Subversion of the Constitution: Situational Analysis of Disobedience of Court Orders from 2010 to 2024

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Abstract

The constitutional review process in Kenya, which culminated in the 1980s, gained significant momentum in 1991 when the Kenya African National Union (KANU) repealed section 2A of the Constitution to restore multiparty democracy. This restoration marked a pivotal expansion of political space and the promise of democratic governance. However, the State's continued failure to deliver meaningful progress in democracy, governance, and development fuelled a deeper demand for comprehensive constitutional and institutional reforms. The adoption of the new Constitution on 27 August 2010 was a historic milestone, embodying the hopes and aspirations of Kenyans, particularly the Wanjiku's, who represent the ordinary citizen, for a just, accountable, and inclusive governance framework.

Over fifteen years since the promulgation, the Constitution has been tested by persistent challenges, notably systematic disobedience of court orders by State actors and other powerful interests. This disobedience not only undermines the authority of the Judiciary, which has remained resolute in upholding the rule of law and protecting constitutionalism, but also erodes the very foundations of democracy and public trust in state institutions. This paper critically examines the trajectory of constitutional implementation in Kenya, highlighting the dissonance between the optimism at inception and the stark realities encountered during implementation. It interrogates the causes and implications of persistent non-compliance with judicial directives and explores how this pattern compromises the social contract and the rights of the Kenyan people.

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The analysis of the paper underscores the consequences of disobedience of court orders on governance, the rule of law, and citizens' access to justice, emphasizing its chilling effect on democratic consolidation and transformative constitutionalism. It decrees concerted efforts to reinforce judicial authority, institutional reforms to ensure accountability, and civic education to empower Kenyans to demand adherence to constitutional norms. Ultimately, this reflection serves as a clarion call to action to reclaim the promise of the 2010 Constitution and ensure that Wanjiku's optimism transforms into tangible democratic gains and the goal of social justice for all Kenyans.

Keywords: Disobedience of the Court, the Rule of Law , The Promise of the Constitution, accountability.

1. Introduction

The constitutional review process dates back to the 1980s; the agitation for gains can however be traced to 1991, when the ruling Kenya African National Union (KANU) was forced to repeal section (2A) of the former Constitution to restore multiparty democracy. The restoration of political pluralism was a major step in opening political space in 1991. But the State's failure to advance in democracy, governance and development led to a different clamour. To many, the State's failure could not be addressed without comprehensive constitutional and institutional reform.[1]

Kenyans gave birth to the new Constitution on 27 August 2010. We now mark over fifteen years since its promulgation. The Constitution has faced constant subversion through disobedience of court orders. The Judiciary has been firm in promoting the rule of law and safeguarding the Constitution. This paper reflects on the optimism that *Wanjiku* had after the promulgation of the Constitution and where we got it wrong as a country over the more than a decade of implementing the Constitution. The paper specifically looks at the disobedience of court orders after the implementation of the Constitution and the resultant effect of such disobedience on the Kenyan populace.

1 Kenya Human Rights Commission Wanjiku's Journey 'Tracing Kenya's Quest for a New Constitution and Reporting on the 2010 National Referendum' KHRC 2010 https://khrc.or.ke/storage/2023/12/WANJIKUS-JOURNEY-Tracing-Kenyas-Quest-for-a-New-Constitution-Reporting-on-the-2010-Referendum.pdf

2. Deviation from the Concept of Separation of Powers and Rule of Law under the Constitution

The principle of separation of powers is embedded in the Constitution of Kenya, 2010. This is reflected under Chapter 8 of the Constitution, that gives the legislative authority to the Parliament consisting of the National Assembly and the Senate at the National level [article 94(1)]; Chapter 9 that gives executive power to the Executive consisting of the President, Deputy President and the Cabinet [article 130(1)]; and Chapter 10 that gives judicial authority to the Judiciary consisting of the courts and tribunals established by or under the Constitution [article 159(1)]. This constitutional framework envisages distinct functions of the three branches of government, but which are inter-dependent. This framework did not create ranks or superiority of one branch over the others.

The principle of the rule of law is closely associated with the principle of separation of powers within a democratic system of government. It posits that no person is above the law and that everybody is subject to the law irrespective of their position or status in society. Further, it requires governance to be based on established laws and principles rather than the personal whims of the rulers. The principle of the Rule of Law runs through the Constitution from the preamble to the Sixth Schedule. The Constitution imposes an obligation to every person to respect, uphold and defend the Constitution. [Article 3 (1)].

Over the past fifteen years, the relationship between the Judiciary, Parliament, and the Executive has increasingly been marked by disregard for constitutional norms. Both Parliament and the Executive have adopted a posture of superiority over the Judiciary, consistently treating it with disdain. Instances of non-compliance with court orders and outright failure to appear before courts in cases where they are sued reveal a disturbing trend of undermining judicial authority. Such actions are antithetical to the ideals of a democratic and open society. They amount to violations of the Constitution and have profound consequences, including erosion of the rule of law, undermining the authority of the Judiciary and a threat to democratic governance.[2]

The trend of disobedience of court orders signals that legal accountability is optional thereby eroding public trust in state institutions and risking chaos

2 Otiende Omollo, EBS ' An Advisory Opinion on the Disputes Involving various STATE Organs (Executive, Parliament, Judiciary and the Governors) https://www.ombudsman.go.ke/sites/default/files/2023-09/Advisory%20Opinion%20on%20Supremacy%20Wars-%203rd%20March%202014_0.pdf

and instability by fostering a culture where disputes cannot be resolved though lawful means.

The Executive has equally weakened the independent commissions. Key roles in independent commissions remain vacant for extended periods, hampering their ability to fulfill their mandates. The Executive has bypassed constitutional and legislative requirements when making appointments, eroding the credibility of these institutions. Court rulings related to appointments and operations of independent commissions are often disregarded, further weakening their authority. This weakening undermines the restructuring and decentralization of state power envisioned in the Constitution, rolling back gains made in governance since its promulgation.

The persistent undermining of the Judiciary and independent commissions by Parliament and the Executive threatens the foundational principles of the Constitution. Upholding judicial independence and strengthening independent institutions is imperative for preserving democracy, the rule of law, and accountability. As a nation, it is crucial to resist these encroachments and ensure that constitutional provisions are respected in both letter and spirit.

3. Justice in the Wake of Disobedience of Judicial Orders

All the Chief Justices have called out the Executive and Legislature on the constant disobedience of court orders. In the year 2012, Former Chief Justice Dr. Willy Mutunga decrying the state of disobedience of court orders stated that the authority of the court is very important. If orders are not obeyed then the law of the jungle, and not the rule of law will prevail. He expressed that if the Government does not obey court orders it will not achieve Vision 2030.[3] On 13 October 2014 he urged that the "disobedience of court orders is a subversion of the Constitution and the Rule of Law. That's the constant North, not the Handshake".[4]

In the Year 2019 former Chief Justice Honourable David Maraga issued a statement and warned that disobeying a court order was not only a violation of the Constitution but also a dereliction of public duty. He stressed that "courts are temples of justice and the places of refuge for those seeking protection. They must never be despoiled either through acts of physical transgressions or blatant disregard of their pronouncements". The now retired Chief Justice also

3 Nation Newspaper 'Obey court orders or remain poor, CJ says' https://nation.africa/kenya/news/obey-court-orders-or-remain-poor-cj-says-836150

4 https://x.com/WMutunga/status/521604296388149248

noted that the disregard of court orders is an act not only inimical to the rule of law but it is also completely at odds with Kenya's Constitutional outlook. At the instance of former President Uhuru Kenyatta failing to appoint 40 Judges appointed by the Judicial Service Commission, the Chief Justice lamented that the former President was responsible for the operational crisis witnessed in the Judiciary and had continued to hamper administration of justice in the country.

On 4 January 2024 current Chief Justice, Hon. Lady Justice Martha Koome warned that the consistent threats by public officers to defy court orders compromised the rule of law and set the stage for anarchy.[5]

Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. Judicial Authority is vested in the court. Other organs of the state are required to assist and protect the court. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya and another* [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:

> "It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void".

The period between 2010 and 2024 in Kenya has been marked by significant judiciary activity, with the Judiciary often stepping into its role as the guardian of the Constitution. This era has seen tensions between the Judiciary and other arms of government characterized by judicial disobedience. Let us explore instances of such disobedience and the broader implications on the Kenyan people.

5 https://www.the-star.co.ke/news/2024-01-15-jsc-fires-warning-shot-over-threats-to-disobey-court-orders

3.1 Chief Justice's advice to the President on dissolution of Parliament for failure to enact the gender rule

Six petitions were filed seeking the Chief Justice to advise the President to dissolve Parliament under article 261(7) as read with articles 27(3) & (8), 81 (*b*) and 100 of the Constitution. The petitions were based on the ground that, despite four Court orders compelling Parliament to enact the legislation required to implement the two thirds gender rule in accordance with article 27(3) read together with articles 81(*b*) and 100 of the Constitution, Parliament has blatantly failed, refused and/or neglected to do so.

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, the Supreme Court's advisory opinion directed Parliament to enact the requisite legislation by 27 August 2015. Upon failure to enact that legislation, even after extending the period by one year as authorized by article 261(2) & (3), a petition was filed in the High Court-Constitutional Petition number 182 of 2015-*Centre for Rights Education & Awareness (CREAW) v Attorney-General & another* [2015] eKLR-in which the High Court issued an order of *mandamus* directing the Attorney General and the Commission on Implementation of the Constitution to "prepare the relevant Bill(s)for tabling before Parliament for purposes of implementation of articles 27(8) and 81(*b*) of the Constitution as read with article 100 and the Supreme Court Advisory Opinion dated 11 December 2012 in Reference Number 2 of 2012" within forty (40) days from 26 June 2015.

Despite Bills presented to it pursuant to that order, Parliament did not enact the required legislation prompting the filing in the High Court of another Petition-Constitutional Petition No. 371 of 2016, *Centre for Rights Education and Awareness and others v Speaker the National Assembly and others* [2017] eKLR. After hearing that petition, the High Court issued another order of mandamus "directing Parliament and the Honourable Attorney General to take steps to ensure that the required legislation is enacted within a period of sixty (60) days from the date of [that] order and to· report the progress to the Chief Justice." Parliament's appeal against that decision was dismissed by the Court of Appeal in its judgment in *Speaker of the National Assembly v Centre for Rights Education & Awareness and others* [2019] eKLR dated 5 April 2019.

In his advice, the Chief Justice David Maraga held found and held that it was over 9 years now, Parliament has not enacted the legislation required to implement the two-thirds gender rule which, as the Court of Appeal observed in its said judgement, is clear testimony of Parliament's lackadaisical attitude and

conduct in this matter. Consequently, it is my constitutional duty to advise Your Excellency to dissolve Parliament under article 261(7) of the Constitution.

3.2 The Building Bridges Initiative

The Building Bridges Initiative (BBI) was a proposed set of amendments to the Constitution of Kenya initially proposed in October 2019.[6] In the wake of the 2017 general election annulment and subsequent re-run, incumbent President Uhuru Kenyatta mandated the formation of the Presidential Taskforce on Building Bridges to Unity Advisory on 31 May 2018. The Taskforce was assigned to provide constitutional and legislative solutions in 9 broad categories: Lack of National Ethos, Ethnic Antagonism and Competition, Responsibilities and Rights, Shared Prosperity, Divisive Elections, Safety and Security, Devolution, Corruption and Inclusivity.

In October 2019, the Taskforce published their findings, which were incorporated into the Constitutional Amendment Bill, introduced in November 2020. The initiative consisted of 78 amendments, spanning 13 of the Constitution's 18 chapters. After the Bill passed, a Constitutional referendum was scheduled to occur in Kenya in June 2021, per the Kenyan Constitution.

The referendum, which was approved by 30 of the 47 county assemblies, was halted on 13 May 2021, by a five-judge panel of the High Court of Kenya. In its decision, the court stated that the process by which the referendum was formed was unconstitutional and barred the Independent Electoral and Boundaries Commission from proceeding with the referendum.[7] In response to this, the Attorney-General of Kenya and the Kenyan government filed an appeal of the court's decision, asking that the ruling be overturned. On 20 August 2021, a seven-judge panel from Kenya's Court of Appeal upheld the High Court's ruling that the BBI process was unconstitutional.[8]

In September 2021, Kenya's Attorney-General's Office filed a notice of appeal announcing that it will challenge the Court of Appeal's ruling, taking the case to Kenya's Supreme Court. On 31 March 2022, the Supreme Court of Kenya upheld the rulings of the lower courts, ruling that "The Constitution Amendment Bill of 2020 is unconstitutional," because President Kenyatta

6 Building Bridgdes to a United Kenya: from a nation of blood ties to a nation of ideals https://d2s5ggbxczybtf.cloudfront.net/bbireport.pdf

7 *David Ndii and others v The Attorney-General and others.* [2021] eKLR.

8 *Independent Electoral and Boundaries Commission and 4 others v Ndii and 312 others; Ojwang and 4 others* (*Amicus Curiae*) [2021] KECA 363 (KLR).

initiated the amendments through his creation of the Presidential Taskforce on Building Bridges to Unity Advisory, and vocal endorsement of the legislation crafted based on their findings.[9]

3.3 Analysis of Various NG-CDF Decisions

On August 2022 in the case of the *Institute for Social Accountability v The National Assembly,*[10] the Supreme Court struck down the Constituency Development Fund ["CDF"] Act of 2013 primarily on two grounds: first, that in turning representatives (MPs) into administrators, it violated the separation of powers; and secondly, that in setting up an effective "third level" of government it violated the scheme of devolution under the Constitution, and in particular- threatened to usurp the powers and functions of county government.[11]

However, at the time the Supreme Court delivered its judgement in 2022, the CDF Act of 2023 had already been replaced. In its place there was the National Government Constituencies Development Fund ["NG-CDF"] which had been enacted in 2015 to address the flaws in the 2013 Act. It sought to do so through various provisions that – it was argued – achieved an adequate separation between the MP and the CDF Committee (thus taking care of the separation of powers problem), and also limited the CDF's scope to developmental functions that were constitutionally within the national government's domain (thus taking care of the devolution problem). There were further amendments in 2022 and 2023, which had the same purpose.[12]

The question was whether this was enough, in light of constitutional principles, and the Supreme Court's articulation of them in the CDF Case. In a judgment delivered on 20 September 2024 (*Wanjiru Gikonyo v National Assembly*)[13], the High Court of Kenya held that it was not, and struck down the NG-CDF Act.[14]

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9 *Attorney-General and 2 others v Ndii and 79 others; Dixon and 7 others* (Amicus Curiae) [2022] KESC 8 (KLR).

10 *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* [2022] KESC 39 (KLR).

11 Gautam Bhatia, Separation Power- II: The Kenyan High Court's Ng-CDF Decision https://indconlawphil.wordpress.com/2024/09/28/separating-power-ii-the-kenyan-high-courts-ng-cdf-decision/#:~:text=The%20Supreme%20Court%20struck%20down,under%20the%20Constitution%2C%20and%20%E2%80%93%20in

12 *Supra* note 10.

13 *Gikonyo & another v National Assembly of Kenya & 4 others; Council of Governors & 3 others* (Interested Parties) [2024] KEHC 10886 (KLR)

14 *Supra* note 10.

David Ndii, Adams Oloo, Paul Mwangi, Henry Mien, Jimmy Wanjigi, James Orengo & Simba Arati v Gordon Khalangwa Director of Citizens and Immigration Services & Fred Matiang'I Cabinet Secretary Ministry of Interior Coordination of National Government [2018] KEHC 2859 (KLR)

The Court in this case determined that the decision to suspend the petitioners' passports is a violation of the petitioners' rights to hold a passport under article 12, to equal protection of the law under article 27, to free movement under article 39 and to Fair Administrative Action under article 47 of the Constitution.

The Court made an order of *certiorari* quashing the Director of Immigration's decision dated 5 February 2018 to suspend the petitioners' passports, and an order of prohibition restraining the respondents by themselves and/or their agents from in any way interfering with the petitioners' rights to hold a passport and/or freedom of movement otherwise than by strict compliance with the Kenya Citizenship and Immigration Act and Fair Administrative Actions Act.

Kenya National Commission on Human Rights & Legal Advice Centre t/a Kituo Cha Sheria v Attorney General, Ministry of Interior & Coordination of National Government, Joseph Nkaissery & Karanja Kibicho [2017] KEHC 8086 (KLR)

On 6th May 2016 the fourth respondent issued a directive by way of press release entitled "Government Statement on Refugees and Closure of Camps" whose details are, *inter alia* that "owing to national security, hosting of refugees has come to an end and that the Department of Refugee Affairs (DRA) has been disbanded and that the Government is working on mechanism for closure of the two refugee camps (Kakuma and Dadaab) within the shortest time possible.

The Court in issuing a declaration declaring the directive *ultra vires* held that the government's decision violated the principle of non-refoulement and was therefore a breach of international law, international conventions and the country's obligations under the various conventions to which it's a signatory and above our able constitution. The Court also held that the decision violated the provisions of article 47 of the Constitution and the Fair Administration Act; the decision was arbitrary and that the first respondent had no authority to disband the Department of Refugees which is a public body established under statute.

3.4 Simon Kamau and 19 others v Director of Pensions & Teachers Service Commission [2016] KEHC 1490 (KLR)

In 1997, the Kenya National Union of Teachers and the Government entered into an agreement to increase salary for teachers. The increment was to be implemented in five phases, as from 1 July 1997. By the time the respondents were retiring from service, only one phase of the increment had been effected. Consequently, pension-dues were calculated on the basis of their basic salary as it stood after only the first phase of increment. The respondents instituted a suit in the High Court (Nakuru H.C.C.C. No. 65 of 2006), contending that their pension was wrongly calculated. Upon hearing the petition, the High Court (Maraga, J) held that they were entitled to full increment at the time of their retirement. It was held that the applicant should have advised the Pensions Department as to the respondents' correct salaries. The Court ordered that all retired teachers who had been covered by the 1997 agreement, were entitled to full retirement benefits based on the total agreed increment. The applicant was ordered to make payment, or to liaise with the Pensions Department, to ensure payment of those dues.

Aggrieved by that decision, the applicant filed an appeal in Civil Appeal No. 300 of 2009, alleging that the computation and award of pension should not be based on salary that had not been earned. The Court of Appeal rejected the applicant's submissions, and upheld the Judgment of the High Court: to the effect that the respondents had an accrued contractual right to the additional salary. The Court of Appeal equally dismissed an application for certification as a matter of general public importance.

TSC filed an application dated 16 September 2014 to the Supreme Court seeking a stay of the Orders made by the Court of Appeal and extension of time to file an appeal. The Court dismissed their application for stay orders and leave to appeal out of time.

It is worth to note that on the 15th August 2016, parties at the High Court recorded a consent order that would have had the KShs 1.5Billion paid out to the pensioners in installments starting with those who retired in 2007 onwards and teachers entitled to the enhanced pension as ordered by various courts. The Director of Pensions Mr Shem Nyakutu undertook to effect the payments within thirty (30) days and report back to court on the progress on the 16 September 2016. He failed to attend and his counsel could not explain to the court what progress had been made towards the payments. None of the retired teachers had been paid.

In a ruling dated 6 October 2016, the Court summoned the Controller of Budget to shed light and explain why she had been frustrating the retired teacher's payment process. The Court also imposed a fine of KShs 200,000 to be paid by the Director of Pensions, Mr. Shem Nyakutu personally within a period of seven (7) days failing which he shall be arrested and committed to a one (1) month civil jail at Kamiti Maximum Prison, without further recourse to court. The Officer Commanding Police Station (OCS), Central Police Station, Nairobi to enforce the order of arrest, if there is default.

3.5 Peter M. Kariuki v Attorney-General (Petition 403 of 2006)

The petitioner, a former Commander of the Kenya Air Force, alleged that he had suffered inhumane treatment amounting to torture and breach of his fundamental rights following his arrest, imprisonment and conviction after an attempted coup in 1982. Following his release, the petitioner instituted proceedings for declarations and reliefs for the purpose of which he applied for employment records and salary details including those of comparable officers.

The Court reasoned that the petitioner had a constitutional right to the information requested under section 35 of the Constitution and that it was "completely unacceptable for the Attorney-General" to insinuate that the records requested could not be disclosed. The Court ruled that the Defense Forces are subject to the Constitution, pursuant to articles 3 and 10. Article 10 stipulates transparency and accountability as among the national values binding all state organs. The Court further ruled that article 35, on the right to information, grants Mr Kariuki the right of access to the information requested from the Department of Defense.[15] In the High Court's final determination it awarded a global award of KShs 7,000,000 as compensation by way of general damages.

On Appeal, the Court of Appeal (Patrick Kiage, Kathurima M'Inoti and Mohammed Warsame, JJA) reversed the High Court judgment, quashed General Kariuki's conviction and the four-year jail term meted by the court martial. The Court awarded General Kariuki KShs 22.9 million as salary arrears and KShs 15 million as general damages for violation of his constitutional rights, in particular, the violation of his right to a fair trial by an independent and impartial court. It also directed the appellant's ranks, benefits, honours and decorations be restored.[16]

15 *Peter M. Kariuki v Attorney General* [2011] KEHC 1564 (KLR).

16 *Peter M. Kariuki v Attorney General* [2014] KECA 713 (KLR).

General Kariuki's quest to get the benefits of his well-earned judgement has been elusive to date.[17]

3.6 Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others[18]

In the first removal of Embu county governor, the disobedience of lawful court orders by both the County Assembly and Senate was evident in a clear abuse of their powers. The Embu County Assembly defied a court order by Githua, J that restrained it from holding removal proceedings without serving the governor and allowing him to be heard. In the same removal proceedings, the Senate also disobeyed the court order by Majanja, J, which restrained the Speaker of the Senate from introducing and debating the removal of Wambora based on the resolution that was made by the Embu County Assembly. Despite the court orders, both the Embu County Assembly and the Senate went on with the removal proceedings and passed resolutions to remove the governor from office. Lawful court orders are not suggestions for the parties to interpret or choose whether to obey or not. The High Court in Wambora 1 was persuaded by the reasoning of English decisions and held that actions done in disobedience of lawful court orders are null and void *ab initio* and a nullity in law. The effect of this finding was that the resolutions passed by both the Embu County Assembly and the Senate to remove the governor from office were invalid.[19]

Even though the Supreme Court later annulled the conservatory orders issued on 23 January 2014 in *Justus Kariuki Mate and another v Martin Nyaga Wambora and another*[20] on 15 December 2017, such annulment did not overturn the High Court order in Wambora 1 that quashed the resolutions of impeachment from the office of the governor by the Embu County Assembly and the Senate. The appellants in *Justus Kariuki Mate* wanted the conservatory orders to be annulled after being convicted of contempt of court by both the High Court and the Court of Appeal. In annulling the conservatory orders, the Supreme Court made a finding that the Embu County Assembly was operating

17 https://nation.africa/kenya/news/ex-air-force-chief-s-31-year-battle-for-his-honour-stolen-in-1982-coup-bid-908456

18 *Martin Nyaga Wambora, County Government of Embu, Council of Governors, International Legal Consultancy Group & Margaret Lorna Kariuki v Speaker of the Senate, Clerk of the Senate, Attroney General, Deputy Governor Embu County, Speaker of the County Assembly of Embu, County Assembly of Embu & Commission for the Implementation of the Constitution* [2014] KEHC 5604 (KLR).

19 Leonard Muye Mwakuni 'Kenya's Gubernatorial Impeachments: Superior Court as Guardians against abuse of power Kabarak Journal of Law and Ethics Volume 5, 2020.

20 *Mate & another v Wambora & another* [2017] KESC 1 (KLR).

within its constitutional scheme of devolution and separation of powers that was 'quite legitimately outside the path of the ordinary motions of the judicial arm of State' and that 'there would have been hardly any scope for the deployment of the Court's conservatory orders more particularly without first hearing the petitioners'. The High Court invalidated the resolutions of impeachment from the office of the governor because both the Embu County Assembly and Senate carried out removal proceedings in violation of lawful court orders.[21]

3.7 Judicial Service Commission v Speaker of The National Assembly & 8 others[22]

The question was whether the president was right to set up a tribunal to remove some members of the JSC as recommended by the National Assembly. The president's actions were based on actions undertaken by the National Assembly resulting in a petition to him under article 251(3) of the Constitution which empowers the president to constitute a tribunal for removal of a member of a constitutional commission upon the recommendation of the National Assembly. The High Court held that the removal process was invalid since it was as a result of a process in Parliament that took place in violation of an interim court order, hence making the president's acts based on an invalid act. The High Court ruled that the president is required to establish a tribunal for removal of a commissioner of an independent commission if requested by the National Assembly, but in discharging this role the president must act in accordance with the dictates of the Constitution. The High Court emphasized the fact that the JSC was a creature of the Constitution, an independent commission subject only to the Constitution and the law and, as provided under article 249(2) of the Constitution, was not subject to direction or control by any person or authority. The Court proceeded to quash the appointment of members of the tribunal established by the president.[23]

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21 *Supra* 9.

22 *Judicial Service Commission v Speaker of the National Assembly & 4 others; Commission on Administrative Justice (Amicus Curiae); Law Society of Kenya (Interested Party)* (Petition 518 of 2013) [2014] KEHC 7493 (KLR) (Constitutional and Human Rights) (15 April 2014) (Judgment).

23 Walter Khobe 'The Relationship Between the Judiciary and the Political Branches, 12 Judicial–Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' Stellenbosch Handbooks In African Oxford Constitutions of the World [OCW] Constitutional Law Published 03 March 2016 https://oxcon.ouplaw.com/display/10.1093/law/9780198759799.001.0001/law-9780198759799-chapter-13#:~:text=In%20Judicial%20Service%20Commission%20v,recommended%20by%20the%20National%20Assembly.

3.8 Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General[24]

The High Court emphasized the fact that the president ought to receive recommendations from the JSC before he makes any nomination for the position of the Chief Justice for such a nomination to comply with the (p. 293) constitutional requirements. The president withdrew his nomination of Justice Alnasir Visram as the Chief Justice after the High Court found that he had ignored the prescribed criteria for appointments to judicial office.

3.9 Independent Policing Oversight Authority and another v Attorney General & 660 others.[25]

The issue before the Court involved allegations of unfairness, irregularities, and corruption in the recruitment process for appointments to the National Police Service. There were allegations that the selection criteria were not known to the public and that if there were any guidelines or regulations governing the process, such regulations were made without public participation. The High Court held that the National Police Service Commission was required to promote the values and principles of transparency, accountability, and public participation whenever it discharged its functions. It found that the National Police Service Commission had not made recruitment guidelines public in violation of the principle of public participation in the enactment of legislation, regulations, and guidelines which is an important aspect of good governance recognized by the constitution of Kenya, 2010. The Court also found that the National Police Service Commission had acted *ultra vires* its mandate by delegating its powers of recruitment to sub-county recruitment committees. This led the Court to quash the outcome of the recruitment process of 14 July 2014 and make orders for the recruitment to be done afresh.

Subsequent to this finding by the High Court, and when an appeal lodged by the government was pending before the Court of Appeal, Kenya suffered a terrorist attack that resulted in the killing of 147 students of Garrissa University College. The president in his address to the nation following the terrorist attack decried the small number of police officers available to act at the time of the attack, and ordered the trainees whose recruitment had been nullified by the High Court to report to the Police Training College. This order by the

24 *Centre for Rights Education & Awareness (CREAW) v Attorney-General and another* [2015] eKLR.

25 *Independent Policing Oversight Authority & another v Attorney-General & 660 others* [2014] eKLR.

president generated a public outcry and the president was forced to withdraw the directive.[26]

Subsequently, the Court of Appeal upheld the decision of the High Court cancelling the recruitment process.[27]

3.10 Benson Riitho Mureithi v J.W. Wakhungu & 2 Others.[28]

The High Court held that it has the jurisdiction to inquire into the issue of propriety of appointment to public office. Further, the Court held that any state officer making an appointment has the responsibility to put in place a mechanism that would allow public participation and consideration of the suitability of the integrity of potential appointees as demanded by the Constitution. Since the Cabinet Secretary for Environment, Water and Natural Resources in this instance did not involve the public when making appointments and did not consider the integrity of the appointee, the High Court nullified the appointment of the interested party as the Chairman of the Athi Water Services Board.[29]

3.11 David Kariuki Muigua v Attorney General & another[30]

The High Court nullified the appointment by the Minister for Industrialization of the Chairman of the Standards Tribunal on the grounds that there was no public participation in the appointment process. The Court observed that appointment to public office must involve a competitive process that enables public participation and upholds the principles of transparency and accountability in governance.

3.12 Abdi Yusuf v Attorney General and 2 others[31]

The president was barred by the High Court from resubmitting to the National Assembly for fresh approval, nominees for appointment as commissioners of

26 *Supra* 13 Walter Khobe, 'The Relationship Between the Judiciary and the Political Branches, 12 Judicial–Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' Stellenbosch Handbooks In African Oxford Constitutions of the World [OCW] Constitutional Law Published 03 March 2016.

27 *Attorney-General and others v Independent Policing Oversight Authority and another* [2015] eKLR.

28 *Benson Riitho Mureithi (Suing on His Behalf and on Behalf of the General Public v J.W. Wakhungu Cabinet Secretary Ministry of Environment, Water and Natural Resources & Attorney General* [2014] KEHC 7650 (KLR).

29 *Supra* 13.

30 *David Kariuki Muigua v Attorney-General and another* [2012] KEHC 3516 (KLR).

31 *Abdi Sitar Yusuf V Attorney General and others* [2013] KEHC 6055 (KLR).

the Teachers Service Commission on the basis that these nominees had earlier been rejected by the National Assembly. The president had resubmitted a list of nominees that had previously been rejected by the National Assembly on grounds of lack of regional balance and meritocracy. In disregard of the Teachers Service Act, the statute establishing the Teachers Service Commission (that required the president to submit new nominees), the president resubmitted the rejected list of nominees. The High Court held that the principles of rule of law and legality required the president to make appointments in accordance with statutory enactments. These decisions undoubtedly stand as examples of the Judiciary circumventing attempts by the president to abuse his power of appointment.

3.13 Amoni Thomas Amfry & another v Minister for Lands & 8 others[32]

The issue for consideration was whether the Court could issue an order directed at the president to gazette the Chairperson and members of the National Land Commission. The selection panel had shortlisted candidates, conducted interviews, and forwarded names to the president, who in consultation with the prime minister, nominated the Chairperson and members of the Commission. The National Assembly duly approved the names of persons so selected and forwarded them to the president to be gazetted. Subsequently, the president failed to gazette the appointments within seven days as provided by law. The issue before the Court was whether it could direct the president to comply with constitutional and statutory provisions. The High Court held that compliance with the provisions of the Constitution and statute goes to the heart of the rule of law. Moreover, the Court observed that the rule of law is a recognized national value to which the Court must give effect. The High Court granted relief directing the president to comply with the law and officially appoint the Chairperson and members of the National Land Commission within seven days from the date of judgment. Subsequently, the president complied with the directive of the High Court and gazetted the Chairperson and members of the National Land Commission.

32 *Amoni Thomas Amfry & another v Minister for Lands & another & Mohamed Swazuri & 8 others* [2013] KEHC 6080 (KLR).

3.14 Attorney General & 6 others v Mohamed Balala & 11 others[33]

The Court of Appeal confirmed the High Court's position that the requirement for presidential consent for persons wishing to acquire or dispose of first and second row beach plots in the coastal region was unconstitutional. The petitioners argued that there existed no legal backing for this requirement and that the requirement was discriminatory since it did not apply to the whole country but only to the coastal region. They also sought an order declaring that requirement of consent was illegal and discriminatory. In granting the orders sought, the Court noted that the requirement of presidential consent for the disposition or acquisition of first and second row beach plots was a contravention of the constitutional values of the rule of law, equity, non-discrimination, and transparency. The Court also noted that the requirement for presidential consent was an anachronistic provision, which has no place in present-day Kenya due to its discriminatory nature.

3.15 Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others[34]

On 2 February 2018 Miguna Miguna, an advocate and political activist was arrested for undisclosed reasons at his house in Runda, Nairobi. Orders were made for his production to the High Court (Kimaru J) and subsequently by the Kajiado Magistrate's Court where he was partly presented. The police defied the orders issued and would remove Mr Miguna from the Country following revocation of his citizenship by the then Cabinet Secretary for the Ministry of Interior and Co-ordination of National Government, Dr. Fred Matiangi. The Court summoned the Inspector General of Police, the Director, Criminal Investigation and the Director of Immigration but they failed to appear in Court. The Court, however, nullified the Cabinet Secretary's Orders in respect to Miguna's citizenship. Upon the Court directing the presentation of Miguna's passport, the same was presented in Court though the Director of Immigration's advocates albeit perforated.

Upon filing the instant petition Miguna's advocates sought the reinstatement of Dr. Miguna's passport for facilitation of his re-entry to Kenya. The Court directed the Director of Immigration to issue Dr. Miguna travel documents to enable him re-enter and to remain in Kenya pending the hearing of the

33 *Attorney General and others v Mohamed Balala and 11 others* [2014] KECA 879 (KLR).

34 *Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others* [2018] eKLR.

petition. Despite Miguna's return on 26 March 2018 and upon production of his national identity card, the immigration department denied him entry to Kenya. The High Court (Aburili, J) would issue a subsequent order for his production to Court on 28 March 2018. Dr. Miguna's advocates were assaulted while effecting service of this Order. The Court (Odunga, J) thereafter convicted the Cabinet Secretary, Ministry of Interior, Director of immigration and the Inspector General of Police for contempt of Court and were to appear the next day for sentencing. The three were ordered not to remove Miguna from the jurisdiction of the court and release him unconditionally forthwith to appear in court the following day, 29 March 2018 at 1000 hrs.

The Cabinet Secretary-Ministry of Interior and Coordination of National Government, Director of Immigration and the Inspector General of Police failed to appear in court for sentencing at 1000 hrs as ordered by Justice Odunga. The judge declared that the three had violated article 10 of the Constitution by failing to adhere to the rule of law by brazenly disobeying orders of the Court. They were each fined KShs 200,000 to be deducted from their next month's salary.

3.16 The Arrest warrants against then Principal Secretary, Interior Ministry, Dr. Karanja Kibicho

In the years 2016 to 2017 three arrest warrants were simultaneously issued against Dr. Karanja Kibicho, the then Principal Secretary in the Ministry of Internal Security. The first related to his failure to pay Micheal Danson Mahugu, a Nyayo Torture victim awarded Kenya Shillings Two Million as damages for violations of his constitutional rights.[35] Dr. Kibicho failed to appear in Court to show cause why he should not be punished for failing to comply with a court order to pay Mr. Mahugu a sum of KShs. 2.6 million. The Court sentenced Dr. Kibicho to a three-months' jail term. Justice George Odunga while passing the sentence had ordered Inspector General of Police Joseph Boinnet to arrest Kibicho and hand him over to Industrial Area Prison to start serving the sentence. Despite the order, Dr. Kibicho was not arrested.

The second arrest warrant related to failure to pay an accident victim, Patrick Mbithi. Mr. Mbithi was knocked down by a Kenya Defence forces van in the year 2007 and was three years later awarded KShs 122,536 with interest.

35 *Michael Danson Mahugu v Attorney-General* [2012] KEHC 2913 (KLR).

Dr. Francis Gikonyo equally ordered Dr. Kibicho's arrest for defying an order not to raid a liquor store during a crackdown on illicit alcohol dealers. In the case, Hakim Commercial Agencies filed a suit in Chuka Law Courts seeking an injunction order restraining the PS and his officers from interfering with the company's business of manufacturing alcoholic drinks. The Court issued a stay order lasting 60 days and extended, the same for a further 45 days. However, on the same day the order was extended the PS led a team of administrators and police who confiscated the alcoholic drinks from the company and arrested the proprietor. In the Court's final determination dated 9 February 2023, the Court found that the decision by the Ministry of Interior and Coordination of National Government was devoid of merit.[36]

3.17 Republic v Permanent Secretary in Charge of Internal Security – Office of the President & Attorney General ex-parte Joshua Mutua Paul [2013] KEHC 86 (KLR)

In this case, the applicant had been awarded a sum of KShs 250,000 as general damages on account of false imprisonment. He commenced proceedings in which he sought orders compelling the Permanent Secretary in charge of Internal Security, Office of the president and/or the Hon. A.G. to honour and satisfy the judgment. The Court directed the Principal Secretary, Ministry of Interior and Coordination of National Government one Dr. Monica Kathina Juma and/or any other person holding such position in the said Ministry to appear before this Court to show cause why he/she should not be committed for contempt of Court.

3.18 The President's Failure to Appoint Judges

On 22 July 2019 the Judicial Service Commission (JSC) recommended 11 persons for appointment as Judges of the Court of Appeal and further on 13th August 2019 the JSC recommended 30 persons for appointment as judges of the Environment and Land Court, to the then President of the Republic of Kenya, H.E. Rtd President Uhuru Muigai Kenyattas. The President did not make the appointments, leading to the filing of Nairobi High Court Petition No. 369 of 2019, *Adrian Kamotho Njenga v Attorney-General and 3 others* (Interested Parties) [2020] eKLR, in which the court, on 6 February 2020, made the following declaratory orders: that the President was constitutionally

36 *Albert Gitari Luka t/a Hakim Commercial Agencies v Chairperson, Tharaka Nithi Alcoholic Drinks Control Board & 2 others* [2023] KEHC 872 (KLR).

bound by the recommendation made by the first interested party, in accordance with article 166(1), as read with article 172(1)(*a*), of the Constitution of Kenya, on the persons to be appointed as Judges; that the failure by the President to appoint the persons recommended violated the Constitution and the Judicial Service Act, No. 1 of 2011; and that the continued delay to appoint the persons recommended was a violation of articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution.

The President did not act on the orders made on 6 February 2020, leading to the filing of Nairobi High Court Constitutional Petition No. 206 of 2020 *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission and 3 others* (Interested parties) on 22 June 2020. On 3 June 2021, the President gazetted 34 of the nominees for appointment and left out 6. Thereafter, judgment, in Nairobi High Court Constitutional Petition No. 206 of 2020, was delivered on 21 October 2021, and the following orders were made: a *Mandamus* order directing the President to appoint the remaining 6 nominees as Judges to their respective courts, within the next 14 days; upon the lapse of the 14 days, without the President having made the appointments, a presumption to arise that his power to make the appointments had expired and his office become functus, so far as the appointments were concerned, and the 6 nominees to be deemed duly appointed, effective from the date of default; and subsequent to their being deemed appointed, the first respondent herein, in conjunction with the first interested party, be at liberty to take all necessary steps to swear in the 6 Judges. Unfortunately, one of the nominees had at the time passed on.

The judges' appointment was only gazetted on 13 September 2022 and they were sworn in on 14 August 2022, after three years' waiting. They subsequently filed *Muchelule and others v Attorney-General; Judicial Service Commission (Interested Party)* [2024] KEHC 12116 (KLR) asserting that the refusal to appoint them, caused them public humiliation because of insinuations from the President and other public officials taking a cue from the President, that they were collectively unfit to hold office of judge of the respective courts. This injured their dignity. They also suffered great humiliation and anxiety, physical and mental anguish given the uncertainty over their appointment.

The Court held in their favour and awarded them damages of KShs 15,000,000 for violation of their constitutional rights and fundamental freedoms and exemplary damages of KShs 5,000,000 for abuse of state power resulting in the violation of the petitioners' constitutional rights and fundamental freedoms.

4. Current Status on Disobedience of Court Orders: The case of Abductions

After the Gen-Z protests that was witnessed in June 2024 heralding a new revolution agitating for the respect of the rule of law, the country has witnessed a wave of abductions carried out by the Executive and/or 'mercenaries' hired by members of the Executive to conceal the real identity of the perpetrators. The Judiciary has been steadfast in calling out the Executive in the wave of abductions witnessed in the country.

In *Law Society of Kenya and others v Inspector General of Police and others* (petition E436 of 2024) [2024] KEHC 10995 (KLR) (20 September 2024) (Ruling), the court summoned the then acting Inspector General of Police Gilbert Masengeli. The acting Inspector General of Police failed to appear in court on numerous occasions i.e. on 26 August 2024, 29 August 2024, 3 September 2024, 5 September 2024 and 9 September 2024, including the date of his sentence on 13 September 2024. On 13 September 2024, the Court sentenced Mr Masengeli to six (6) months imprisonment but suspended the same for seven (7) days to give him an opportunity to purge the contempt by complying as directed. In the seven-day period the three petitioners who had been abducted were released i.e. Bob Micheni Njagi, Jamil Longton and Salam Longton

Mr Masengeli appeared in Court on 20 September 2024 to purge his contempt. While the Court noted that the petitioners had been released it reiterated that the Judiciary should be steadfast in upholding its independence.

I cannot end this deliberation without speaking on the need of all to respect and uphold the independence of the Judiciary. It is the Judiciary that guarantees adherence to the rule of law. Every Kenyan who means well for this country must fight for the independence of the Judiciary so that Judges can make decisions based purely on law and the facts without any fear of reprisals, interference, pressure or threats, whether direct or indirect. The cornerstone of our democracy is the rule of law. It should be known to all that the independence of the Judiciary is not for the benefit of Judges *per se* but for the benefit of the public at large.

Independence gives the Judge the discretion to make fair and even-handed decisions that uphold the rule of law. Through their decisions, Judges hold other organs of government to account in accordance with the Constitution and the law yet the State has a primary duty of ensuring Judicial Independence is protected as that is a constitutional dictate.

Vide Ruling dated 20 September 2024, the Court pardoned Mr Masengeli after finding that he was remorseful, noting that the sentence serves the objective of restoring the dignity and authority of the court.

In another case before Justice Chacha Mwita the Law Society of Kenya seeks the release of Justus Mutumwa, Martin Mwau and Karani Muema. The Court has since directed that the Inspector General of Police & the Director of Criminal Investigations to release the three petitioners immediately and unconditionally or bring their bodies before the court. The matter is slated for 17th January wherein the IG & DCI chiefs will be cited for contempt.

In yet another case the Court ordered the Inspector General of Police Douglas Kanja to personally produce six individuals i.e. Peter Muteti, Bernard Kavuli, Billy Mwangi, Gideon Kibet, Rony Kiplangat, and Steve Kavingo. Following the Court's directions, the six petitioners were released.[37] The case is however set for Contempt proceedings on 27 January 2024.

5. Conclusion

The Constitution has vastly reorganised and fragmented governmental power and entrenched limits on its exercise. It has empowered the citizenry to make unprecedented demands on their rulers, as demonstrated in the recent Gen Z protests. Once treated as tokenistic exercises, constitutional requirements for public participation in policymaking have been given force by a reinvigorated Judiciary backed by an engaged public. It is a far throw from the dismissive declaration by 1990s dictator, Daniel Arap Moi that "Wanjiku" had little interest in the Constitution. The recent Gen Z protests, which, for the first time in the country's history, forced the president to abandon the Finance Act – the legal authorisation to raise new taxes – after he had forced it through Parliament, demonstrated the potential impact of Wanjiku's unwelcome gatecrashing.[38]

The Constitution was not just made by and for Wanjiku; it is informed by her lived experiences, the experiences of all Kenyans. Despite the successful struggle for a voice in the management of her affairs, Wanjiku is yet to fully realize her reinvigorated status and role in governance affairs. Although major milestones have been attained in actualizing the promises of the Constitution, much more remains to be done, and at the centre is the cardinal role of Wanjiku.

37 https://www.bbc.com/news/articles/ced8q1yxggqo

38 Patrick Gathara 'How Kenya's Constitution has transformed the Country' https://www.thenewhumanitarian.org/opinion/2024/08/28/how-kenya-constitution-has-transformed-country

The current status in the country reflects continued impunity, re-emergence of the disobedience of court orders, lack of transparency and accountability and the weakening of Parliament and independent institutions. The wave of disobedience of court orders permeates to other sectors of the Executive with Ministries failing to comply with return to work formulas entered into by doctors, teachers, nurses and clinical officers and thereby hindering the provisions of services to the general public. The resultant effect of this is the stagnation of the economy and the well-being of the citizens.