

# Forgive Them, as They Do Not Know What They Are Saying: A Passing Thought about Chapter Six in Reply to Owiti and Ogutu's Responses

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## **Abstract**

This brief response considers the rejoinders to the paper titled "Ruinous Judicial Activisms: What a Solemn Scrutiny of the Ruling of Justice Mumbi Ngugi in the *Moses Kasaine Lenolkulal* Reveals." It examines the responses it has elicited to identify areas of convergence and divergence both with the paper and with each response. In the end, it suggests that jurists should look at the purport of Chapter Six of Kenya's Constitution, as it now stands, not in one way only as there can be temptations to misuse it.

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## 1. By Way of Introduction

My essay, “Ruinous Judicial Activisms: What a Solemn Scrutiny of the Ruling of Justice Mumbi Ngugi in the Moses Kasaine Lenolkulal Reveals” has attracted two response one by an academic, Ken Ogutu and another by a prosecutor, JV Owiti.<sup>1</sup> The aim of those responses was to upset my claim that Justice Ngugi had veered off and made certain blunders that she could have avoided. Passionate about what they think Chapter Six has brought to Kenya’s constitutional order, the two respondents defended Justice Ngugi and her colleague Justice Ngenye, who had come to her aid. They defended her differently.

In the case of Owiti, he profiled Justice Ngugi’s ruling as enabling Chapter Six of the Constitution to “fully resurrect and give a beacon of hope for the continued constitutional transformation of the democracy that is Kenya” but on a different accord from Ogutu’s. Ogutu has enormous faith that Chapter Six is not a gratuitous portion of the Constitution and it justifies ambitions such as those that Justice Ngugi and her sister were trying to achieve. In this short riposte, I take a survey into the two responses to see if they have addressed the key questions that I raised, but in the end to contend that the success or failure of Chapter Six must not be examined from a consequentialist point of view only, because that Chapter serves other noble purposes.

## 2. Don’t Look at it Like JV Owiti: What Ken Ogutu is actually Saying

Owiti’s article has not pretended to confront and address my article much as it has explained uncontroverted context and external validation to the decision of Justice Ngugi. Its main portions address the history of the decision, some background to it, including the revision proceedings, in passing the issue of grant and denial of bail and the reasonableness of conditions that attach to it as justifying the moves adopted by trial courts and endorsed by the judges. Closer to attacking my argument head-on, Owiti makes an assessment of whether article 181 read with section 33 of the County Governments Act stand violated with imposition of restrictions on access to office. Here his view is as follows:<sup>2</sup>

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<sup>1</sup> I had a chance to review these views in the draft form of the Journal.

<sup>2</sup> See the part on JV Owiti’s paper labelled “Did the condition however infringe upon Article 181 of the Constitution, section 33 of the County Government Act and or Section 62(6) of the ACECA?”

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.

The trajectory that Owiti takes that pursues legitimating discourse is that removal from office and suspensions are not one and the same thing. That is in fact, the version that judges have internalised and the argument is often that the concerned person can continue taking his salary but must not be in his office- the presumed scene of crime. This invention is often resorted to because removal of a person to whom section 62 (6) applies would directly clash with article 182 (d) of the Constitution that contemplates removal upon conviction over an offence that attracts a punishment of over 12 months imprisonment. When judges distinguish between removal and access to office, this response contends, they are merely ascribing formal legitimacy to an initiative that would otherwise conflict with the Constitution. Yet, failure to access office is essentially effective/constructive removal from office and one does not need to believe in it to see it.

The aims for which these measures are pursued, according to Owiti, is to protect the integrity of the trial process; in other words, to prevent interference with witnesses. Yet this is also the point of departure for Ogutu. According to Ogutu, my lead article was justified in admonishing judges from invoking witness protection claims and for him, judges should instead just enforce Chapter Six directly without fear or favour. After claiming that I am oblivious of the impact of corruption, he offers rather compelling views about the effect of Chapter Six generally and how he does not see any conflict between it one part and the ambitions of Justice Ngugi on the other. What he seemed to say- also without saying- is that Chapter Six is a justiciable part of the Constitution and judges must not shy from enforcing it, in fear that it is likely to trigger discomfort or metaphysically constructed legal dilemmas. The principal point is presented as follows through his segment on the uniqueness of public service:<sup>3</sup>

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<sup>3</sup> Ken Ogutu's paper.

Persons accused of any crimes while serving the public should therefore stand suspended from office pending the resolution of the cases they face. It is not about access to evidence or tampering with witnesses, but to ensure those exercising public power have the confidence of the people regarding their character and integrity. When that confidence is questioned as will happen when one is facing trial, it is only fair that they are stopped from exercising their functions until the cases are concluded.

Yet the underlying concern for trial courts in all the cases that have come to them has been protection of witnesses and not the activation or enforcement of Chapter Six provisions. He has explained himself that protection of witnesses is a less compelling reason just as my article had contended. But if Ogutu's position was Justice Ngugi's, then she ought not to have distinguished between the Swazuri Case and the Lenolkulal Case because the concerns and ambitions of the trial courts were similar in both cases: protection of the integrity of the trial process. In the end, Ogutu having noticed the problem with his argument proclaims that "Perhaps Chapter Six should be amended so that anyone accused of corruption stands suspended automatically regardless of other provisions on removal from office for state and public officers." These are certainly not sentiments from someone who believes that Chapter Six, as it presently stands, legitimates effective removal from office.

All in all, the two articles fail to address the main concern, which is why Justice Ngugi failed to restrain herself from commenting on the constitutionality of section 62 (6) of ACECA vis a vis Chapter Six and also fail to convince why distinguishing the case with the Swazuri one was of essence if the effect of Chapter Six is what was on board. The core arguments had been advanced in the lead article was that there was no justification for the judge to deploy Chapter Six of the constitution and endorse disingenuous effective removal of sitting Governors and other elected representatives from office on the basis that their continued stay in office can be prejudicial to the integrity of the trial processes. That claim remains unmoved. It is also what Ken Ogutu has said.

### **3. Never Mind Chapter Six?**

Underlying this debate and the aims of the Judges is whether Chapter Six is of any worth if courts allow persons that are presumed guilty to continue in office when the process of establishment of their innocence or guilt is underway. Owiti, Ogutu and the two Judges think that this should not be the case, unless we are making

a tacit admission that Chapter Six is just but hollow rhetorical propositions. That is why Owiti believes that the actions of Judges Ngugi and Ngenye are breathing life to the Chapter, a view that is certainly shared by Ogutu who thinks that that Chapter is so consequentialist and it cannot permit public officers to remain in office after they have been assessed to be culpable. To think otherwise, these jurists imagine, is to expose the 2010 Constitution to sham constitutionalism.<sup>4</sup> But that would be to judge the Constitution harshly than it deserves.

This riposte does not, for one, doubt that Chapter Six is of practical applicability particularly when that happens in the right manner and over some aspects of public regulation. For instance, articles 74, 77 and 78 play more of consequentialists' role than the other articles in the Chapter. But those are not the ones in the mind of these jurists. What is doubted is to assume that if Chapter Six is not given life to by all means possible, then we are disingenuous as a country about why we came up with a Constitution with that Chapter entrenched therein. What however Ogutu and Owiti do not know, it can be presumed, is that Constitutions play other very important roles one of which is to express values. Chapter Six, should not be written off as sham or sham like, as it should be understood to mean that as a society, Kenya's public servants and leaders should aim at reflecting Chapter Six ideals and the image that officers should cast should be the one that conforms to it. The values that the Chapter expresses are so pervasive such that they generate moral and political justifications for citizens and their elected leaders to ponder upon when considering electing or choosing them or removing them. Armed with this understanding, one can imagine that judges should not struggle to 'breathe' life into the Chapter in fear that the Chapter can be rendered gratuitous. This is particularly important when the means by these initiatives are achieved are disingenuous and when they bear far reaching implications. Failure to acknowledge the expressive function of constitutions is the sin which the two responses have committed.

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<sup>4</sup> For an insight into this role of constitutions, See, Albert, Richard, *The Expressive Function of Constitutional Amendment Rules* (July 20, 2013). 59 *McGill Law Journal* 225 (2013). Available at SSRN: <https://ssrn.com/abstract=2296380>.

