been filled. He approached the High Court with a revision application that was placed before a different judge, Ngenye Macharia J. In defence of her colleague and the opprobrium that Justice Ngugi deserved, Justice Ngenye, echoing the sentiments of Justice Ngugi remarked that:⁵⁶

36. In as much as the accused persons remain innocent until otherwise proven, it would make a mockery, not only to the people of the County of Kiambu but to the letter and spirit of the Constitution that persons charged with such weighty offences can be allowed to go back to the office to continue with dealings that they are alleged to have committed against the law. Furthermore, the objects and purpose of ACECA can be glimpsed from its preamble which states that the Act is meant to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith.⁵⁷

37. It is clear that the drafters of the Constitution intended to ensure that corruption did not infiltrated public offices; and in there lies an indication that accountability is a key tenet of leadership and integrity. The 1st Applicant has been charged in court because of the doubt the public has in his integrity. Until such a time that he is vindicated or convicted, he is yet to fulfil his duty to account for the alleged breach of the public trust entrusted in him under Article 73 of the Constitution. And therefore, absurdity would reign in if the court allowed him to go back to the office to continue executing his duties.⁵⁸

⁵⁴ Rachael Mburu, 'Waititu freed on Sh15mn cash bail and should not access county office' 30 July 2019, <https://www.capitalfm.co.ke/news/2019/07/waititu-freed-on-sh15mn-cash-bail-and-should-not-access-county-office/> accessed on 20 August 2019.

⁵⁵ Simon Ndonga 'I'm now in charge, Kiambu Deputy Governor declares after Waititu was barred from office', Capital News, 30 July 2019 available at <https://www.capitalfm.co.ke/news/2019/07/im-now-in-charge-kiambu-deputy-governor-declares-after-waititu-was-barred-from-office/> accessed on 20 August 2019.

⁵⁶ *Ferdinand Ndungu Waititu Babayao & 12 others v Republic* [2019] eKLR, available at <http://kenyalaw.org/caselaw/cases/view/179373/>

⁵⁷ *Ibid*, at para.

⁵⁸ *Ibid*, at para.

Justice Ngenye fell into the same trap. The above cited paragraphs 36 and 37, as far as a critical reader can see, are simply her personal views about corruption generally but neatly expressed in a pompous though rather dogmatic fashion. She picked up the Justice Ngugi ruling with renewed zeal in her case making tenacious comments on culpability and feigning existence legal absurdities. All in all, the Justice Ngenye ruling reveals that the Justice Ngugi one has found sympathy in spite of its shortfalls and will continue to inspire rhetoric on the subject or the moves of trial courts unless and until the higher courts change the terms of that ruling.⁵⁹ And they should.

6. Concluding Observations

This appraisal has sought to present the limitations embodied in the ruling by Justice Ngugi in respect of the *Lenolkulal case*. The case made here is that there was no rational basis or justification for Mumbi Ngugi J to (a) distinguish the Swazuri from the *Lenolkulal case* (b) purport to purge section 62 (6) of ACECA on the basis that it contravened the spirit of Chapter 6 of the Constitution; and (c) venture into an analysis of the role of the deputy governor in cases where a Governor is charged. Her ruling failed to consider the wider implications of her pronouncements which arguably renders her activism pathological to rule of law. In the place of her approach, this contribution recommends that to resolve the quandary about ensuring integrity of trial processes, the mechanism provided for under the *Witness Protection Act* should be interrogated and pursued. Also, the DPP could think of the possibility of pursuing, in the first instance, a removal from office of a state officer before commencing a criminal trial.

⁵⁹ See for instance, Makau Mutua 'Anti-Graft Mood Prevailing in Kenya Should be Clad in Iron', <https://mobile.nation.co.ke/blogs/Anti-graft-mood-prevailing-in-Kenya-should-be-clad-in-iron/1949942-5239414-format-sitemap-rlqpw0z/index.html> accessed on 20 August 2019.