

# A Tale of Judicial Courage: Lady Justice Mumbi Ngugi's Bravery that Gave Back Some Life to the Dying Edicts of Chapter 6 of the Constitution

## A Response to "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

This paper responds to and critiques the foregoing paper by O'kubasu: "Ruinous Judicial Activism: What a Solemn Scrutiny of the Ruling of Justice Mumbi Ngugi in the *Moses Kasaine Lenolkulal* Case Reveals." The author argues that contrary to the assertions by O'kubasu, the ruling, which barred *Lenolkulal* from accessing his office, did not seek to have the governor step aside, like other public officers, neither did it remove him from office as contemplated by Article 181 of the Constitution and section 33 of the County Government Act. The condition was/ is reasonable and fits perfectly within Articles 24, 27, 49(1) (h) and 50 of the Constitution and therefore is legal and proper.

Having noted the magnitude to which corruption levels have grown, in spite of an impressive array of existing laws and institutions to fight it, and the ascent to public office by persons with unresolved issues of integrity,

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it is argued that the decision of Mumbi J in the *Lenolkulal* case is not only a brave stand for the values of Chapter Six and the Rule of Law, but it also provides an opportunity to further salvage Chapter Six of the Constitution, which has for a long time been on its death bed. With the decision having been relied on in other cases, it is hoped that Chapter 6 of the Constitution shall fully resurrect and give a beacon of hope for the continued constitutional transformation of the democracy that is Kenya.

## 1. Introduction

One of the key factors that informed Kenyans' struggle for the new Constitution was to end impunity, which had bedevilled the country for decades, and establish a system of governance firmly based on the rule of law and respect for the people. Kenyans shed blood and lost limb and property in the quest to redesign and restructure the government and have leaders who would champion virtuous and ethical conduct of affairs. That is the essence of Chapter 6 of the Constitution - on ethics.<sup>1</sup> The centrality and importance for legislation on Leadership and Integrity in Kenya's governance cannot be overestimated given the history of our country.<sup>2</sup>

The said chapter sets the principles on leadership and integrity requirements of public officials. Articles 73 and 75 of the Constitution require State officers to be selected "on the basis of personal integrity, competence, and suitability and to conduct themselves in a manner that shows respect for the people and promotes public confidence and brings honour to the nation and dignity to the office they hold. The provisions of Chapter 6 are amplified under the Leadership and Integrity Act 2012.

In interpreting and applying the provisions of the Constitution, including Chapter 6 thereof, Courts must be alive to the constitutional needs and aspirations of the ultimate Sovereign — the Kenyan people. It is this realization that the High Court at Nairobi had in mind in the case of *Trusted Society of Human Rights Alliance vs. Attorney General & 2 Others*,<sup>3</sup> in which the Court, in acknowledging the aspirations of Kenyans in including Chapter 6 of the Constitution, held *inter alia*:<sup>4</sup>

Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that Chapter Six and Article 73 will be enforced in the spirit in which they included them in the Constitution. The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not

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<sup>1</sup> <https://mobile.nation.co.ke/blogs/Kick-out--punish-errant-public-officers/1949942-4820672-10q8bdoz/index.html>.

<sup>2</sup> *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 Others* (Nairobi High Court Petition No. 454 of 2012); [2013] eKLR.

<sup>3</sup> Nairobi High Court Petition 229 of 2012; [2012] eKLR.

<sup>4</sup> At para 102.

intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers will be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice...

For a long while, it seems that Chapter 6 has somehow turned on its head: instead of helping Kenyans, Kenyans have become the victims of our leaders. There must be a remedy, in the outstanding virtue of the Constitution: Article 10: ‘the national values and principles of governance... bind all State organs, State officer, public officers and all persons whenever any of them applies or interprets this Constitution; enacts or applies or interprets any law; or makes or implements public policy decisions.’<sup>5</sup>

Despite Chapter 6 of the Constitution on Leadership and Integrity, the impressive array of existing laws<sup>6</sup> and architecture of institutions,<sup>7</sup> the national sport of looting the public has become even more popular than betting. Aspirants under investigation or before our courts for corruption, hate crimes and unethical behaviour seek public office unrestricted. Parents seem incapable of leading families with ethical values.<sup>8</sup>

It is in the foregoing context that Lady Justice Mumbi Ngugi must be seen to have been brave enough to stand for the values of Leadership and Integrity and the Rule of Law generally and her decision - the subject of this debate – be seen as an opportunity to further salvage Chapter 6 of the Constitution on Leadership and Integrity which has for a long time been on its death bed. This paper is a response to – and to an extent a critic of – the views by the learned Duncan M. Okubasu’s paper “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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<sup>5</sup> <https://www.the-star.co.ke/siasa/2019-03-30-leadership-and-integrity-kenyans-have-become-victims-of-their-leaders/> accessed on 25 August 2019.

<sup>6</sup> Including the Leadership and Integrity Act, No. 19 of 2012; the Ethics and Anti-Corruption Commission, No. 22 of 2011; and the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, among others.

<sup>7</sup> Including the Ethics and Anti-Corruption Commission (EACC) and Independent Electoral and Boundaries Commission (IEBC), County Assemblies, the Office of the Auditor General, Parliament and the Judiciary.

<sup>8</sup> <https://www.standardmedia.co.ke/article/2001241336/chapter-6-of-the-constitution-is-not-just-another-paragraph> accessed on 25 August 2019.

## 2. *Moses Kasaine Lenolkulal vs. Director of Public Prosecutions*<sup>9</sup>

In the *Lenolkulal* case, Lady Justice Mumbi Ngugi<sup>10</sup> was called upon to exercise her Supervisory and Revisionary jurisdiction under Article 165 (6) and (7) of the Constitution<sup>11</sup> and sections 362 and 364 of the Criminal Procedure Code.<sup>12</sup> That jurisdiction limits what the court could do to calling for the file of the subordinate court and ascertaining itself as to the propriety, correctness and legality of the impugned proceedings and/or order of the subordinate court.

Where the court finds such impropriety, incorrectness and/or illegality, then the Superior Court will not hesitate to correct the same by setting aside such proceedings and/or order and directing the subordinate court as to the next course of action. Of course, the Superior Court (the High Court) would, where it finds no reason to interfere with the proceedings and/or order of the subordinate court, refuse to revise and dismiss the application (like in the instant case).

## 3. Background of the Case

Governor Lenolkulal of Samburu County was vide *Republic vs. Moses Kasaine Lenolkulal & 13 Others*<sup>13</sup> alongside thirteen other people including other employees of the Samburu County Government, charged with four counts of corruption-related charges<sup>14</sup> under the Anti-Corruption and Economic Crimes Act,<sup>15</sup> (hereinafter referred to as the ACECA).

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<sup>9</sup> Milimani ACEC Criminal Revision No. 25 of 2019 delivered on 24<sup>th</sup> day of July 2019 (hereinafter *the Lenolkulal Case*).

<sup>10</sup> As she then was before her recommendation for Promotion as a Court of Appeal Judge on 22<sup>nd</sup> July 2019.

<sup>11</sup> Articles 165 (6) and (7) provide:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

<sup>12</sup> Chapter 75 of the Laws of Kenya.

<sup>13</sup> Milimani CM ACEC No. 3 of 2019.

<sup>14</sup> The offences alleged to have been committed between 27<sup>th</sup> March 2013 and 25<sup>th</sup> March 2019 included Conspiracy to commit an Offence of Corruption contrary to section 47A (3) as read with section 48 (1) of the ACECA; Abuse of Office contrary to section 46 as read with section 48 (1) of ACECA; Conflict of Interest contrary to section 42 (3) as read with section 48(1) of ACECA; and Unlawful Acquisition of Public Property contrary to Section 45(1) as read with section 48(1) of ACECA.

<sup>15</sup> No. 4 of 2003; assented to on 30<sup>th</sup> April, 2003 and commenced on 2<sup>nd</sup> May 2003.

Upon such charges, the Plea Court, in compliance with the provisions of Article 49(1) (h) of the Constitution,<sup>16</sup> and at the instigation of the Prosecution, attached bail conditions<sup>17</sup> to the release of the Governor on bail (pending trial). As part of the said conditions, the Plea Court made an order barring the Governor from accessing his Samburu County Government Office. This was meant to prevent the possible interference with witnesses, and the scene of crime i.e. the offices where there were some exhibits. These conditions were initially given on an interim basis with the Plea Court directing the Prosecution to make a formal application for the conditions to be confirmed in the substantive.

The Prosecution accordingly made the application for the confirmation of the bail terms. A few days later, upon the Governor reshuffling his Cabinet (of course in his capacity as the Governor despite having been barred from accessing the office), the Prosecution rushed to court to seek the cancellation of the Governor's bail for allegedly breaching the condition of bail. The argument by the Prosecution was two-fold. One, that the Governor must have accessed the office to effect the reshuffle of his Cabinet. And two, that by reshuffling the Cabinet, he had interfered with (potential) witnesses contrary to the need to protect the integrity of the trial. The two applications (for confirmation of the bail terms and for the cancellation of bail) were heard together.

Upon hearing of the applications, the Subordinate Court was not persuaded by the Prosecution's arguments in support of the application for cancellation of the Governor's bail and in dismissing the Prosecution's arguments, ruled that the Court could not and had not removed the Governor from office and as such the Governor had perfectly exercised his powers as the Governor of Samburu County in reshuffling his Cabinet. Also, the Court held that there was no evidence that the Governor had accessed the office in reshuffling the Cabinet.

On the more relevant application to this debate - the confirmation of the bail terms in the substantive - the Governor in opposing the application, argued that the orders should not be confirmed as such an order barring the Governor from accessing his Samburu County Government Office would amount to removal and/or suspension, and would thus go against the express provisions of Article 181 of

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<sup>16</sup> "An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

<sup>17</sup> The Director of IFMIS was also directed to bar the Governor and any other person charged alongside him from accessing the funds of the Samburu County Government on the IFMIS Platform.

the Constitution and section 33 of the County Governments Act<sup>18</sup> on removal of Governors from office, and section 62(6) of ACECA.

While section 62 (1) of the ACECA provides that a public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case,<sup>19</sup> it exempts County Governors vide subsection (6) by excluding from the operation of the section offices to which the Constitution limits or provides for the grounds upon which holders thereof may be removed or the circumstances in which the office must be vacated.

Article 181 of the Constitution provides for the grounds for the removal of County Governors to include gross violation of this Constitution or any other law,<sup>20</sup> where there are serious reasons for believing that the county Governor has committed a crime under national or international law,<sup>21</sup> abuse of office or gross misconduct<sup>22</sup> and or physical or mental incapacity to perform the functions of office of County Governor<sup>23</sup> and that Parliament shall enact legislation providing for the procedure of removal of a County Governor on any of the foregoing grounds.<sup>24</sup> The County Governments Act is the legislation enacted to give effect to the provisions of Article 181 of the Constitution.<sup>25</sup>

The court disagreed with the Governor and in agreeing with the Prosecution, confirmed the conditions earlier attached for the Governor's release on bail including that the Governor was barred from accessing the Samburu County Offices, and the Government of Samburu accounts on the Integrated Financial Management and Information System (IFMIS) Platform. The Governor was aggrieved and thus went to the Superior Court on Revision.

#### 4. Revision

The Governor having been so aggrieved by the Subordinate Court's order barring him from accessing his office approached the High Court to exercise its

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<sup>18</sup> Act No. 17 of 2012.

<sup>19</sup> Provided that the case shall be determined within twenty-four months.(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

<sup>20</sup> Article 181(1) (a) of the Constitution.

<sup>21</sup> Article 181(1) (b) of the Constitution.

<sup>22</sup> Article 181(1) (c) of the Constitution.

<sup>23</sup> Article 181(1) (d) of the Constitution.

<sup>24</sup> Article 181(2) of the Constitution.

<sup>25</sup> The Act provides for the procedure for the Removal of County Governors at section 33.

Supervisory and Revisionary jurisdiction as already mentioned here above. The High Court was therefore simply to satisfy itself as to whether the order barring the Governor from accessing his Samburu County Government Office was proper, correct and or legal.<sup>26</sup> If the answer was in the affirmative, it would dismiss the application. If it found the impugned order improper, incorrect and or illegal, it would invalidate it.

Just like he had argued before the Subordinate Court, the Governor argued that barring him from accessing his office amounted to removing and or suspending him from office. The High Court disagreed for various reasons as discussed below. The question before the Court was so simple and succinct: *“does barring a Governor amount to Removing/ Suspending the Governor from office as argued by the Governor?”*

While the High Court expressly answered the question in the negative and correctly so in my view, the Court went unnecessarily beyond what it was supposed to do in the circumstances in exercising its powers of Revision. The Application for review simply sought the Court’s determination as to whether or not the decision by the Trial Court to attach a condition barring the Governor from accessing his office was correct, legal or proper.

## **5. Grant or Denial of Bail under Article 49(1)(h) of the Constitution**

The question as to the conditions attached to the release of the Governor on bail fell squarely on Article 49(1)(h) of the constitution which is to the effect that every arrested person has the right to be released on bail on reasonable conditions unless there are compelling reasons not to so release him.

While bail is a Constitutional right and every accused person should as a matter of right be released on bail even without asking for it, unless there is some compelling reason not to do so, the conditions attachable to such release of an accused on bail is entirely a discretion of the Plea Court and will therefore vary from one judicial officer to the other and from case to case. As such, as long as the Plea Court has properly applied its mind to the obtaining circumstances of the case, a superior court shall be reluctant to interfere with such exercise of discretion unless the same was unreasonable, and or not judicious/ judicial in the circumstances.

A Superior Court on revision relating to conditions of bail may therefore not interfere with the terms of bail set by the Subordinate Court even where the

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<sup>26</sup> Section 362 of the Criminal Procedure Code, Cap 75 Laws of Kenya.



Superior Court would have granted more favourable conditions to the accused. The test is whether the discretion was exercised judiciously.

## 6. Is the Condition Barring the Governor from Accessing his Office Un/Reasonable?

This should be the central question in the debate. Let's escalate it a little more. Can a Governor suspected of having committed a criminal offence be arrested? The answer is obvious. Only the President is exempt from civil and or criminal proceedings per official immunity while sitting as such.<sup>27</sup> This explains the arrests of Governors Ojaamong,<sup>28</sup> Obado,<sup>29</sup> and Lenolkulal, which is the subject of this discussion, and most recently Waititu.<sup>30</sup>

Can a Governor having been charged with a criminal offence be denied bail and/or remanded? This too is fairly straight forward. Governor Obado<sup>31</sup> faced this fate when his initial application for bail was denied, although it was later granted. Once charged with an offence, Governors, just like any other Kenyan, are subject to the Criminal Law and Procedure. They are accused persons to whom Articles 49 and 50 of the Constitution apply. Just like they are entitled to the right to fair hearing, including to be presumed innocent, their fundamental rights and freedoms can be limited within law in compliance with Article 24<sup>32</sup> of the Constitution.

All accused persons are equal before the law. This is the import of Article 27(1)<sup>33</sup> of the Constitution. Courts will many times set conditions to protect the integrity of a trial by preventing possible interference with witnesses and/or documents. Barring the Governor from accessing the Samburu County Government offices was meant to reduce contact with prospective witnesses many of whom were employees of the County Government of Samburu and therefore his juniors. Such a relationship would definitely be exploited by the Governor, who

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<sup>27</sup> Article 143 of the Constitution.

<sup>28</sup> *Republic vs. Sospeter Odeke Ojaamong' & 8 Others* (Nairobi ACEC No. 23 of 2018).

<sup>29</sup> *Republic vs. Zacharia Okoth Obado* Nairobi High Court Criminal Case No. 46 of 2018; [2018] eKLR.

<sup>30</sup> *Republic vs. Ferdinand Ndung'u Waititu & 12 Others* Nairobi ACEC No. 22 of 2019.

<sup>31</sup> *Ibid* at 21.

<sup>32</sup> Even rights or fundamental freedoms in the Bill of Rights may be limited as permissible by law although only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

<sup>33</sup> "Every person is equal before the law and has the right to equal protection and equal benefit of the law."

like any other person accused of such a serious offence has the propensity to self-preserve at whatever cost, including interference.

As already indicated, the Plea Court held that the Governor had merely been barred from accessing his office but not removed. This position, which I agree with, was confirmed by the High Court. In the later *Waititu* case<sup>34</sup> (addressed here below), Lady Justice Ngenye-Macharia held, *inter alia*:<sup>35</sup>

No doubt, the Constitution confers upon a trial court or this Court the power to set such conditions as it deems reasonable when admitting an accused person to bail. This resonates with Article 49(1)(h) of the Constitution...

A trial court is therefore called upon in granting bond or bail to set reasonable conditions that an accused person must comply with. In this case, the court below issued several conditions, with only one being in contention namely; denying the 1<sup>st</sup> Applicant access to the Kiambu County Government offices. (emphasis mine)...

## **7. Did the Condition Infringe upon Article 181 of the Constitution, section 33 of the County Government Act and/or Section 62(6) of the ACECA?**

While the Governor's access to his office is restricted by being barred from accessing the same or in other cases where Courts have permitted access with supervision — like in the *Swazuri* case<sup>36</sup> — the Governor remains the elected will of the people: with the mandate and powers. Such mandate and powers cannot be taken away by the court thus the two courts' express confirmation that the Governor was not removed from office.

The Governor still exercises his powers — except such as would be incompatible with the conditions set for his being out on bail. While he is still the Governor, he is still an accused person before a Court that is also a custodian of the people power. He is an accused Governor. That comes with repercussions, the presumption of innocence notwithstanding. The presumption of innocence is not to be thrown in anyhow where a failure to take steps to protect the integrity of a trial would render the trial nugatory and therefore go against the need for fair administration of the Criminal justice.

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<sup>34</sup> Anti-Corruption Revision 30 of 2019 Consolidated with Revision Application 29 & 31 of 2019; [2019] eKLR.

<sup>35</sup> At paras 41 & 42.

<sup>36</sup> *Muhammed Abdalla Swazuri & 16 Others vs. Republic* (Nairobi High Court ACEC No. 13 of 2018); [2018] eKLR.

There is the need for the delicate balance: the need to jealously guard against the infringement of the right to be presumed innocent on the one hand, and the need to ensure a fair administration of the criminal justice by protecting the integrity of the trial and to ensure that such trials are not prejudiced.

## **8. *Ferdinand Ndung'u Waititu Babayao & 12 Others vs. Republic*<sup>37</sup>**

Not long after Justice Mumbi Ngugi's decision in the *Lenolkulal* case, the High Court<sup>38</sup> was confronted with a similar application for revision of the bail terms that had been set by the learned trial magistrate<sup>39</sup> and which included a term that Ferdinand Waititu, the first accused person therein, should not access his office until this criminal case is heard and determined.

Lady Justice Ngenye-Macharia was persuaded by the decision of the learned Lady Justice Mumbi Ngugi in the *Lenolkulal* case<sup>40</sup> — which she found instructive in guiding the court to arrive at its decision — and in dismissing Waititu's application for the review of the bail terms that had among other things barred Waititu from accessing his office pending the hearing and determination of the case. Of relevance to this debate is the fact that the learned Lady Justice Ngenye-Macharia found, *inter alia*, that:<sup>41</sup>

The instant case is one where a governor is charged with criminal offences under ACECA alongside other persons. Together with his co-accused a condition was set that they should not set foot into the offices of the County Government of Kiambu whilst the trial is on-going. This court having aligned itself to the supremacy of the Constitution holds that attaching conditions to the grant of bail is not tantamount to a removal of the Governor from office.

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<sup>37</sup> Ibid at 33.

<sup>38</sup> Lady Justice Hedwig I. Ong'udi.

<sup>39</sup> The other terms included that:

2. Equally accused persons who are employees of the county will not access their offices during the pendency of this criminal Case.
3. The rest of the accused are also barred from setting foot in Kiambu County Offices pending full trial.
4. All accused will deposit their travelling documents with the court to minimize the risk of the accused travelling out of this court's jurisdiction without leave of court. For those without passports a confirmation of the fact must be given by the department of immigration.
5. They must not contact witnesses or in any way interfere with exhibit or any evidence."

<sup>40</sup> Especially paragraphs 29, 53, 58 and 59 of the decision in the *Lenolkulal* case.

<sup>41</sup> At para 33.

## 9. Distinguishing the Lenolkulal from Swazuri Cases

In her decision that is the subject of this debate, Lady Justice Mumbi Ngugi, in refusing to revise the orders of the learned trial magistrate, and in refusing to revise the order of the trial court that had barred Lenolkulal from accessing Samburu County Government Offices, correctly distinguished the *Lenolkulal case* from the *Swazuri case*. The learned Lady Justice Mumbi Ngugi was not persuaded by Lady Justice Ong’udi’s decision in the *Swazuri case*.

In the *Swazuri case*, the trial court<sup>42</sup> had similarly issued an order directing Swazuri – a person whose removal from office is provided for under the Constitution<sup>43</sup> and who was similarly exempt from the operation of section 62(1) and (2) of the ACECA by dint of section 62(6) thereof not to access his office. The trial court had directed that *Swazuri* had to obtain prior authorization of the Secretary /CEO of the Ethics and Anti-Corruption Commission (EACC) in order to access his office. Lady Justice Ong’udi, however, set aside the orders of the trial court for two reasons, *inter alia*, that there was a conflict of interest in the operation of the order by the learned trial magistrate because the Secretary/CEO of EACC and the investigating agency (EACC) could be seen to be controlling the affairs at the National Land Commission (NLC) yet both EACC and NLC are independent commissions. Lady Justice Mumbi Ngugi correctly distinguished the *Swazuri case* as follows:<sup>44</sup>

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.

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<sup>42</sup> Hon. Lawrence Mugambi, Chief Magistrate.

<sup>43</sup> The removal of the Commissioners of the National Land Commission to which Swazuri was the Chairperson at the material time is provided for under , Articles 248(2)(b), 250 and 251 of the Constitution; and section 10 of the National Land Commission Act, No. 5 of 2012.

<sup>44</sup> At para 26.

Similarly, Lady Justice Ngenye-Macharia in the *Waititu* case<sup>45</sup> distinguished the *Waititu* and *Lenolkulal* cases on the one hand, and the *Alex Kyalo Mutuku*<sup>46</sup> and *Swazuri* cases, on the other. With regards to the *Alex Kyalo Mutuku* case, the learned Lady Justice Ngenye-Macharia pointed out that it was clear that the court did not consider the constitutionality of sub-section (6) of Section 62 of ACECA but sub sections (1), (2), (3) and (4) as can be glimpsed from paragraphs 62 and 63 of the judgment. Further:<sup>47</sup>

The *Alex Kyalo Mutuku* case was a Petition in which the eight Petitioners had been charged with offences of wilful failure to comply with the law relating to procurement contrary to Section 45(2) (b) as read with Section 48 of ACECA. They were challenging the constitutionality of the decision to suspend them on half pay pending the determination of the trial.

As regards the *Swazuri* Case, Lady Justice Ngenye-Macharia held:<sup>48</sup>

With regards to the Muhammed Abdalla Swazuri case, the court made what is clearly an obiter remark that Section 62(6) of the ACECA did not apply to constitutional officers and, inter alia, that their removal or suspension from office would only occur under the constitutionally mandated terms. She cited Article 251 of the Constitution as applicable in that case. The Court's ratio decidendi was clearly not concerned with the constitutionality of the order made, rather, on the practicality of implementing it. In the view of Hon. Ong'udi, J, there would be a big conflict of interest in the operation of the order of the learned trial magistrate. She justified this by stating that the Secretary/CEO of EACC which was the investigating agency could be seen to be controlling the affairs at the National Land Commission (NLC) yet both EACC and NLC were independent commissions.

## 10. Conclusion

Since the condition barring the Governor from accessing his office does not seek to have the Governor step aside like other Public Officers (as per section 62(1) of the ACECA), nor remove him as is the provision of Article 181 and section 33 of the County Government Act, the condition was/ is reasonable and fits perfectly within Articles 24, 27, 49(1) (h) and 50 of the Constitution and therefore is legal and proper.

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<sup>45</sup> Supra (n 34) 34.

<sup>46</sup> *Alex Kyalo Mutuku & 7 others v Ethics and Anti-Corruption Commission & 2 others* [2016] eKLR.

<sup>47</sup> At para 24.

<sup>48</sup> At para 28.

Lady Justice Mumbi Ngugi stood for the Rule of Law at a time when it may not have been fashionable so to do from among her peers. The fact that her decision has already been relied on and approved by her sister Lady Justice Ngenye-Macharia in the *Waititu* case should be a pointer in the right direction. With such decisions, Chapter 6 of the Constitution shall fully resurrect and give a beacon of hope for the continued constitutional transformation of the democracy that is Kenya.