NUMBER 126, JULY 2026

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Platform Publishers Kenya Limited
The Platform for Law, Justice and Society is published monthly by Platform Publishers Kenya Ltd
Fatima Court, 2nd Floor Suite 148
Junction at Marcus Garvey/Argwings Kodhek Road, Opposite Studio House
Kilimani, P.O.Box 53234-00200
Nairobi, Kenya

All correspondence intended for publication should be addressed to:
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EDITORIAL

The Court of Appeal's decision in the NSSF litigation: A critical analysis of judicial error and accountability in Kenya

There are few institutional failures more damaging to the judiciary than delivering the correct legal analysis in response to the wrong dispute. Courts are expected to resolve difficult questions of law; they are not expected to determine applications that were never before them. Yet this is precisely what unfolded in the National Social Security Fund (NSSF) litigation, exposing an extraordinary breakdown in judicial case management and raising difficult questions about institutional accountability within Kenya's appellate system.

On 29 May 2026, the Court of Appeal delivered what appeared to be a landmark ruling in *National Social Security Fund Board of Trustees v Kenya Tea Growers' Association & 14 Others*. The judgment dismissed NSSF's application for a stay of the Employment and Labour Relations Court's decision and immediately sent shockwaves through Kenya's pension sector. Employers, workers, trade unions and financial markets interpreted the ruling as one that fundamentally altered the legal framework governing statutory pension contributions.

The apparent legal certainty proved illusory.

Shortly after the decision, counsel for NSSF drew the Court's attention to a startling reality. The application determined by the Court had ceased to exist as a live controversy years earlier. Instead of ruling on the joinder application argued before the same bench on 23 January 2025, the Court had inadvertently determined an interlocutory stay application filed in October 2022, an application that had already been overtaken by subsequent proceedings before both the Court of Appeal and the Supreme Court.

In effect, the Court delivered a carefully reasoned decision in relation to a dispute that was no longer before it.

To its credit, the Court ultimately acknowledged the mistake and, on 26 June 2026, vacated its earlier ruling in the interests of justice. Judicial candour deserves recognition, particularly where courts openly acknowledge their own errors. Yet correcting the mistake does not exhaust the issues raised by this episode. Rather, it invites a deeper inquiry into how such a fundamental administrative failure occurred and what it reveals about the institutional safeguards designed to protect the integrity of judicial decision-making.

Understanding the significance of this episode requires appreciating the history of the litigation itself. Since its enactment, the NSSF Act, 2013 has generated prolonged constitutional litigation concerning enhanced statutory pension contributions. The Employment and Labour Relations Court invalidated the legislation in 2022, citing multiple constitutional deficiencies. The Court of Appeal later overturned that decision, only for the Supreme Court to restore the Labour Court's jurisdiction and remit the appeal for rehearing. Against this already complex procedural background, numerous interlocutory applications accumulated before the appellate court, including NSSF's application for stay and a subsequent application by the Kenya Export Floriculture, Horticulture and Allied Workers Union seeking joinder as an interested party.

It was the latter application that the parties argued in January 2025. It was the former application that the Court mistakenly determined sixteen months later.

The consequences extended far beyond procedural embarrassment. By December 2025, NSSF managed assets exceeding KSh. 623 billion and had become a significant institutional investor in national infrastructure projects. Any judicial pronouncement affecting its contribution regime inevitably carried implications for employers, employees, retirement savings, capital markets and public investment. Unsurprisingly, the erroneous ruling generated widespread confusion. Employers contemplated revising payroll deductions, trade unions issued competing public statements, and NSSF itself undertook an extensive public information campaign to reassure contributors that existing contribution rates remained unchanged.

This confusion was not the product of legal uncertainty. It resulted from a judicial determination made in respect of a matter that had already ceased to exist.

From a jurisprudential perspective, the episode illustrates the limits of traditional procedural doctrines. Ordinarily, the doctrine of functus officio prevents courts from revisiting decisions once delivered, subject only to narrowly defined exceptions such as clerical mistakes or accidental slips. The present error, however, cannot plausibly be characterised as a simple clerical omission. The Court neither misstated a fact nor inadvertently omitted a paragraph. Rather, it adjudicated an entirely different application from the one argued before it.

Such an error strikes at the very identity of the judicial process. The issue is not whether the Court reached the correct legal conclusion but whether it exercised its adjudicative authority over the correct dispute. Where no live application exists, there is, in substance, nothing capable of judicial determination. The Court's subsequent decision to vacate its ruling was therefore less an exercise of review than a necessary restoration of procedural legitimacy.

The episode also exposes broader institutional concerns. According to correspondence placed before the Court, the hearing notes and audio recordings would have immediately revealed the true application argued before the bench. Their apparent absence from the Court's deliberative process suggests deficiencies in file preparation, judicial briefing, and internal case-management procedures. In an appellate court handling numerous complex constitutional disputes, meticulous attention to the procedural record is not merely administrative efficiency; it is an indispensable safeguard against judicial error.

Perhaps the most troubling consequence lies in public confidence. Courts derive their institutional authority not from force but from trust. That trust depends upon the assumption that judicial decisions emerge from careful consideration of the matters actually presented for adjudication. When a court inadvertently decides a dispute that no longer exists, confidence in the reliability of judicial administration inevitably suffers.

The responsibility for preventing similar occurrences cannot rest with judges alone. Advocates handling procedurally complex litigation should assist the bench by clearly identifying the specific application under determination. Court registries must ensure precise cause-listing and accurate file management. More fundamentally, the judiciary should strengthen its internal case-management systems to ensure that judges are equipped with complete procedural histories before judgments are prepared and delivered.

Errors are inevitable within any human institution. What distinguishes resilient constitutional democracies is not the absence of mistakes but the willingness to confront them openly and implement reforms that minimise their recurrence. The Court of Appeal deserves credit for acknowledging and correcting its mistake. Yet genuine institutional accountability demands more than judicial candour after the event. It requires structural reforms capable of preventing similar failures in the future.

The NSSF litigation remains unresolved. The joinder application still awaits determination, while the substantive appeal concerning the constitutionality of the NSSF Act continues before the Court. When those matters are eventually decided, the Court of Appeal will have an opportunity to demonstrate that the events of 29 May 2026 were an isolated lapse rather than evidence of a deeper institutional weakness. For Kenya's pension sector, and for the credibility of the administration of justice itself, nothing less will suffice.

In addition, the incident serves as a crucial constitutional reminder that procedural integrity is not merely a technical convenience, but rather a fundamental element of substantive justice. The courts are not merely responsible for enunciating legal principles; they also adjudicate specific disputes between identifiable parties. Regardless of the legality of the reasoning employed, the legitimacy of the judicial function is called into question when the connection between the dispute argued and the decision delivered is severed.

This episode should be interpreted as a cautionary tale regarding the mounting demands that contemporary appellate courts are expected to meet, rather than as a singular administrative error. In order to ensure the proper exercise of judicial power, it is essential to implement effective judicial administration, precise case management, and rigorous procedural verification as litigation becomes increasingly intricate and multilayered. Institutional excellence necessitates administrative precision in addition to judicial independence.

In conclusion, the NSSF litigation teaches us that the legitimacy of any court is contingent upon institutional discipline as much as on legal reasoning, rather than the fact that judges are fallible—an observation that is as ancient as the judicial office itself. In addition to achieving the appropriate legal outcomes, a judiciary establishes public trust by irrefutably demonstrating that each decision is made on the appropriate dispute, at the appropriate moment, and based on the correct record. It was a significant initial step for the Court of Appeal to recognise and reverse its erroneous ruling. Ensuring that such an error does not recur is, however, the more enduring challenge. Judicial accountability is assessed not only by the courage to rectify errors, but also by the dedication to the development of institutional systems that inhibit them. If this episode serves as the impetus for enhanced case-management safeguards and increased procedural vigilance, it will not only be remembered as an unfortunate judicial error, but also as a pivotal moment in the enhancement of the integrity of Kenya's appellate justice system.

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COVER STORY

The ghosts have found a resting place: Dugdale, bad law and remedial evasion in the Gachagua impeachment judgment

By Kennedy Ogeto, SC

Former Deputy President Rigathi Gachagua

Abstract

The High Court's ruling in ***Gachagua & 57 others v Speaker, National Assembly & 35 others*** *marks a seminal moment in Kenyan constitutional jurisprudence, offering the first rigorous judicial examination of the impeachment of a Deputy President under the 2010 Constitution. Its importance transcends the immediate political fate of H.E. Rigathi Gachagua, serving instead to resurrect profound and long-standing anxieties regarding the limits of executive and parliamentary power. By affirming the justiciability of impeachment, rejecting an absolutist political-question doctrine, and mandating adherence to the fair-hearing requirements of Articles 47 and 50, the Court acknowledged the constitutional infirmities in the Senate's proceedings, most notably the denial of an adjournment despite the Deputy President's indisposition. However, the Court's subsequent refusal to quash the impeachment, citing constitutional finality, the risks of dual incumbency, and institutional stability, reveals a troubling dissonance. While awarding KShs 50 million in constitutional damages and directing Parliament to codify a statutory framework, the ruling ultimately severs constitutional rights from constitutional consequence. This article argues that the judgment constitutes "bad law" by effectively rendering these acknowledged rights illusory. It represents a contemporary iteration of the "Dugdale problem", a judicial culture that conceded rights in principle while dismantling them in practice. Where historical precedent once rendered the Bill of Rights inoperative through procedural voids, the Gachagua judgment achieves a similar outcome through judicial restraint, allowing political momentum and remedial timidity to eclipse constitutional integrity. Through a rigorous analysis of the judgment, an interrogation of Kenyan constitutional doctrine, and an engagement with comparative remedial theory, this article introduces the concepts*

of "remedial evasion" and "fait accompli constitutionalism." It contends that true constitutional stability is not achieved by allowing an unconstitutional impeachment to solidify into irreversible fact. Rather, it demands that the mechanisms of political removal remain substantively accountable to the mandates of constitutional validity, ensuring that justice is neither deferred nor denied under the guise of stability.

Keywords: *impeachment; Deputy President; Dugdale; bad law; fair hearing; Article 50; constitutional remedies; constitutional finality; remedial evasion; Kenya.*

Introduction

The High Court's adjudication of the Gachagua impeachment compelled the 2010 Constitution to confront an existential inquiry it had long held in abeyance: what judicial recourse exists when the removal of a popularly elected Deputy President deviates from constitutional norms? Beyond the immediate political exigencies surrounding H.E. Rigathi Gachagua, this case demanded that the judiciary navigate the precarious equilibrium between electoral mandates, parliamentary prerogative, and procedural due process. By illuminating the limits of legislative power, the judgment constructs a nascent framework for judicial review in impeachment proceedings, potentially constraining future parliamentary efforts to insulate fait accompli political maneuvers from constitutional accountability.

The title of this article draws on historical memory; The ghosts have found a resting place because the judgment allows an older anxiety to resurface in contemporary language. Dugdale's ghost does not consist merely in the proposition that a court lacks jurisdiction over rights. It consists, more insidiously, in the judicial instinct that rights may be recognized while their enforcement is deferred, discounted, or rendered practically harmless. The 2010 Constitution was drafted precisely against that tradition. Articles 22 and 23 confer jurisdiction on the courts to enforce rights; Article 22(3)(d) rejects the notion that procedural technicality may obstruct rights litigation; Article 25(c) shields the fair-trial right from derogation; and Article 2(4) strips unconstitutional conduct of legal validity.[1] A judgment that finds a non-derogable fair-hearing breach at the decisive stage of impeachment, yet leaves the impeachment politically undisturbed, does more than reach a debatable remedial conclusion. It creates bad law by making constitutional enforcement contingent upon the speed with which political actors complete the unconstitutional act.

The Court's judgment is not a mere abdication of constitutional responsibility; it is something more interesting, and more troubling. The Bench rejected an absolutist political-question doctrine and insisted that impeachment proceedings remain subject to the Constitution.[2] It accepted that the High Court could examine whether the National Assembly and the Senate had complied with constitutional procedure, respected rights, and remained within the boundaries fixed by Articles 145 and 150.[3] It recognized that Article 50, reinforced by Article 47 and by the specific hearing guarantees in Article 145, applied to the Senate process.[4] Most significantly, it held

[1] *Gachagua & 57 others v Speaker, National Assembly & 35 others* [2026] KEHC 8198 (KLR) (Constitutional and Human Rights) (High Court of Kenya, Nairobi, 8 June 2026).
[2] Constitution of Kenya 2010, arts 2(4), 22, 22(3)(d), 23, 25(c).
[3] *Gachagua* (n 1) paras 275-289.
[4] *Gachagua* (n 1) para 470.

that the Senate violated Gachagua's fair-hearing rights by proceeding to determine the impeachment after refusing an adjournment notwithstanding his absence and medical incapacity.[5] These holdings possess genuine constitutional value. They preserve the foundational proposition that Parliament is not the sovereign master of impeachment, but a constitutional organ exercising delegated authority beneath a supreme Constitution.

The judgment nonetheless retreats at the very point where constitutional review matters most. Having found a rights violation within the process that produced removal, the Court declined to quash the impeachment. It treated the Senate vote, the subsequent nomination and approval of Prof Kithure Kindiki, and the resulting occupation of the office of Deputy President as a constitutional fait accompli.[6] It reasoned that quashing the Senate resolution would restore Gachagua, produce two Deputy Presidents, unsettle official acts, and risk disorder.[7] The Court then converted the breach into declaratory relief and an award of KShs 50 million in constitutional damages, payable by the Senate.[8] The result is a judgment that proclaims justiciability while withholding its ordinary remedial force. It tells Parliament that impeachment must comply with the Constitution and simultaneously tells Parliament that an impeachment tainted by a non-derogable fair-hearing violation may remain politically effective provided it is completed with sufficient alacrity and followed by replacement.

This article argues that the judgment's central defect does not lie in its refusal to reinstate Gachagua as Deputy President. A serious critique need neither romanticize the petitioner nor deny that impeachment is a legitimate constitutional mechanism; the Constitution plainly permits removal where the prescribed grounds and procedures are satisfied.[9] The deeper difficulty is that the Court transformed a grave violation of a non-derogable fair-hearing right into a compensable procedural wrong, without disturbing the political outcome that the violation produced. It thereby fashioned a doctrine of remedial evasion: a judicial posture in which courts recognize constitutional wrongs, preserve the fruits of those wrongs, and then seek to vindicate constitutional supremacy through declarations and money. In the context of impeachment, that posture is especially perilous, because the political branches can outpace constitutional litigation. Once removal and replacement are complete, a court may be tempted to treat the new political arrangement as too disruptive to unsettle. Constitutional discipline thereby becomes weakest precisely where the political incentive to disregard it is strongest.

The article proceeds by reading the judgment on its own terms. It reconstructs the Court's reasoning fairly, acknowledges its doctrinal strengths, and then subjects its remedial logic to rigorous scrutiny. The argument is grounded in the text and structure of the Constitution, particularly Articles 1, 2, 10, 22, 23, 24, 25, 47, 50, 73, 93, 94, 95, 96, 118, 124, 145, 149, 150, 159, 160, 165 and 259. It draws further on Kenyan doctrine concerning constitutional supremacy, public participation, fair administrative action, natural justice, parliamentary

[5] *Gachagua* (n 1) paras 453-456.
[6] *Gachagua* (n 1) paras 459-468, 476.
[7] *Gachagua* (n 1) paras 489-503.
[8] *Gachagua* (n 1) paras 494-501.
[9] *Gachagua* (n 1) paras 507-509.

Hon Mwengi Mutuse

accountability and constitutional remedies. Comparative law is deployed with restraint. South African jurisprudence on appropriate relief, suspended invalidity and structural interdicts proves instructive, since South Africa, like Kenya, operates under a written, supreme and remedial Constitution. United States impeachment doctrine is treated more cautiously, since the textual commitment of impeachment to the Senate under the American Constitution cannot displace Kenya's explicit constitutional supremacy, enforceable Bill of Rights, and broad High Court jurisdiction.[10]

The claim advanced here is therefore deliberately narrow and precise. The judgment is not constitutionally significant because it declined to return one politician to office. It is significant because it leaves Kenyan constitutional law in an uneasy position: Parliament is formally bound by the Constitution, yet an unconstitutional impeachment may remain politically effective. Should that proposition survive appellate scrutiny, future impeachment litigation risks becoming an exercise in post-mortem compensation rather than constitutional control. The danger is not confined to remedial inadequacy. It extends to the normalisation of a constitutional order in which procedural rights are solemnly affirmed, monetised, and left without consequence for the legality of the very public act they were designed to discipline.

2. The judgment and the constitutional moment

The factual background was compressed, dramatic, and constitutionally novel. Gachagua had been elected Deputy President alongside President William Ruto in the general election of 9 August 2022, an election the Supreme Court upheld before their swearing-in on 13 September 2022.[11] On 1 October 2024, Hon Mwengi Mutuse introduced an impeachment motion under Articles 145 and 150. The motion contained eleven grounds, including alleged gross violations of the Constitution, undermining the President and Cabinet, undermining devolution, interference with judicial independence, breach of the oath of office, criminal allegations under cohesion, anti-corruption and anti-money laundering laws, attacks on the National Intelligence Service, and insubordination and bullying of public officers.[12] The National Assembly passed the motion on 8 October 2024 and transmitted it to the Senate. The Senate heard the matter and upheld five of the eleven charges,

[10]Constitution of Kenya 2010 arts 145 and 150.
[11]*Nixon v United States* 506 US 224 (1993); compare Constitution of Kenya 2010 arts 2, 22, 23 and 165.
[12]*Gachagua* (n 1) para 1.

following which a Gazette Notice of 17 October 2024 communicated that Gachagua had ceased to hold office. President Ruto nominated Prof Kithure Kindiki to fill the resulting vacancy; the National Assembly approved the nomination, and Kindiki was sworn in on 1 November 2024.[13]

The petitions before the High Court challenged nearly every legally significant stage of that process. The petitioners impugned the specificity of the charges, the adequacy of public participation, the conduct of the presiding officers, the Senate's refusal to appoint a special committee, the compression of the timelines, the refusal to adjourn after Gachagua fell ill, the nomination and approval of Kindiki, the role of the IEBC, and the absence of a statutory framework tailored to Deputy Presidential impeachment.[14] The Court distilled these into seven broad issues: jurisdiction, predetermination and bias, public participation, the constitutionality and legality of the Standing Orders, the composition of the National Assembly and the IEBC and nomination questions, constitutional process under Articles 145 and 150, and fair trial under Articles 47 and 50.[15]

The Court's summary holdings were sweeping. It held that the impeachment proceedings were justiciable and that the High Court possessed jurisdiction under Articles 22, 23 and 165 to determine whether Parliament had acted within constitutional bounds.[16] It rejected the allegations of bias and predetermination as unsubstantiated and grounded in political inference rather than objective evidence.[17] It upheld the National Assembly's public participation process and held that the Senate bore no independent duty to conduct a separate participation exercise at the impeachment trial stage.[18] It further held that public participation was not required for the nomination and approval of Kindiki, since Article 149(1) establishes a specific, time-bound and electoral mode of replacement.[19] The Court upheld the Standing Orders, rejected the contention that the National Assembly was disabled by the unresolved two-thirds gender question, and held that the absence of the IEBC did not affect the mid-term replacement process.[20]

The judgment became most delicate upon reaching Article 150. The Court accepted that Parliament ought urgently to enact a dedicated statutory framework for the removal of a Deputy President, since the constitutional phrase 'with the necessary modifications' demands adaptation of the presidential impeachment framework to the Deputy President's distinct constitutional position.[21] Yet it simultaneously held that the absence of such legislation did not vitiate the impeachment already undertaken.[22] On the special committee question, the Court expressed the reasoned view that the Senate's failure to resolve whether to admit the motion for investigation, and its failure to appoint a special committee, were constitutionally infirm; it nonetheless

[13] *Gachagua* (n 1) para 2.
[14] *Gachagua* (n 1) paras 3-5.
[15] *Gachagua* (n 1) paras 7-13, 273.
[16] *Gachagua* (n 1) para 273.
[17] *Gachagua* (n 1) para 470.
[18] *Gachagua* (n 1) para 471.
[19] *Gachagua* (n 1) paras 341-345, 472.
[20] *Gachagua* (n 1) paras 346-355, 472.
[21] *Gachagua* (n 1) paras 473-474.
[22] *Gachagua* (n 1) para 475.

deferred to what it treated as binding Supreme Court authority in *Sonko*, which permits the Senate to hear governor impeachments either in plenary or through a special committee.[23]

The doctrinal axis of the judgment lay in its fair-hearing analysis. The Court found that the Senate had adopted a fully adversarial oral hearing: the National Assembly presented witnesses who were examined and cross-examined, while Gachagua, who was his own sole witness, had not completed his case when he fell ill.[24] The Court found that the Senate possessed a procedural window to adjourn to Saturday, 19 October 2024; that Senators acknowledged Gachagua's indisposition; and that the refusal of an adjournment was not a proper exercise of constitutional discretion.[25] It went further still, describing the right to a fair trial as non-derogable, absolute, and incapable of yielding to constitutional timelines or political exigency.[26] That finding ought to have supplied the bridge between constitutional wrong and constitutional consequence. Instead, the judgment crossed the bridge only halfway before halting.

The final orders reveal this tension starkly. The Court declined to quash the Senate resolution. It issued a declaration that Gachagua's fair-trial rights had been infringed by the Senate's refusal to adjourn. It declared the constitutional necessity of a dedicated statutory framework for Deputy Presidential impeachment. It awarded KShs 50 million in constitutional damages, payable by the Senate, to vindicate the Constitution, restore dignity and deter future violations. It made no order as to pension and benefits and directed each party to bear its own costs.[27] The judgment thus carries two distinct constitutional messages. The formal message is that impeachment must obey the Constitution. The remedial message is that a completed unconstitutional impeachment may nonetheless survive where invalidation would prove institutionally inconvenient. It is the latter message that demands scrutiny.

3. Justiciability without remedial courage

The Court's treatment of justiciability is among the judgment's better features. It properly proceeded from constitutional supremacy rather than parliamentary autonomy. Articles 1 and 2 establish that all public power is delegated power, and that Parliament enjoys no sovereignty in the Westminster sense.[28] The Court rightly emphasized that the Constitution of Kenya recognizes no parliamentary supremacy, and that no State organ, Parliament included, enjoys immunity from constitutional scrutiny.[29] That position accords with the Supreme Court's advisory opinion in *Speaker of the Senate v Attorney-General*, where the Court held that Parliament must act within the Constitution and cannot invoke its internal rules as a refuge from constitutional obligation.[30] It is equally consistent with *Wambora*, in which the Supreme Court recognized that courts may intervene where parliamentary

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[23]*ibid.
[24]*Gachagua* (n 1) paras 420-448; *Sonko v County Assembly of Nairobi City & 11 others* [2022] KESC 76 (KLR).
[25]*Gachagua* (n 1) paras 457-463.
[26]*Gachagua* (n 1) paras 464-466.
[27]*Gachagua* (n 1) para 467.
[28]*Gachagua* (n 1) para 509.
[29]Constitution of Kenya 2010 arts 1 and 2.
[30]*Gachagua* (n 1) para 277.

or county assembly processes breach constitutional requirements, while exercising restraint on questions of internal procedure and merit.[31]

This is the correct Kenyan answer to the political-question objection. Impeachment is political in its consequences, but it is not lawless in its form. The Constitution does not merely authorize Parliament to remove a President or Deputy President; it prescribes thresholds, grounds, timelines, hearing guarantees and institutional sequence.[32] A court that examines whether those constitutional conditions have been observed does not sit as a third House of Parliament. It performs the function assigned to it under Articles 22, 23 and 165, namely the interpretation, enforcement and protection of the Constitution.[33] The judgment is persuasive in its warning that declining jurisdiction merely because a dispute carries political consequences would amount to judicial abdication rather than restraint.[34]

The Court was likewise correct to distinguish *Nixon v United States*. The United States Constitution textually commits the 'sole Power to try all Impeachments' to the Senate, and the Supreme Court has read that commitment as excluding judicial review of the Senate's trial procedures.[35] Kenya's Constitution contains no equivalent exclusion. It provides a broad, enforceable Bill of Rights, an explicit supremacy clause, and a High Court jurisdictional provision empowering courts to determine whether anything done under the Constitution or any law is inconsistent with it.[36] The Court therefore rightly declined to transplant American total avoidance into Kenyan doctrine.[37] Comparative law is instructive only when it respects constitutional architecture; it becomes hazardous when it imports foreign institutional settlements into a text that strikes a different balance.

Yet the judgment's justiciability holding becomes fragile precisely because the Court does not follow it through to its logical conclusion. Justiciability is not exhausted by the power to hear a case and pronounce a breach. It also comprehends the power, and at times the duty, to grant a remedy that gives legal effect to the constitutional norm violated. Article 23 empowers the High Court to grant appropriate relief, including declarations, injunctions, conservatory orders, declarations of invalidity, compensation and judicial review, the list being inclusive rather than exhaustive.[38] Kenyan doctrine has repeatedly affirmed that constitutional remedies must be effective and responsive to the right infringed, rather than merely symbolic.[39] The South African Constitutional Court articulated the same principle in Fose: appropriate relief is relief required to protect and enforce the Constitution, and courts must, where necessary, fashion new remedies to that end.[40]

The difficulty, then, is not that the Court lacked jurisdiction, but that it exercised jurisdiction to identify constitutional wrong

[31]*Speaker of the Senate & another v Attorney-General & 4 others* [2013] KESC 7 (KLR) paras 55, 61-62.
[32]*Mate & another v Wambora & another* [2017] KESC 1 (KLR) paras 52, 59.
[33]Constitution of Kenya 2010 arts 145 and 150.
[34]Constitution of Kenya 2010 arts 22, 23 and 165.
[35]*Gachagua* (n 1) paras 281-286.
[36]Nixon (n 17) 229-238.
[37]Constitution of Kenya 2010 arts 2, 22, 23 and 165(3)(d).
[38]*Gachagua* (n 1) paras 287-289.
[39]Constitution of Kenya 2010 art 23(3).
[40]*Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] KESC 34 (KLR) paras 112, 115-116; *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] KESC 53 (KLR) para 412.

without altering the legal consequences of that wrong. The judgment is best understood, on this account, as justiciability without remedial courage. It preserves the language of constitutional supremacy at the threshold stage, yet yields at the remedial stage to the political reality that the impugned process had already created. A court may legitimately exercise remedial discretion, and not every procedural defect demands invalidation. But where the defect consists in the violation of a non-derogable fair-hearing guarantee at the decisive stage of an impeachment trial, remedial discretion must be disciplined by the very constitutional hierarchy the Court had earlier affirmed. Absent that discipline, justiciability degenerates into declaratory theatre: the court speaks, while the unconstitutional act remains legally triumphant.

4. Why the judgment is bad law: The ghost of Dugdale and Constitutional under-enforcement

To describe a judgment as bad law is not merely to say that it is unpersuasive, politically inconvenient, or vulnerable on appeal. A judgment becomes bad law when its reasoning supplies a legal rule that weakens the Constitution's internal architecture. The Gachagua judgment does so in four connected respects. It separates violation from validity. It treats finality as capable of attaching to a constitutionally tainted process. It substitutes damages for the ordinary corrective force of invalidity. And it creates incentives for political branches to move with sufficient speed to generate facts that courts will subsequently hesitate to disturb. These are not minor remedial imperfections; they are doctrinal errors of prospective force, because impeachment law is shaped not only by what courts say about jurisdiction, but by what courts permit once jurisdiction has been exercised.

The judgment is bad law because it confuses remedial prudence with remedial surrender. Article 23 empowers the High Court to grant appropriate relief, including declarations, injunctions, conservatory orders, compensation and judicial review orders.[41] That remedial discretion is broad but not formless; it must be exercised so as to vindicate the right, discipline the public power that violated it, and give practical effect to constitutional supremacy. The Court treated the institutional difficulty of quashing the impeachment as though that difficulty alone extinguished the ordinary consequence of unconstitutional process. Yet a constitutional court's task is often hardest precisely where the unlawful act has already produced institutional consequences. Were difficulty sufficient to excuse remedy, the gravest constitutional violations would become the least remediable, for ambitious political actors would soon learn to complete them before courts could intervene.

This is why Dugdale matters. In the late 1980s, the High Court decisions associated with Justice Norbury Dugdale acquired notoriety for rendering the old Bill of Rights practically unenforceable. In *Joseph Maina Mbacha and Three Others v Attorney General*, and in the related *Gibson Kamau Kuria* litigation, the Court treated the absence of procedural rules under the former section 84 as disabling the High Court's rights-enforcement jurisdiction.[42] Kuria and Vazquez captured

[41] *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC) para 19.
[42] Constitution of Kenya 2010 art 23(3).

the constitutional injury with precision: the High Court appeared to remove itself from its role of enforcing the Bill of Rights, notwithstanding that the Constitution itself conferred original jurisdiction to enforce fundamental rights.[43] The Dugdale error was thus not merely procedural formalism; it was the judicial conversion of express constitutional rights into rights without an effective forum.

The 2010 Constitution was designed to foreclose precisely that retreat. Article 22(1) confers on every person a right to institute proceedings where a right has been denied, violated, infringed or threatened. Article 22(3)(d) commands that formalities relating to proceedings, including their commencement, be kept to the minimum, and that a court shall, where necessary, entertain proceedings founded on informal documentation. Article 22(3)(b) requires that court fees must not impede access to justice. Article 159(2)(d) directs courts to administer justice without undue regard to procedural technicality.[44] These provisions were not drafted as ornaments. They constitute a repudiation of a legal culture in which constitutional rights could be defeated by procedural inconvenience.

The Gachagua judgment does not reproduce Dugdale literally. It does not deny jurisdiction, nor does it declare the Bill of Rights inoperative. Indeed, it travels a considerable distance in the opposite direction by holding that impeachment is justiciable and that fair-hearing rights applied to the Senate proceedings.[45] For that reason, the analogy must be drawn with care. The defect here is not jurisdictional denial but remedial under-enforcement. Dugdale rendered rights ineffective at the courthouse door; Gachagua risks rendering rights ineffective at the remedial exit. In both moments the Constitution is acknowledged yet not permitted to alter power; in both, legality survives in language while disappearing from consequence.

It is in this sense that the ghosts have found a resting place. The old ghost of procedural defeat has settled comfortably within a new vocabulary of stability, finality and practicality. The Court did not hold Article 50 unavailable; it held the contrary, that the right had been violated. Yet once the inquiry shifted from breach to consequence, the Court allowed political completion to perform the office that procedural absence once performed: preventing the right from altering the legal outcome. This is a subtler species of bad law, for it appears rights-friendly at the point of entry while proving power-friendly at the point of exit.

The judgment is bad law, further, because it distorts Article 25(c). The non-derogable character of the fair-trial right does not entail that every procedural misstep automatically nullifies every process. It does mean, however, that a court must treat a serious denial of hearing at the decisive stage as a constitutional injury of the highest order. Once the Court accepted that the Senate's refusal to adjourn denied Gachagua the opportunity to participate, personally and through counsel, in the final phase of his trial, the burden shifted to the Court to explain why the resulting decision could nevertheless stand. The judgment's answer was institutional anxiety. Yet Article 25(c) exists precisely to prevent institutional anxiety, political urgency or public

[43] *Joseph Maina Mbacha and Three Others v Attorney General* High Court Misc Application No 356 of 1989 (unreported) (Dugdale J); *Gibson Kamau Kuria v Attorney General* High Court Misc Application No 279 of 1985 (unreported).
[44] Kuria and Vazquez (n 17) 142-43.
[45] Constitution of Kenya 2010 arts 22(1), 22(3)(b), 22(3)(d) and 159(2)(d).

convenience from defeating the irreducible minimum of fair trial.

Nor is this merely a remedial disagreement. The Court's approach establishes a legal rule for future Parliaments. It suggests that where an impeachment process is completed, a replacement sworn in, and official acts undertaken, a court may preserve the outcome even after finding a grave violation of hearing rights. That rule is not neutral; it rewards haste. It signals to political actors that, by compressing the process and accelerating replacement, they may convert constitutional illegality into mere judicial inconvenience. In the impeachment context, where timelines are short and political incentives intense, this is a perilous doctrine. It renders courts strongest in theory and weakest precisely at the moment enforcement matters most.

The point is not that the Court was obliged to order immediate reinstatement. Bad law may also arise from a court's failure to imagine lawful intermediate paths. Kenyan remedial doctrine, particularly after *Mitu-Bell*, does not compel courts to choose between chaos and surrender.[46] The Court could have declared constitutional invalidity, suspended its effect, preserved the acts already performed by the replacement Deputy President, ordered Parliament to enact a governing framework, and directed a constitutionally compliant process should Parliament wish to proceed further. Such an order would have averted dual incumbency while declining to legitimate an unconstitutional impeachment. It is the failure to consider that remedial grammar that transforms the judgment from merely cautious into bad law.

5. Participation, Speed and Constitutional Meaning

The public participation portion of the judgment is doctrinally careful yet constitutionally under-curious. The Court correctly stated that public participation demands neither perfection nor tokenism, the governing standard being meaningful participation assessed contextually.[47] It acknowledged that the impeachment of a Deputy President is no ordinary legislative business, but a solemn and irreversible decision affecting the second highest constitutional office and the architecture of the executive.[48] It then relied on evidence of notices published in newspapers, English and Kiswahili templates, 337 access points, and options for submission by email, post, hand delivery and online means, together with participation by just over 223,000 people.[49] On that basis it held that the National Assembly's public participation met the constitutional threshold.[50]

That conclusion is not indefensible. Kenyan law prescribes no single ritual of participation, and courts have been careful to avoid constitutionalizing impractical standards. In *British American Tobacco*, the Supreme Court held that public participation must be real, purposive and meaningful, though its mode, degree, scope and extent depend on the circumstances of each case.[51] In *Okiya Omtatah*, the Supreme Court reiterated that Article 118 imposes a duty to facilitate participation, and that

[46] *Gachagua* (n 1) paras 275-289, 453-468.
[47] *Mitu-Bell Welfare Society v Kenya Airports Authority and others* [2021] KESC 34 (KLR) paras 120-124.
[48] *Gachagua* (n 1) para 326.
[49] *Gachagua* (n 1) para 327.
[50] *Gachagua* (n 1) paras 328-330.
[51] *Gachagua* (n 1) para 341.

timelines, costs and legislative context bear upon the assessment of reasonableness.[52] The High Court was accordingly correct not to reduce the inquiry to numerical turnout alone; a modest number of participants does not, without more, establish that Parliament failed to facilitate participation.

The difficulty is that the Court's facilitation/outcome distinction risks becoming too attenuated for a constitutional process of this gravity. The Court held that once Parliament provides adequate notice, accessible channels, sufficient information and a genuine opportunity to participate, its constitutional duty is discharged; what the public elects to do with that opportunity belongs to civic agency rather than to Parliament.[53] That proposition carries force in ordinary legislative settings. It is considerably less persuasive where the process concerns the first impeachment of a Deputy President under the 2010 Constitution, conducted on compressed timelines, upon complex allegations, and within a politically charged environment. In such a setting, the constitutional question is not merely whether doors were opened, but whether the public possessed a meaningful opportunity to understand the charges, appreciate the evidence, receive balanced information, and submit views capable of influencing their representatives before political momentum became irreversible.

The Court's own authorities invited a deeper inquiry. *British American Tobacco* identifies clarity of subject matter, simplicity of structure, balanced influence, commitment to process, inclusive representation, integrity, transparency and capacity to engage as the constituent elements of meaningful participation.[54] Those elements cannot be reduced to the mere existence of forms, venues and notices. The impeachment allegations were legally and factually complex, comprising alleged gross violations of multiple constitutional provisions, claims of criminal conduct, and assertions of gross misconduct.[55] A public participation process that presents citizens with the motion, while affording insufficient access to the affected office-holder's response, may satisfy a narrow notice model but struggles to satisfy a balanced-influence model. Citizens are not adjudicators, as the Court observed, but neither are they a decorative audience; their participation acquires democratic meaning only where they are furnished sufficient information to engage the question before Parliament with genuine civic agency.

The Senate stage poses a harder problem. The Court held that the Senate was not required to conduct its own public participation, since its role under Article 145 was adjudicative rather than consultative.[56] That reasoning has genuine force: the Senate hears charges rather than conducting a referendum, and a trial-like process cannot be converted into a popularity exercise without compromising fairness. Yet the Court's reasoning may have moved too quickly from 'not ordinary public participation' to 'no participation duty whatsoever'. Article 118 applies to the legislative and other business of Parliament and its committees.[57] Impeachment before the Senate is surely 'other business',

[52] *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* [2019] KESC 15 (KLR) paras 86, 96.
[53] *Cabinet Secretary for the National Treasury and Planning & 4 others v Okiya Omtatah Okoiti & 52 others; Bhatia (Amicus Curiae)* [2024] KESC 63 (KLR) paras 102-105, 125, 143.
[54] *Gachagua* (n 1) paras 331-333.
[55] *British American Tobacco* (n 28) para 96.
[56] *Gachagua* (n 1) para 2.
[57] *Gachagua* (n 1) paras 342-345.

notwithstanding its adjudicative form. The better question was whether a modified participatory obligation attaches to the Senate's determinative role, not a fresh plebiscite, but perhaps a duty to satisfy itself that the initiating House's participation exercise had been adequate, to receive the public materials already gathered, to explain how such materials informed the hearing, or to ensure that the Senate process remained genuinely public and intelligible.

The Court's concern that a separate Senate participation process would confuse adjudication with consultation is legitimate. It does not follow, however, that the Senate's constitutional obligation is confined to sitting in public and hearing the parties. The Senate's vote is the operative constitutional act that effects removal.[58] A constitutional order committed to participation should hesitate before locating every public voice at the initiating stage and none at the determinative one. A more nuanced judgment might have held that the Senate need not replicate the National Assembly's participation exercise, while still requiring it to conduct a reasoned adequacy review of that exercise before proceeding. Such an approach would have respected the Senate's adjudicative function without emptying Article 118 of meaning within the very chamber whose vote effects removal.

The Court's treatment of speed suffers from a comparable compression. It treated constitutional timelines as part of the context rendering expedition inevitable.[59] Timelines undoubtedly matter; the Constitution itself prescribes short periods under Article 145, and courts cannot lightly extend constitutional time. But speed cannot operate as a solvent of participatory meaning. A constitutional process may be urgent and yet unconstitutional, if urgency is managed in a manner that deprives the public or the affected officer of a meaningful opportunity to participate. The real question was not whether impeachment must proceed quickly, but whether Parliament designed a process capable of honouring speed and constitutional substance in tandem. That inquiry demanded more than satisfaction that notices existed and venues were listed. It required a sharper assessment of whether constitutional democracy can tolerate an impeachment model in which the public is invited to comment on a national removal process before the dust of accusation has settled.

6. The Special Committee and the Architecture of Fairness

The special committee issue exposes an unresolved tension within the architecture of Articles 145 and 150. Article 150(2) applies the provisions governing removal of the President to the Deputy President, with necessary modifications.[60] Article 145(3)(b) provides that the Senate may, by resolution, appoint a special committee of eleven members to investigate the matter.[61] The petitioners argued that the special committee was mandatory, or at minimum that the Senate could not collapse investigation and final adjudication into a single plenary process. The Court's reasoning here was conflicted in a revealing way. It traced the constitutional history of the impeachment provision, examined earlier drafts, and suggested that the committee route carried deep structural significance.[62] It then reasoned that once the

[58]Constitution of Kenya 2010 art 118.
[59]Constitution of Kenya 2010 art 145(7).
[60]*Gachagua* (n 1) paras 357-369.
[61]Constitution of Kenya 2010 art 150(2).
[62]Constitution of Kenya 2010 art 145(3)(b).

Senate resolved to proceed with the motion, its discretion was exhausted and a special committee ought to have investigated the matter.[63] The Court stated that it would have found constitutional non-compliance in the failure to resolve whether to admit the motion, and in the failure to appoint a special committee.[64]

That reasoning is doctrinally powerful, for it understands procedure as constitutional design. The committee stage is no decorative parliamentary convenience; it separates investigation from final political judgment, creates a smaller forum for evidentiary testing, and confers on the affected office-holder a distinct right to appear and be represented before the investigating body.[65] It produces a report that structures the plenary vote. Absent that stage, the Senate risks becoming investigator, prosecutor, adjudicator and final voter within a single breath. A plenary hearing may command political visibility, but visibility is not equivalent to fairness. The architecture of fairness sometimes requires institutional separation within a single House.

The Court, however, felt bound by *Sonko*. It held that the Supreme Court's treatment of governor impeachment under section 33 of the County Governments Act had settled the law, permitting the Senate to hear charges either in plenary or through a special committee.[66] The Court's deference to precedent is understandable; a High Court cannot disregard the Supreme Court. Yet the transposition from gubernatorial impeachment to Deputy Presidential impeachment merited more careful limitation. A Deputy President forms part of the national executive, elected on a presidential ticket; the constitutional text governing presidential impeachment is not merely mirrored by ordinary statute, but constitutes the primary constitutional architecture. Article 150's phrase 'with the necessary modifications' likewise signals that the Deputy President's removal cannot be treated as a mechanical replica of either presidential or gubernatorial removal. The Court acknowledged that phrase as substantive when granting mandamus for legislation, yet did not allow it sufficient force in analyzing the process already employed.[67]

The concern is not that every impeachment must be heard by committee in every circumstance. It is that the Court's ultimate holding permits the Senate to select the politically most efficient route without explaining how the alternative route preserves equivalent guarantees. If plenary is available, it must be adapted to provide functional equivalents of investigation, evidentiary organization, and a fair opportunity to respond. A court could hold that a special committee is not formally mandatory while still requiring the Senate to demonstrate that the plenary route embodied procedural safeguards equivalent to the committee model. The High Court did not develop that intermediate doctrine; it moved from an internally persuasive reading of Article 145 to an external deference to *Sonko*, leaving the architecture of fairness under-theorized.

This matters because the fair-hearing violation subsequently found by the Court

[63]*Gachagua* (n 1) paras 420-429.
[64]*Gachagua* (n 1) paras 439-446.
[65]*Gachagua* (n 1) para 447.
[66]Constitution of Kenya 2010 art 145(5).
[67]*Gachagua* (n 1) paras 447-448.

did not arise in a procedural vacuum. The refusal to adjourn occurred within a plenary setting already burdened by speed, political visibility, and the absence of a prior committee report. A special committee might not have cured every difficulty, but it would have slowed the process sufficiently to distinguish investigation from final vote, and to create a more disciplined evidentiary record. The Court's remedial conclusion treats the refusal of adjournment as an isolated breach. A more constitutionally attentive reading would regard it as the culmination of a design defect: once the process is collapsed into a fast plenary trial, the space for fairness narrows, and a medical emergency becomes not merely an inconvenience but a structural test of whether the Senate understands impeachment as adjudication under law.

7. The Fair-Hearing Finding as the Judgment's Doctrinal Centre

The strongest doctrinal section of the judgment is its fair-hearing analysis. The Court correctly framed the issue under Articles 47 and 50.[68] It recognized that Article 50 protects adequate time and facilities to prepare a defence, presence at trial, and the right to adduce and challenge evidence.[69] It connected those guarantees to Article 145(5) and (6), which afford the President, and by necessary modification the Deputy President, the right to appear and be represented before the special committee, together with an opportunity to be heard before the Senate vote.[70] It further recognized that Article 47 applies to exercises of public power affecting rights, interests and legitimate expectations, including impeachment processes preceding removal.[71]

The Court's factual reasoning was equally compelling. It did not pose the vague question of whether Gachagua had at some point been heard, but asked whether he had been prevented from completing his hearing after the opposing party had concluded a full adversarial presentation.[72] That distinction is decisive. The National Assembly had led evidence through witnesses who were examined and cross-examined; Gachagua had not completed his case, and he was his own sole witness.[73] Once the Senate had adopted an oral adversarial process, it could not abandon that process at the very point when the affected office-holder was to give his evidence.[74] To do so was to deny equality of arms, and to subject the parties to differing procedural standards, no minor irregularity but one going to the integrity of the hearing itself.

The Court's conclusion on the adjournment was likewise sound. The Hansard record showed that the Speaker had explained that an adjournment to Saturday, 19 October 2024 was procedurally available.[75] Senators acknowledged Gachagua's indisposition and nevertheless rejected the adjournment.[76] The Court found this to be an improper exercise of constitutional discretion, requiring instead a reasonable adjournment.[77] Its reliance on *Kariuki v*

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[68] *Gachagua* (n 1) paras 475, 508.
[69] *Gachagua* (n 1) para 449.
[70] *Gachagua* (n 1) para 453; Constitution of Kenya 2010 art 50(2)(c), (f) and (k).
[71] *Gachagua* (n 1) para 454; Constitution of Kenya 2010 arts 145(5), 145(6)(b) and 150(2).
[72] *Gachagua* (n 1) para 455; Constitution of Kenya 2010 art 47.
[73] *Gachagua* (n 1) para 459.
[74] *Gachagua* (n 1) paras 457-460.
[75] *Gachagua* (n 1) paras 462-463.
[76] *Gachagua* (n 1) para 464.
[77] *ibid.

Attorney-General was apt; that authority emphasizes that although adjournment remains discretionary, courts and tribunals must specifically consider whether its denial will occasion a miscarriage of justice where a constitutional fair-trial right is implicated.[78] Impeachment of a Deputy President is not a criminal trial, but its consequences are grave enough that a refusal to adjourn cannot be justified by ordinary administrative convenience.

The decisive passage appears at paragraph 467. There the Court stated that the right to a fair trial is non-derogable; that it does not yield to constitutional timelines or political exigency; that it is an absolute constitutional guarantee; and that its violation cannot be justified by reference to any competing constitutional interest, however weighty or pressing.[79] This is the doctrinal hinge on which the entire judgment turns. Once the Court made that finding, the remedial question became unavoidable: what legal consequence follows when the decisive process by which a Deputy President is removed is infected by violation of an absolute fair-hearing guarantee?

The judgment's answer is a declaration and damages, but no invalidation. That answer is unstable because it disconnects right from remedy. Non-derogability is not ornamental language. Article 25(c) excludes the right to a fair trial from limitation under Article 24.[80] If a right cannot be limited by competing interests, a court should be slow to permit competing interests to determine that its violation carries no consequence for the validity of the process. Remedial discretion remains available, but it must proceed from the premise that an absolute right possesses special constitutional status. To hold that the right does not yield to political exigency at the merits stage, while the remedy yields to constitutional stability at the remedial stage, is to reintroduce through remedies what Article 25 had excluded through rights.

The point is not that every breach of Article 50 must automatically require reinstatement. It is that the remedy must cure, neutralize, or at the very least decline to legitimate the outcome produced by the breach. A declaration that a person was denied a fair hearing, combined with an order that leaves intact the very decision reached after that denial, risks conceptual incoherence. In ordinary judicial review, a decision reached through denial of a fair hearing is commonly quashed, because the right to be heard is valuable precisely because it precedes and conditions the decision. It would be curious to hold that the hearing was constitutionally required, constitutionally denied, and yet that the decision made after that denial remains fully effective, as though the hearing had in fact been provided. That is the judgment's deepest wound.

8. Constitutional finality and the problem of invalidity

The Court's refusal to quash rests heavily on constitutional finality. It reasoned that once the Senate resolved to impeach Gachagua and the National Assembly confirmed Kindiki, the constitutional process was complete and the vacancy filled.[82] Article 145(7) provides that where at least

[78] *Gachagua* (n 1) paras 465-466.
[79] *Kariuki v Attorney-General* [2014] KECA 713 (KLR), cited in *Gachagua* (n 1) para 466.
[80] *Gachagua* (n 1) para 467; Constitution of Kenya 2010 art 25(c).
[81] Constitution of Kenya 2010 arts 24 and 25(c).
[82] See generally *Ridge v Baldwin* [1964] AC 40 (HL); *Local Government Board v Arlidge* [1915] AC 120 (HL).

two-thirds of all members of the Senate vote to uphold an impeachment charge, the President shall cease to hold office.[83] For the Court, this automatic cessation of office meant that the impeachment had become final in a constitutional sense and could not be undone without producing an institutional anomaly.[84]

That reasoning conflates finality following a valid process with finality despite an invalid process. Article 145(7) describes the legal consequence of a constitutionally proper Senate vote. It does not say that any vote labelled an impeachment vote, however procedurally unconstitutional, produces irreversible finality. Constitutional finality is not a magic cloak thrown over invalid action by the speed of the political branches. A vote taken in breach of the Constitution cannot derive stronger protection from Article 145(7) than a vote taken in compliance with it. To read Article 145(7) otherwise is to permit Parliament to generate finality by violating the very preconditions of lawful finality.

Kenya's Constitution does not sanction that inversion. Article 2(4) provides that any law, including customary law, inconsistent with the Constitution is void to the extent of the inconsistency, and that any act or omission in contravention of the Constitution is invalid.[85] The provision is not confined to statutes; it speaks of any act or omission. A Senate impeachment vote is an act under the Constitution. Where that act is reached through a process violating a non-derogable fair-hearing right, Article 2(4) at the very least requires the Court to confront the question of invalidity directly. It may tailor the consequences, suspend effect, preserve past acts, or craft structural relief. What it cannot do is avoid the question of invalidity by treating finality as though it presupposed validity.

The Court itself recognized, earlier in the judgment, that Kenya is governed by constitutional supremacy rather than parliamentary supremacy.[86] It relied on *Speaker of the Senate* to affirm that Parliament cannot operate outside the four corners of the Constitution.[87] That principle should have governed the finality analysis as well. Constitutional finality is a rule of consequence within legality, not a doctrine of immunity from legality. A court may respect the fact that the Constitution creates automatic cessation following a valid Senate vote, without thereby being required to treat an unconstitutional Senate vote as valid merely because the Constitution renders valid votes automatic in their effect.

The comparative materials the Court invoked point, if anything, in the opposite direction. The United States model of total avoidance is tied to the specific text and history of American impeachment. Kenya's Constitution deliberately supplies broader judicial review and rights enforcement.[88] South African constitutional doctrine, closer in remedial structure, demonstrates that courts can declare invalidity while managing its consequences. In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*, the Constitutional Court emphasized that constitutional supremacy requires courts to declare inconsistent conduct invalid, while dealing justly with the consequences of

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[83] *Gachagua* (n 1) paras 489-491.
[84] Constitution of Kenya 2010 art 145(7), applied to the Deputy President through art 150(2).
[85] *Gachagua* (n 1) paras 490-503.
[86] Constitution of Kenya 2010 art 2(4).
[87] *Gachagua* (n 1) para 277.
[88] *Speaker of the Senate* (n 18) paras 61-62.

that invalidity.[89] In *AllPay* (No 2), the South African Constitutional Court held that once a procurement process is unlawful, the court must declare it invalid, though it may thereafter craft a just and equitable remedy to avoid disrupting beneficiaries.[90] The lesson is not that Kenya must import South African outcomes, but that invalidity and remedial management are distinct analytical steps. The High Court instead treated remedial difficulty as a reason to decline declaring operative invalidity at all.

A more coherent approach would have distinguished three questions. Was the Senate process unconstitutional? The Court answered in the affirmative, at least as to fair hearing. Did that unconstitutionality affect the validity of the impeachment? The Court should have answered in the affirmative also, subject to remedial tailoring. What consequences ought to follow, given the subsequent appointment of Kindiki and the imperative of institutional stability? It is there that remedial imagination should have been exercised. By merging the second and third questions, the judgment allowed practical consequence to determine legal validity. That is the essence of remedial evasion.

9. Dual incumbency, stability and remedial imagination

The Court's anxiety concerning dual incumbency was genuine. Were the Senate resolution quashed, the Court reasoned, Gachagua would automatically resume office, since Article 148(6) exhaustively prescribes how a Deputy President's term ends and Article 148(7) prescribes resignation by written notice to the President.[91] Since Kindiki had already assumed office under Article 149(1), quashing the impeachment could produce two Deputy Presidents, uncertainty over official acts, confusion in government business, and possible unrest.[92] A court should not treat such consequences lightly; constitutional adjudication is not an abstract seminar detached from the institutional life of the Republic.

But remedial complexity is not remedial impossibility. Courts routinely manage the consequences of constitutional invalidity through carefully tailored orders. Article 23 confers wide remedial authority on Kenyan courts.[93] Article 159 requires courts to administer justice in a manner that protects constitutional purposes and substantive justice.[94] The Supreme Court in *Mitu-Bell* approved structural interdicts as part of the remedial vocabulary under Article 23, recognizing that courts may retain supervisory authority where necessary to secure effective relief.[95] South African courts have long separated declarations of invalidity from the management of their consequences through suspension, prospective effect and supervisory orders.[96] These instruments exist precisely because constitutional enforcement sometimes threatens disruption if applied crudely.

The High Court could have declared the Senate proceedings constitutionally invalid,

[89]Nixon (n 17).
[90]*Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8, 1995 (4) SA 877 (CC) paras 99-100.
[91]*AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (No 2) [2014] ZACC 12, 2014 (4) SA 179 (CC) paras 30, 42 and 56.
[92]*Gachagua* (n 1) paras 494-496; Constitution of Kenya 2010 art 148(6)-(7).
[93]*Gachagua* (n 1) paras 497-501.
[94]Constitution of Kenya 2010 art 23(3).
[95]Constitution of Kenya 2010 art 159(2).
[96]Mitu-Bell (n 22) paras 112, 115-116.

while suspending the operative effect of that invalidity for a defined period. It could have ordered Parliament to enact the dedicated Article 150 framework within that period, as it ultimately did through mandamus. It could have directed that, should Parliament wish to pursue removal, it do so through a constitutionally compliant process within that framework. It could have preserved the validity of official acts taken by Kindiki pending compliance, under a de facto officer or prospective-validity rationale. It could have prohibited dual incumbency during the suspension period, and could have structured its order to require the parties to return for consequential directions. None of these options would have been simple, but constitutional adjudication often demands difficult remedial design where rights, offices and public administration intersect.

The Court instead treated quashing as though it carried only one possible consequence, the immediate and automatic restoration of Gachagua alongside the simultaneous occupancy of Kindiki. That assumption narrowed the remedial field artificially. A declaration of invalidity need not operate instantly and retrospectively in full force. Suspended invalidity exists precisely because courts recognize that immediate nullification can injure the constitutional order the court seeks to protect. But suspension differs fundamentally from refusal. Suspension holds that the act is unconstitutional, while its legal consequences are managed to avoid chaos as the Constitution is restored. Refusal holds that the act is unconstitutional, yet its result remains effective because restoring legality is deemed too difficult. The former preserves supremacy through calibrated remedy; the latter dilutes supremacy through resignation.

The Court's reliance on the spectre of constitutional crisis likewise demands caution, for the phrase may readily become a veto over constitutional enforcement. In *Law Society of Kenya v Anne Kananu Mwenda*, the Court warned that courts should not themselves create constitutional crises.[97] That principle is sound, but it cannot mean that courts must preserve unconstitutional acts whenever invalidation proves inconvenient. On occasion, the constitutional crisis is not created by the court's remedy at all, but by the political branches' unconstitutional speed. A court that withholds effective relief because Parliament has engineered a difficult factual situation risks rewarding the very conduct that produced the dilemma.

It is here that the concept of fait accompli constitutionalism becomes useful. It describes a pattern in which political actors act rapidly, complete a constitutionally contested process, fill the resulting offices, and then invite the court to preserve stability. The court, apprehensive of disruption, acknowledges the wrong but declines to disturb its result. That dynamic is especially acute in impeachment. Removal and replacement can occur within days, while constitutional litigation takes months. If speed can render unconstitutional outcomes practically irreversible, the Constitution's procedural safeguards become vulnerable to strategic compression. Future Parliaments will learn that the safest path through judicial review is not more careful compliance, but faster completion.

Constitutional stability is not preserved by tolerating unconstitutional process; it is

[97]See, eg, *Minister of Home Affairs v Fourie* [2005] ZACC 19, 2006 (1) SA 524 (CC) paras 156-160; *AllPay* (No 2) (n 48) paras 30, 42 and 56.

preserved by ensuring that political power remains answerable to law. A judgment that invalidates an unconstitutional impeachment while suspending its consequences to avoid dual incumbency may be institutionally demanding, but it teaches the correct lesson: political branches may act quickly only within constitutional discipline. A judgment that compensates while preserving the result teaches a considerably more dangerous lesson, that constitutional rights matter, but not sufficiently to undo the political outcome their violation produced.

10. Damages and the monetisation of constitutional breach

The award of KShs 50 million in constitutional damages is among the most striking features of the judgment. The Court took care to state that the award was not compensation for loss of office, but was intended to vindicate the Constitution, restore dignity and deter future violations.[98] It relied on *Gitobu Imanyara*, where the Court of Appeal accepted that constitutional damages may serve not only compensatory, but also vindicatory and deterrent, functions.[99] In principle, constitutional damages are entirely legitimate. Where rights are violated and no ordinary remedy suffices, monetary relief may prove necessary to acknowledge injury, vindicate the right, and discourage recurrence.

The difficulty in this case is that damages became a substitute for invalidity. The wrong at issue was not merely personal humiliation or procedural inconvenience; it was a violation of the hearing guarantee within the very process that removed a nationally elected Deputy President. If that process remains effective, damages risk converting a non-derogable right into a mere cost of doing political business. The Senate is instructed to pay, yet the impeachment survives. The political actors who benefited from the violation retain that benefit. The public office remains filled on the basis of a process the Court itself found constitutionally infirm. The remedial message is thus not deterrence alone, but pricing.

The difficulty is sharpened by Article 25(c). A non-derogable right is not simply a right that attracts a higher measure of damages; it is a right whose violation the Constitution treats with special seriousness.[100] Monetary vindication may be appropriate where the violation cannot be meaningfully reversed, or where the public act in question is no longer operative. But where the violation constitutes the very condition under which an operative constitutional outcome was produced, damages alone are conceptually insufficient, for they leave the unconstitutional consequence intact. The result is the monetization of non-derogable rights, the Court affixing a financial figure to a breach while declining to disturb the institutional benefit obtained through it.

This is not an argument that Gachagua ought to have received no damages whatsoever. A declaration of invalidity, whether suspended or otherwise tailored, could readily have been accompanied by damages had the Court considered further vindication necessary. The objection is to damages functioning as remedial displacement. In *Fose*, the South African Constitutional Court cautioned that appropriate relief is relief required to protect and enforce the Constitution.[101] In some cases damages will accomplish that

[98] *Law Society of Kenya v Anne Kananu Mwenda & others* [2021] eKLR, cited in *Gachagua* (n 1) para 500.
[99] *Gachagua* (n 1) para 507.
[100] *Imanyara & 2 others v Attorney-General* [2016] KECA 557 (KLR), citing *Siewchand Ramanoop v Attorney General of Trinidad and Tobago* [2005] UKPC 15.
[101] Constitution of Kenya 2010 art 25(c).

end; in others, damages unaccompanied by process correction will under-enforce the right. In impeachment, where the harm is partly institutional in character, a purely monetary remedy cannot restore the constitutional order. It compensates the individual while leaving the underlying public law defect unrepaired.

The deterrence rationale is likewise uncertain. KShs 50 million is a substantial sum for an individual award, but the relevant institutional actor is Parliament, funded from the public purse. The financial burden thus falls ultimately on the public rather than on the political actors who chose to proceed. Absent pairing with invalidity, future political branches may rationally treat such damages as an acceptable public cost for securing a high-value political outcome. The Constitution should not be reduced to an auction in which an impeachment may be purchased at the price of after-the-fact damages.

The Court's own reasoning demonstrates why damages proved inadequate. It held that the refusal of an adjournment prevented Gachagua from completing his case at the decisive moment, after the National Assembly had completed its own.[102] That wrong cannot be fully vindicated without addressing the decision reached in the aftermath of that unfairness. The injury was not confined to a wound to Gachagua's dignity; it lay in the fact that the Senate vote was taken under unfair conditions. A remedy that leaves the vote untouched vindicates dignity in words and in money, but not legality in institutional fact.

11. Mandamus and the Court's unresolved contradiction

The mandamus order is at once valuable and revealing. The Court declared the constitutional necessity for Parliament to enact a dedicated statutory framework governing the impeachment of the Deputy President under Article 150. It reasoned that the phrase 'with the necessary modifications' constitutes a substantive constitutional directive requiring adaptation of the presidential removal framework to the Deputy President's distinct constitutional position.[104] That is an important holding, recognizing that Article 150 is no mere cross-reference. The Deputy President occupies an office possessing its own democratic mandate, functions, succession implications, and relationship to the President. A process designed for presidential impeachment cannot simply be transposed onto the Deputy Presidency without deliberate legislative design.

The unresolved contradiction is plain. If the absence of a dedicated framework was sufficiently serious to justify mandamus, why was it not sufficiently serious to affect the validity of the impeachment already undertaken? The Court answered that the mere absence of legislation did not impugn the instant impeachment.[105] That answer may be defensible where the existing constitutional text supplies adequate procedural safeguards and Parliament complies with them. But the Court found that Parliament had not complied with the fair-hearing requirements, and had also suggested, prior to deferring to *Sonko*, that the Senate's failure to appoint a special committee was constitutionally infirm.[106] The absence of a dedicated framework was thus not an abstract legislative gap; it formed part of the practical environment

[102] *Fose* (n 23) para 19.
[103] *Gachagua* (n 1) paras 459-466.
[104] *Gachagua* (n 1) para 509.
[105] *Gachagua* (n 1) para 475.
[106] *Gachagua* (n 1) paras 475, 508.

that permitted uncertainty over committee process, timelines, adjournment, public participation and replacement to generate constitutional injury.

A court can, in some circumstances, compel future legislation without invalidating past action. But where the very case before the court demonstrates how legislative absence contributed to a rights-violating process, mandamus alone appears prospective at the cost of present accountability. The order instructs Parliament to repair the roof after the constitutional rain has already entered the house, while leaving the resulting damage untouched. A more coherent remedial model would have linked mandamus to the validity of the process itself, for instance, by declaring the process unconstitutional, suspending invalidity, ordering Parliament to enact the framework, and directing that any renewed impeachment comply with it. That approach would have treated the legislative gap as both a future problem and a present constitutional cause.

The Court's mandamus reasoning further underscores the inadequacy of its finality analysis. If Article 145 and the existing Standing Orders sufficed to produce irreversible constitutional finality, the need for a dedicated Article 150 framework would be correspondingly less urgent. If, conversely, Article 150 requires necessary modifications that Parliament failed to enact, the Court should have been more hesitant before treating the impeachment as constitutionally complete. The judgment attempts to hold both positions simultaneously, that the framework is constitutionally necessary, yet its absence carries no consequence for the first process conducted without it. That is not impossible in every case, but it required a more careful explanation than the Court supplied.

12. Towards a better doctrine of impeachment review

A better doctrine of impeachment review should proceed from a simple proposition: impeachment is political power exercised through constitutional form. Courts should not review the political wisdom of impeachment, substitute their own assessment of the merits for Parliament's, or require Parliament to retain an office-holder whom the Constitution permits it to remove. But courts must insist that the grounds, procedure, participation, evidentiary sufficiency and hearing rights attached to impeachment remain legally meaningful. The 2010 Constitution was designed to discipline public power, not merely to decorate it with procedure.[107]

The first element of such a doctrine is calibrated justiciability. Courts should distinguish the merits of impeachment from constitutional compliance. Whether particular conduct amounts, as a political matter, to gross misconduct may often fall within Parliament's evaluative domain. Whether a charge is constitutionally cognizable, whether the affected officer had adequate notice, whether evidence was sprung upon him, whether public participation was meaningful, whether the hearing was fair, and whether the vote complied with constitutional thresholds are legal questions properly for the courts. This distinction preserves parliamentary autonomy while rejecting immunity, and avoids the false choice between judicial overreach and judicial abdication.

[107] *Gachagua* (n 1) paras 443-448.

The second element is heightened procedural scrutiny. The removal of a Deputy President is not ordinary legislative business; it overturns part of a national electoral mandate and bears upon succession to the Presidency. The standards governing notice, disclosure, time to respond, impartial presiding, evidentiary testing and adjournment should accordingly be more exacting than those applicable to routine parliamentary motions. The Court recognized this in substance when it described impeachment as solemn and consequential, but it did not translate that recognition into a robust remedial posture.[108] A future court should state clearly that the more irreversible the constitutional consequence, the more exacting the procedural fairness required before that consequence may lawfully crystalize.

The third element is a modified doctrine of participation. Public participation in impeachment should be treated neither as a referendum on guilt nor reduced to a checklist of notices and forms. The initiating House should provide balanced information, reasonable time, accessible materials, and mechanisms capable of capturing qualitative views. The Senate, as the determinative House, should at minimum satisfy itself on record that the initiating participation process was constitutionally adequate, and that the resulting public materials have been transmitted and considered. This approach avoids transforming the Senate into a public rally, while recognizing that Article 118 does not disappear the moment Parliament performs an adjudicative constitutional function.

The fourth element is procedural equivalence where the Senate elects plenary over committee. If *Sonko* means that plenary remains permissible, plenary must nonetheless furnish safeguards functionally equivalent to the committee process: a reasoned admission stage, an organized evidentiary record, adequate time, disclosure rules, a fair opportunity to appear, and a clear separation between investigation and final vote so far as plenary procedure allows. Absent such equivalence, the special committee safeguard becomes optional in form and empty in substance. Article 145 should not be construed to permit the Senate to select the path of least procedural resistance where the office at stake is constitutionally central.

The final element is remedial accountability. Courts should develop a sequenced approach: identify the constitutional violation, determine whether it affects the validity of the impeachment process, and then separately design consequences that preserve constitutional order. Where a serious fair-hearing violation infects the decisive stage, invalidity should ordinarily follow. Should immediate invalidity threaten dual incumbency or administrative disruption, the court may suspend its effect, preserve past acts, impose timelines, require a fresh process, or retain supervisory jurisdiction. That approach is more faithful to Articles 2(4) and 23 than a simple refusal to quash. It permits the court to say: the Constitution was violated and the result cannot be legitimized, but the transition back to legality will be managed responsibly.

This remedial model would not require courts to reinstate impeached office-holders in every case. It would, however, require courts to reject the proposition that

[108]HWO Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox' in Issa G Shivji (ed), *State and Constitutionalism: An African Debate on Democracy* (SAPES Books 1991) 3; Yash Ghai and Jill Cottrell Ghai, *Kenya's Constitution: An Instrument for Change* (Katiba Institute 2011) 7-14.
[109]*Gachagua* (n 1) para 327.

The final court verdict on Rigathi Gachagua's impeachment was delivered by a three-judge bench of the High Court on 8 June 2026.

political inconvenience can validate an unconstitutional process. In some cases, the appropriate order may be a suspended declaration affording Parliament an opportunity to cure the breach; in others, a prospective declaration may suffice; in the gravest cases, immediate quashing may be necessary. The point is that remedy must be reasoned from the right, the violation, the institutional consequences, and the Constitution's remedial purposes. It cannot be reasoned from fear alone.

13. Conclusion

The Gachagua impeachment judgment is a serious judgment, but seriousness does not cure contradiction. Its strongest contribution lies in its insistence that impeachment is justiciable under Kenya's Constitution, and that Parliament cannot invoke its political character as immunity from constitutional discipline. Its most troubling feature is its refusal to attach ordinary legal consequences to the very constitutional violation it found. The Court recognized that Gachagua's fair-hearing rights had been infringed, accepted the non-derogable character of the fair-trial guarantee, and acknowledged the need for a dedicated statutory framework. Yet it preserved the impeachment, awarded damages, and left the political outcome intact.

That is why the judgment is bad law. It does not merely resolve one difficult dispute conservatively; it furnishes future constitutional actors with a template for retaining the fruits of unconstitutional process. The Dugdale ghost resides here, not in an express denial of jurisdiction, but in a judicial willingness to allow a right to exist without the consequence necessary to render it real.

That remedial move is no minor technical weakness. It risks reshaping Kenyan impeachment law around a dangerous lesson: that if Parliament moves quickly enough, fills the vacancy, and generates institutional facts, a court may recognize the violation yet decline to undo its effect. That is fait accompli constitutionalism. It rewards speed over legality, and converts the Constitution's procedural safeguards into after-the-fact damages claims. The difficulty is not that the Court refused to restore one politician to office; it is that the Court permitted an unconstitutional process to remain politically victorious.

Constitutional stability is a genuine value, and courts should not create avoidable institutional chaos. But stability is not the opposite of legality. Under the Constitution of Kenya 2010, stability is secured by ensuring that power is exercised through lawful process. A court confronted with an unconstitutional impeachment need not choose between immediate reinstatement and remedial surrender. It may declare invalidity, suspend consequences, preserve official acts, require fresh proceedings, supervise compliance, and compel legislation. These tools are not signs of judicial activism; they are the ordinary instruments of a constitutional court operating under a supreme and remedial Constitution.

The enduring question left by the judgment is therefore not whether Gachagua should return to office, but whether Kenya's constitutional order will permit non-derogable fair-hearing rights to be acknowledged, compensated, and yet ignored in their effect upon public power. If the answer is yes, impeachment will remain justiciable in form but under-enforced in substance. If the answer is no, future courts must insist that Parliament may remove even the highest officers of the Republic, but only through a process the Constitution can recognize as its own. The Constitution is not preserved by permitting unconstitutional politics to mature into irreversible fact. It is preserved when political victory remains answerable to constitutional validity.

The enduring question after the judgment is therefore not whether Gachagua should return to office. It is whether Kenya's constitutional order will allow non-derogable fair-hearing rights to be acknowledged, compensated and ignored in their effect on public power. If the answer is yes, impeachment will remain justiciable in form but under-enforced in substance. If the answer is no, future courts must insist that Parliament may remove even the highest officers of the Republic, but only through a process that the Constitution can recognise as its own. The Constitution is not preserved by permitting unconstitutional politics to mature into irreversible fact. It is preserved when political victory remains answerable to constitutional validity.

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Editorial Apology and Commitment to Compliance

The Platform for Law, Justice and Society acknowledges, with deep regret, the concerns raised by Mr Mwichigi Timothy Kamau regarding the publication of his image in the April 2026 edition. We recognise that this issue has attracted formal attention and we treat the matter with the seriousness it warrants.

Our editorial and publishing mandate is anchored in a commitment to constitutionalism, the rule of law and respect for individual dignity. In this instance, however, we accept that our handling of Mr Kamau's image fell below the standards we set for ourselves and those required under applicable data protection principles. Specifically, we acknowledge that we erroneously published Mr Kamau's photograph in an article he did not author, thereby creating a misrepresentation that should not have occurred within a publication of our standing.

We further extend our sincere apologies to Mr Timothy Ngome, the author of the article titled ***"A Lockean Audit of Kenya's Constitutional Trusteeship,"*** which appeared in the April 2026 edition. The misattribution arising from the use of an incorrect image undermined the integrity of authorship and editorial accuracy, values we hold as fundamental to scholarly and public discourse.

We unreservedly apologise to Mr Kamau for any distress, embarrassment or sense of violation occasioned by the publication and continued circulation of his image without proper attribution, clarity or timely corrective action. We recognise that the use of an identifiable image engages important considerations of informational privacy and personal autonomy, and that any lapse in this regard erodes public trust.

Following the concerns raised, we undertook an internal review of the processes through which the image was sourced, approved and published, including the chain of editorial responsibility and the safeguards governing visual content. We have since initiated steps to remove the image from our digital platforms, restrict its circulation within our archives and ensure that any continued retention is strictly aligned with principles of lawful processing, purpose limitation and data minimisation.

We accept that a meaningful apology must be accompanied by corrective action. Accordingly, we are revising our internal policies on image sourcing and verification, strengthening consent and attribution protocols, and instituting mandatory training for all editorial and production staff on responsible data handling and publication standards. These measures are intended to prevent recurrence and to embed a culture of accountability and care in our editorial practice.

We will continue to engage constructively with all relevant oversight processes and provide such information as may be required to facilitate a fair and transparent resolution of the concerns raised. We are mindful that accountability is best demonstrated through openness, responsiveness and institutional reform.

Finally, we affirm that the rights and dignity of all individuals featured or referenced in our publication are not incidental to our work but integral to it. This apology is therefore not merely an expression of regret, but an acknowledgment of a clear lapse and a commitment to uphold the standards expected of a journal devoted to law, justice and society.

JUDICIAL ACCOUNTABILITY

Against the world's finest: University of Nairobi wins the 24th John H. Jackson Moot Court in Geneva

By Teddy Odira

The victory of Isaac Kimeu, Maina Libby, and Ian Irungu at the 24th John H. Jackson Moot Court Competition in Geneva is a landmark achievement for the University of Nairobi, for Kenya and for African legal education more broadly. It is a moment that deserves not only celebration but careful reflection on what it signifies for the future of public law and international economic jurisprudence emerging from the Global South.

In Geneva, before a panel composed of leading experts in World Trade Organization law, the University of Nairobi team prevailed over some of the most distinguished law schools in the world. Their victory, at a competition that brings together teams from across five continents to simulate WTO dispute settlement proceedings, affirms that African legal scholarship and advocacy can not only participate in but also shape the contours of contemporary international trade law.

This was not merely a success in a student competition but an exacting test of doctrinal mastery, analytical rigor and forensic skill. The team's performance, from the written submissions to the oral pleadings, demonstrated an ability to synthesise policy considerations and comparative jurisprudence into coherent, persuasive

advocacy that resonated with a truly international bench.

John H. Jackson Moot Court Competition has, over the years, become the pre-eminent training ground for future practitioners and scholars of WTO law. To emerge as winners is to have met and exceeded global standards in the interpretation of treaty text, the deployment of precedent and the navigation of the often-fraught interface between trade liberalisation, regulatory autonomy, and development imperatives.

In this context, the achievement of Kimeu, Libby, and Irungu reflects a disciplined engagement with the architecture of international economic law. Their arguments

Ian Kamau Irungu, Isaac Kimeu Kioko and Libby Njoki Maina at the John H. Jackson Mootcourt Competition on Sat Jun 27, 2026

had to be at once doctrinally sound, normatively grounded and acutely attentive to the structural asymmetries that still mark global trade. That they persuaded a bench steeped in this tradition is a testament to their intellectual maturity and professional promise.

This victory also carries a broader institutional and regional significance. It confirms that Kenyan legal education, and particularly the University of Nairobi's Faculty of Law, can produce teams capable of prevailing in highly competitive international settings where the margins between success and failure are exceedingly narrow.

For African legal education, the win contributes to a growing body of evidence that the continent's law schools are not merely consumers of global legal norms, but are increasingly poised to be producers and critics of those norms. It sits alongside earlier regional successes in moot court circuits as part of an emerging tradition of African excellence in international adjudicative simulation, from human rights to trade and beyond.

Perhaps most importantly, the accomplishment of this team will resonate in lecture halls and moot rooms far beyond Geneva. It will inspire younger students to see international economic law not as a distant, technocratic field, but as a site where Kenyan and African voices can articulate principled, sophisticated positions on the regulation of global markets.

In celebrating Isaac Kimeu, Maina Libby and Ian Irungu, we also recognise the faculty mentors, coaches and institutional support that made this journey possible. Together, they have demonstrated that with rigorous preparation, intellectual ambition and an unwavering commitment to excellence, Kenyan law students can meet the very highest standards of international advocacy, and, as Geneva has now shown, can set those standards for others to follow.

Teddy Odira is a Kenyan lawyer, legal researcher and emerging public-interest scholar whose work traverses human rights advocacy, constitutional and public law, economic governance and AI regulation.

INFRASTRUCTURE CAPITALISM

When corporations begin to govern

By Nyaga Dominic

A society can tolerate the failure of most companies. It cannot function without some systems.

That distinction has acquired new urgency. Modern economies depend on payment networks, cloud infrastructure, digital platforms and communications systems that are privately owned but underpin public life. Institutions are therefore forced to answer a question they were never designed for: what happens when systems that shape everyday public life remain private?

Every era produces organisations that become woven into its economic order. Medieval trading leagues once controlled the commercial arteries of Europe. Chartered companies later moved goods, capital and imperial influence across continents. One of them, the East India Company, exercised military, fiscal and administrative authority across vast territories before many of those functions were absorbed by the British state. Industrial economies later produced railroad

Corporations may lobby governments, fund political campaigns, or influence legislation in ways that prioritize business interests over the public good.

The October 2025 outage of Amazon Web Services (AWS), the world's largest cloud platform, disrupted over 1,000 companies, causing service interruptions, delayed transactions, and limited access to critical online services.

networks, banking houses and telephone systems powerful enough to shape entire markets.

Concentrated power is not new. The systems through which it now travels are. When Amazon Web Services, the world's largest cloud-computing platform, suffered a major outage in October 2025, the disruption rippled through more than 1,000 companies. Banks, airlines, payment systems and major digital platforms including Reddit and Snapchat experienced service interruptions. The infrastructure sat in northern Virginia. The consequences did not. The outage ended within hours. The dependency remained.

The modern economy runs through infrastructure that few citizens see and even fewer governments fully control. A retailer in Nairobi depends on digital payments to settle transactions quickly. A hotel's visibility can rise or collapse because an algorithm changed somewhere beyond its reach. A bank may look local while depending on cloud infrastructure sitting outside the country where its customers live. A public agency may deploy digital systems more complex than the legal and institutional frameworks designed to oversee them.

The economy still looks national from the outside. Underneath, payments, communications, logistics and data move through privately governed digital infrastructure. Markets are rarely neutral. They are shaped by law, code, ownership and the institutions controlling access to them.

In Kenya, market shifts stopped being theoretical long ago. When mobile money first emerged in 2007, the story seemed straightforward: technology solving a practical problem in a heavily cash-based economy. Transactions became faster. Distance mattered less. Informality became more legible. Entire categories of commerce expanded.

But something deeper was happening at the same time. Private telecommunications system was quietly becoming part of the country's economic operating system. Salary payments, transport, utility bills, school fees and small-business commerce moved onto privately operated rails until they became embedded in ordinary life. Millions adopted the transition through convenience rather than ideology. The infrastructure became normal long before its institutional consequences were understood.

That experience now extends well beyond payments. Cloud systems underpin communications, financial infrastructure and data storage. Digital platforms shape how businesses acquire customers, how information circulates and how markets coordinate themselves.

Modern power operates through dependency as much as ownership. A system becomes influential not only because it is profitable, but because public institutions, businesses and ordinary citizens gradually lose the practical ability to function outside it. That shift is unsettling some of the assumptions on which competition law was built. Industrial-era regulation focused on physical dominance: pipelines, factories, rail corridors and distribution networks. Modern economic power increasingly operates through platforms, ecosystems, payment rails, cloud infrastructure and network effects.

Several global technology firms now shape policy environments less through territory than through dependence. Countries negotiate not only with other states, but with corporations operating systems their citizens cannot easily function without. Infrastructure, once tied primarily to territory, now sits inside global systems shaped as much by geopolitics as commerce.

Power now travels through these systems as much as territory. Law has met versions of this problem before. In ***Munn v Illinois*** (1877), the United States Supreme Court held that once private property became "affected with a public interest," it ceased to be purely private and could be regulated in the public's name. Grain elevators remained privately owned, yet commerce depended on them. The law therefore treated them differently from ordinary businesses. The more a society depends on a private system, the less purely private that system remains. Decades later, in ***Marsh v Alabama*** (1946), the same court held that a company-owned town could not escape constitutional scrutiny once it served, in practice, as a public space.

Those cases belonged to industrial America. Today's infrastructure operates across borders and legal systems in ways nineteenth-century courts could not have imagined. Yet the underlying tension feels familiar: infrastructure remaining privately owned while becoming socially indispensable.

Africa is often described as technologically behind; it may instead be an early laboratory. Parts of the continent encountered these questions earlier because mobile-money leapfrogging compressed several stages of institutional change into a single generation. The constitutional implications are becoming harder to ignore. American law has long struggled with what lawyers call the state-action problem: constitutional duties generally bind governments, not private actors. Kenya's 2010 Constitution takes a broader view. Article 20(1) provides that the Bill of Rights binds not only state organs but all persons. South Africa's 1996 constitutional framework, under Section 8(2), similarly allows constitutional obligations to operate horizontally between private parties.

African constitutional systems may hold tools for confronting forms of private infrastructural power that older legal traditions are still learning to govern. Kenya's courts have begun to encounter the edges of this transition. In the ***Huduma Namba*** litigation in 2020, the High Court conditioned implementation of the ***Huduma* Card**, the final stage of Kenya's digital identity system, on a data-protection impact assessment. The point was not hostility to innovation. Societies become dependent on systems long before law settles around them.

No modern economy can function outside these systems. The infrastructure arrived first. Governance is still catching up.

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A monumental error: The Court of Appeal's self-inflicted wound in the NSSF litigation and what it reveals about judicial accountability in Kenya

By Teddy Odira

Introduction: When the wrong map produces the wrong destination

There is a particular form of institutional embarrassment that no court can easily survive, not the embarrassment of deciding a hard case wrongly on the merits but the embarrassment of deciding the right case for the wrong application entirely. On 29th May 2026, the Court of Appeal delivered a ruling in Civil Appeal No. E656 of 2022, ***National Social Security Fund Board of Trustees v Kenya Tea Growers' Association & 14 Others***,[1] that convulsed Kenya's entire pension sector. The ruling dismissed NSSF's bid for a stay of the Employment and Labour Relations Court (ELRC) judgment and was initially received as a landmark pronouncement on pension law. What followed was, in the measured language of Ngatia & Associates writing to the Registrar of the Court of Appeal, an expression of profound disbelief and bewilderment arising from the monumental error therein.

The error, as subsequently confirmed by the Court itself, was of a kind that defies easy categorisation. The Court had purported to rule on a stay application dated 14th October 2022 which is an application that had been superseded by years of subsequent litigation, fully argued at the Supreme Court and effectively spent. What had in fact been argued before the same bench on 23rd January 2025 was a joinder application filed by the Kenya Export Floriculture, Horticulture and Allied Workers Union, which sought to be added as an Interested Party. For nearly one year and four months, parties had awaited a ruling on that joinder application. What they received, instead, was a ruling on a phantom application, one no longer live and determined by a Judgment that was delivered on 3rd February 2023.

The Court of Appeal, to its credit, ultimately acted with judicial candour it might well have avoided. On 26th June 2026, it set aside its own ruling, acknowledging that the ruling erroneously delivered by this Court on 29th May 2026 is amenable to setting aside in the interests of justice. The joinder application is now scheduled to be heard on 3rd July 2026. The correction, however, does

[1] *National Social Security Fund Board of Trustees v Kenya Tea Growers' Association & 14 others* KECA 80 (KLR)

not close the inquiry. If anything, it opens it wider. This article examines what happened, why it happened, what the law says about it, and most pressingly, what institutional lessons a constitutional democracy ought to extract from such an episode.

Background: A litigation that has consumed a decade

To understand the magnitude of the error, one must first appreciate the duration of the underlying dispute. The 2013 NSSF Act No. 45 introduced a graduated contribution framework that enhanced both employer and employee contributions to the Fund. The Act was challenged before the ELRC, which, in September 2022, declared the entire statute unconstitutional on multiple grounds including failure to involve the Senate, violation of competition law through granting NSSF a monopoly, usurpation of the Salaries and Remuneration Commission's mandate and unjustified restriction of employees' freedom to choose their pension arrangements.

In February 2023, the Court of Appeal reversed the ELRC, holding that the Labour Court lacked jurisdiction to hear a dispute whose essence was the validity of a legislative process. The 2013 Act was thereby briefly restored to life. In February 2024, however, the Supreme Court intervened, overturning the Court of Appeal and holding that the validity of a pension statute squarely engages the employer-employee relationship, thereby restoring ELRC jurisdiction. The Supreme Court remitted the matter to the Court of Appeal to rehear the substantive appeal on a priority basis.[2]

Against this backdrop, NSSF applied under Rule 5(2)(b) of the Court of Appeal Rules 2022 for a stay of the ELRC judgment pending the substantive appeal, a standard interlocutory application seeking to preserve the status quo.[3] It was on this application, among others, that the litigation traffic accumulated at the Court of Appeal from 2024 onwards. Separately, Kenya Export Floriculture, Horticulture and Allied Workers Union filed its joinder application, arguing before the bench on 23rd January 2025.

The financial stakes could not be more consequential. As of December 2025, NSSF's net assets stood at Ksh 623.4 billion, with member contributions for the half-year ending that month reaching Ksh 43.3 billion.[4] The Fund had committed itself as a cornerstone investor in major infrastructure including the Rironi-Mau-Summit road project, the Talanta Stadium bond, the Bomas project note programme and the Kenya Pipeline Company IPO.[5] Any ruling that disrupted the contribution framework would cascade through the entire retirement benefits architecture, affecting not merely future deductions but interests already declared and distributed to member accounts.[6]

The ruling of 29th May 2026: A thunderbolt from the wrong map

When the ruling was delivered on 29th May 2026, its immediate reception was seismic. A three-judge bench had, by the

[2]KN Law LLP, 'Court of Appeal decision on the 2013 NSSF Act' (KN Law LLP, 12 August 2024) <https://kn.co.ke/what-the-court-of-appeal-decision-on-the-2013-nssf-act-means-for-employers/> accessed 30 June 2026.
[3]Court of Appeal Rules, 2022 (Legal Notice No 40 of 2022, Appellate Jurisdiction Act, Cap 9).
[4]National Social Security Fund, Annual Report and Financial Statements for the year ended 31 December 2025 (NSSF, Nairobi).
[5]ibid.
[6]Jaindi Kisero, 'Weight of court verdict on NSSF deductions' Business Daily (Nairobi, 11 June 2026) <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/court-verdict-s-import-on-nssf-deductions-5492838> accessed 30 June 2026.

logic of paragraph 1 of the ruling, treated the matter as if it were the October 2022 stay application still awaiting determination. The Court dismissed NSSF's bid on the ground that it was not persuaded that the ELRC judgment had created a governance vacuum, and held that the previous statute, Cap. 258, automatically filled the legislative void.

On the surface, this appeared to be a substantive ruling against NSSF's position. Panic rippled through the markets. The NSSF Board was compelled to purchase expensive full-page newspaper advertisements to assure employers and workers that contribution rates remained unchanged. The Central Organisation of Trade Unions (COTU) issued matching clarifications and subsequently castigated the Agricultural Employers Association after it circulated advice to members to immediately revert to the old Ksh 200 rate. Days of public confusion, payroll uncertainty, and institutional noise ensued, all arising from a ruling on an application that was not, in fact, before the Court.[7]

Ngatia & Associates, acting for NSSF, wrote to the Registrar of the Court of Appeal on 2nd June 2026, laying out the error with disarming precision. The letter identified three structural impossibilities in the ruling. First, that the Appeal had been determined by a judgment delivered on 3rd February 2023, making any stay application thereafter legally untenable. Second, that the ruling itself referenced the Supreme Court judgment arising from an appeal against that very Court of Appeal judgment, providing its own internal reminder that the stay was spent and third, that the notes and audio recordings from the 23rd January 2025 hearing would have plainly disclosed that what was argued was the joinder motion, not the stay application. The letter called, in plain terms, for the Court to act *suo motu* to recall the ruling, expunge it from the record, and issue a public announcement of its nullification.[8]

The legal framework: *Functus officio*, the slip rule and the interests of justice

The legal question that arises is that once a court has delivered a ruling, on what basis may it revisit it? The doctrine of functus officio, literally, "having performed one's function", holds that a court which has delivered its final decision has exhausted its authority over that matter and cannot reconsider it.[9] The rationale is that without this doctrine, litigation would be interminable and parties would enjoy no certainty in judicial outcomes.

However, the doctrine is not absolute and Kenyan law recognises several carefully defined exceptions. Section 99A of the Civil Procedure Act (Cap. 21) provides that clerical or arithmetical mistakes in judgments, decrees, or orders, or errors arising from accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any party.[10] This is the classical slip rule. It is, however, strictly circumscribed. It extends to errors in expressing the manifest intention of the court, not to reconsidering the substance of its decision. The courts have been emphatic that the slip rule must not transcend the entire proceedings, as to have a devastating

[7]ibid.
[8]Edwin Gakunga, 'What the Court of Appeal's NSSF ruling means for employers and employees' (LinkedIn, 18 June 2026) <https://www.linkedin.com/pulse/what-court-appeals-nssf-ruling-means-employers-edwin-gakunga-h80jc> accessed 30 June 2026.
[9]David F Harris, Civil Procedure in Kenya (2nd edn, LawAfrica 2017).
[10]Civil Procedure Act (Cap 21), s 99A.

effect going to the root of the decision.[11]

What occurred here was not, on any conventional analysis, a slip or clerical error. The Court did not mistype a figure or omit a party's name. It determined an entirely different application from the one that was actually argued before it which is a substantive, root-level error that produced a decision with no legal basis whatsoever. This goes beyond the slip rule. What rescues it, however, is a distinct and more potent principle that courts possess inherent jurisdiction to set aside orders or judgments that are erroneously sought or erroneously granted in the absence of any party affected thereby. The Court of Appeal's own eventual ruling in June 2026 characterised the error as one apparent on the face of the record, the canonical language for an error that requires no extrinsic evidence to establish and that admits of correction without revisiting the substantive merits.[12]

The interests of justice standard, which the Court invoked in setting aside its ruling, is accordingly the correct jurisprudential anchor. Where an order has been made *de hors* any live application, where, in plain terms, the Court has ruled on something that was simply not before it, the question is not whether a party is appealing or seeking review but whether the Court's record accurately reflects the adjudicative reality. A ruling made in the total absence of a live application is not a ruling at all in the jurisprudential sense. It is a nullity, and no doctrine of *functus officio* can clothe nullity with the character of a binding decision.

The institutional indictment:

What the error reveals

It would be insufficient, and in some ways evasive, to treat this episode merely as a procedural curiosity. The deeper question is how does a three-judge bench of an apex court come to determine an application that was not before it, on facts that any perusal of the court file would have corrected?

The letter from Ngatia & Associates offers a sober diagnostic. It identifies the sheer absence of perusal of the notes made at the hearing and/or the audio recording which precedes a Court session. This is not a trivial observation. It suggests that the bench proceeded to deliver a ruling without reviewing the record of what had actually been argued, a failure of basic judicial housekeeping that in a busy docket may be more common than the public realises, but which in this instance produced consequences of national significance.[13]

The confusion was compounded by the nature of NSSF's litigation history. By the time of the May 2026 ruling, the parties had engaged in years of parallel interlocutory skirmishing at multiple levels of the court hierarchy. The October 2022 stay application had, by the Court of Appeal's own 2023 judgment and the Supreme Court's 2024 remittal, become legally absorbed into and superseded by the substantive litigation framework. Its resurrection in a 2026 ruling was, to borrow from Business Daily's characterisation, a thunderbolt from a court looking at the wrong map.[14]
The error also created the conditions for institutional misinterpretation downstream.

[11]David F Harris, Civil Procedure in Kenya (2nd edn, LawAfrica 2017).
[12]James Gichigi, 'Court of appeal sets aside NSSF ruling after procedural error' The Star (Nairobi, 27 June 2026) <https://www.the-star.co.ke/news/2026-06-27-court-of-appeal-sets-aside-nssf-ruling-after-procedural-error> accessed 30 June 2026.
[13]ibid.
[14]Jaindi Kisero, 'Weight of court verdict on NSSF deductions' Business Daily (Nairobi, 11 June 2026) <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/court-verdict-s-import-on-nssf-deductions-5492838> accessed 30 June 2026.

NSSF initially appeared to interpret the ruling as something other than a dismissal of its stay application, leading to the unusual spectacle of both NSSF and the body adversarial to it, COTU, presenting competing public interpretations of the same judicial pronouncement. This is precisely the kind of public confusion that judicial pronouncements are designed to prevent, not generate. When a ruling produces immediate controversy about what it actually decided, that controversy is itself diagnostic of a fundamental infirmity in the ruling.[15]

The pension sector's legitimate grievance

Beyond the doctrinal analysis, the pension sector's response to this episode deserves serious engagement. Kenya's retirement benefits architecture has been destabilised by the NSSF litigation for the better part of a decade. Employers, workers, pension scheme administrators, and infrastructure project promoters have all had to navigate a landscape of legal uncertainty that periodically lurches from one position to another. The Retirement Benefits Authority's data tells the underlying story clearly. The NSSF's net assets grew to Ksh 623.4 billion by December 2025 precisely because the 2013 Act's enhanced contribution regime was operational. Any abrupt legal reversal, real or misunderstood, threatens not only future payroll calculations but the stability of long-term investments already made on the basis of enhanced contribution flows.[16]
NSSF's letter described the ruling as having caused confusion in the pension sector. That characterisation is modest. The confusion extended to major employers recalculating payroll deductions, to trade unions issuing contradictory public guidance and to the broader investment community grappling with uncertainty about the fund's contribution base. These are not abstract harms. They have real costs, administrative, financial and reputational, that no subsequent correction can fully undo.
The pension sector, as the letter rightly observed, deserves no less than a public announcement of the ruling's nullification alongside its recall from the record.

Suo motu action and judicial accountability: A comparative perspective

The request for suo motu recall of the ruling raises questions about the appropriate posture of courts when confronted with their own errors. Comparative experience is instructive. Courts across common law jurisdictions have grappled with the tension between the finality of judicial decisions and the imperative to correct errors that would otherwise produce manifest injustice. The South African Constitutional Court has recognised that where a judgment has been erroneously granted, the court retains inherent jurisdiction to correct it. The Supreme Court of Kenya itself has acknowledged an exceptional jurisdiction to review its own decisions in circumstances of miscarriage of justice, though the threshold is deliberately high.[17]

What distinguishes the NSSF episode is that the error here is not one of legal reasoning

[15]Mwango Capital, 'NSSF appears to have misinterpreted the 29 May 2026 Court of Appeal ruling' (LinkedIn, 3 June 2026) <https://www.linkedin.com/posts/mwango-capital_nssf-appears-to-have-misinterpreted-the-29-activity-7468519504742891522-qTCp> accessed 30 June 2026.
[16]Jaindi Kisero, 'Weight of court verdict on NSSF deductions' Business Daily (Nairobi, 11 June 2026) <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/court-verdict-s-import-on-nssf-deductions-5492838> accessed 30 June 2026.
[17]Daniel v President of the Republic of South Africa 2013 JDR 1439 (CC), discussed in Godwill Kiletyen, 'The Supreme Court's Power of Review' (LinkedIn, 22 April 2021) <https://www.linkedin.com/pulse/supreme-courts-power-review-godwill-kiletyen> accessed 30 June 2026.

and not a case of the court having applied the wrong test or misinterpreted a statutory provision but an error of *identity*. The court adjudicated a different case from the one before it. In that sense, it is a more fundamental error than most. It calls not merely for the correction of the ruling's disposition, but for an honest institutional reckoning with the processes that allowed it to occur.

The Court's decision to set aside its own ruling is, in this light, a necessary but not sufficient response. The language of the June 2026 ruling which states that the ruling of 29th May 2026 was founded on an error apparent on the face of the record, as it determined an application that was no longer live is characteristically measured, as judicial language invariably is. But it invites a harder institutional question. What changes in case management, file preparation, bench-reading protocols and judicial administrative practice will ensure that a bench of three judges does not, again, proceed to ruling on a matter without verifying what was actually argued? The Court of Appeal's docket is among the most burdened in the region. That is not an excuse for this kind of error; it is a reason to take seriously the structural reforms that would prevent its recurrence.[18]

What the episode demands of legal actors

The legal profession and its associated institutions are not passive observers of this episode. Several obligations flow from it. Counsel appearing before the Court of Appeal carry a duty, enforceable through the general principles of officer-of-court obligations, to ensure that the bench is properly oriented as to the application being argued.[19] Where, as here, a matter has a complex multi-year procedural history with parallel applications at different stages, counsel should consider filing a brief procedural memorandum at the start of hearing, setting out precisely which application is before the Court on that date and what the current procedural posture of the matter is. This is not an unusual practice in well-functioning appellate courts, rather a basic courtesy to the bench and a protection against precisely the kind of confusion that materialised here.

Court registries, for their part, carry an obligation of accurate cause-listing and file management. The Registrar who lists a matter for hearing should ensure that the cause list identifies, with specificity, the application to be argued not merely the case reference number, which alone may not distinguish between multiple pending applications within the same case file. Improved case management systems, including digital case files that contemporaneously record the hearing history and the outstanding matters in each file, would provide the bench with the contextual grounding that apparently was absent on 29th May 2026.

Conclusion: Integrity must outlast error

A legal system that never makes errors is not a legal system but a fiction. What distinguishes a mature constitutional democracy is not the absence of judicial error but the quality of the institutions' response when error is established. On that measure, the Court of Appeal's decision

[18] James Gichigi, 'Court of appeal sets aside NSSF ruling after procedural error' The Star (Nairobi, 27 June 2026) <https://www.the-star.co.ke/news/2026-06-27-court-of-appeal-sets-aside-nssf-ruling-after-procedural-error> accessed 30 June 2026.
[19] David F Harris, *Civil Procedure in Kenya* (2nd edn, LawAfrica 2017) 37–40.

integrity in the legal system is the foundation of justice. Without it, public confidence erodes, the rule of law weakens, and individuals cannot rely on the legal system to protect their rights fairly and impartially.

to set aside its own ruling is a credit to the bench. The acknowledgement that the ruling was founded on an error apparent on the face of the record represents the exercise of exactly the kind of judicial candour that the legal profession, and the public it serves, ought to demand and to applaud.

But acknowledgement without institutional consequence is incomplete. The pensioners of Kenya, the employers navigating payroll obligations, the workers whose retirement security depends on predictable contribution frameworks, and the infrastructure projects anchored to a stable NSSF contribution base all of them absorbed unnecessary cost, uncertainty, and anxiety as a result of a ruling that should never have been delivered. Their experience is not a footnote. It is the lived consequence of a systemic failure that warrants not only correction but reform.

The NSSF litigation is not over. The joinder application now proceeds, and the substantive appeal which will definitively determine the constitutional validity of the 2013 NSSF Act remains pending. The Court of Appeal will have another opportunity to demonstrate, through the quality of its engagement with the merits, that the episode of 29th May 2026 was an aberration, not a pattern. The pension sector, as Fred Ngatia SC observed with characteristic directness, deserves no less. So does the rule of law.

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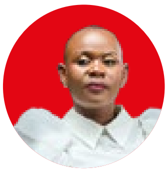
Revisiting Court-Annexed Mediation: Whose dispute is it? The illusion of party autonomy and the diminished advocate's duty to the client



By Caroline Oduor

Abstract

Kenya's Court-Annexed Mediation (CAM) programme marks a decade of institutionalised dispute resolution, having achieved notable statistical milestones including the settlement of disputes worth over Ksh 52.2 billion and a consistent settlement rate exceeding 55% across 82 registries nationwide. Yet beneath these celebrated metrics lies a structural and jurisprudential contradiction that this article subjects to sustained critical scrutiny. The Civil Procedure (Court-Annexed Mediation) Rules, 2022, enacted as Legal Notice 145 of 2022, have progressively shifted CAM from a consensual, party-driven forum into a mandatory institutional mechanism, eroding the foundational principle of party autonomy upon which all ADR is constitutionally premised. The article argues that the compulsory screening, unilateral court referral, registrar-driven mediator appointment, and penalty-backed timelines embedded in the 2022 Rules do not merely strain the ADR model, they invert it, transforming mediation from a choice into a compulsion and settlement from an expression of self-determination into an institutional performance metric. The article further interrogates how this structural inversion has re-cast the advocate's professional role in ways that are irreconcilable with the orthodox duty to the client, generating a tension between zealous representation and mandated facilitation that the current legal framework has failed to resolve.

Keywords: *Court-Annexed Mediation; party autonomy; voluntariness; advocate-client relationship; alternative dispute resolution; Legal Notice 145 of 2022; Article 159(2)(c); settlement culture; mediator accreditation; advocate mediator.*

I. Introduction: A decade of achievement and a growing structural anxiety

There is a particular institutional satisfaction in announcing that an initiative has worked. Since Kenya's Court-Annexed Mediation programme was formally launched in April 2016 pursuant to the constitutional mandate under Article 159(2)(c) of the Constitution of Kenya, 2010, the Judiciary has had much to announce.[1] The 2025 State of the Judiciary

[1] Judiciary of Kenya, 'Court Annexed Mediation' (Judiciary of Kenya, 5 May 2025) <https://judiciary.go.ke/court-annexed-mediation/> accessed 30 June 2026.

and the Administration of Justice (SOJAR) Report recorded the expansion of CAM infrastructure to 82 registries across the country, the referral of over 35,000 cases, a settlement rate consistently exceeding 55%, and the release into the economy of tens of billions of shillings previously locked in frozen litigation.[2] Family mediation has been institutionalised. The Employment and Labour Relations Court mediation stream records a settlement rate approaching 93%. The programme has, on every quantitative measure, been a success.[3]

However, there is a form of institutional progress that produces its own pathologies, a success so celebrated that it begins to resist scrutiny, and a metric so prominent that it gradually displaces the values it was designed to serve. This article is concerned precisely with that dynamic. It interrogates, with the seriousness that a decade of operation demands, whether CAM has remained faithful to the foundational principles of ADR, principally voluntariness, party autonomy, confidentiality and self-determination, or whether, in its institutionalisation, it has subordinated those principles to the administrative imperatives of case clearance, docket management, and statistical reporting.

The question is not academic. It goes to the constitutional legitimacy of CAM itself. Article 159(2)(c) of the Constitution mandates courts to promote ADR and not to impose it.[4] The distinction is not semantic but structural. A system that coerces parties into a consensual forum, prescribes the process by which they must select their facilitator, penalises their absence, and measures its success in settlement rates rather than party satisfaction has not promoted ADR, it has commandeered its vocabulary while abandoning its substance.[5]

Beyond the constitutional question, the institutionalisation of CAM has produced a second set of tensions, less visible in the public discourse but of equal professional importance. The advocate's role within CAM, as both counsel for a party and, in many instances, as an accredited mediator, sits uneasily within a regulatory framework that conflates facilitation with representation, encourages settlement over vindication and has created space for non-advocate mediators to perform functions that have historically belonged to the legal profession. The resulting turf war, which culminated in urgent negotiations between the Law Society of Kenya and the Judiciary Steering Committee on Mediation in 2026, is not merely a professional dispute, it is a symptom of an underlying normative incoherence that the CAM framework has yet to resolve.[6]

This article proceeds as follows. Part II situates CAM within its constitutional and statutory framework. Part III subjects the party autonomy principle to critical analysis, identifying the structural points at which the 2022 Rules depart from it. Part IV examines the impact of CAM on

[2]Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Report 2024/2025* (Judiciary of Kenya 2025) 45–47.
[3]Martha Koome, 'Sh52bn released back to economy through Court Annexed Mediation' (keynote address at the 2nd Annual Mediation Summit, 5 May 2025) <https://judiciary.go.ke/sh52bn-released-back-to-economy-through-court-annexed-mediation-cj-koome/> accessed 30 June 2026.
[4]Constitution of Kenya, 2010, art 159(2)(c).
[5]Judiciary of Kenya, 'Court Annexed Mediation' (Judiciary of Kenya, 5 May 2025) <https://judiciary.go.ke/court-annexed-mediation/> accessed 30 June 2026; Judiciary of Kenya, 'Sh52bn released back to economy through Court Annexed Mediation' (keynote address by CJ Martha Koome at the 2nd Annual Mediation Summit, 5 May 2025) <https://judiciary.go.ke/sh52bn-released-back-to-economy-through-court-annexed-mediation-cj-koome/> accessed 30 June 2026.
[6]Joseph Wangui, 'Non-advocate mediators spark lawyers, Judiciary tiff' (Business Daily, 27 May 2026) <https://www.businessdailyafrica.com/bd/economy/non-advocate-mediators-spark-lawyers-judiciary-tiff-5475756> accessed 30 June 2026.

the advocate-client relationship, including the professional tension generated by the advocate-mediator role and the challenge posed by non-advocate mediators. Part V offers a comparative perspective, drawing on mandatory mediation regimes in other jurisdictions. Part VI advances a set of principled recommendations for recalibrating the CAM framework to restore the constitutional values it currently compromises.

II. The constitutional and statutory framework: A mandate misread?

The constitutional foundation

Article 159(2)(c) of the Constitution provides that in exercising judicial authority, courts shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted.[7] The operative word is promoted. The Constitution does not authorise the imposition of ADR, it mandates its facilitation. The distinction tracks a fundamental distinction in ADR theory between access to a consensual forum and compulsion to participate in one.

This constitutional foundation was reinforced through Section 1A of the Civil Procedure Act (Cap. 21),[8] which directs courts to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes governed by the Act and through Section 59A, which established the Mediation Accreditation Committee (MAC) and provided the statutory basis for the CAM programme. Legal Notice No. 145 of 2022, the Civil Procedure (Court-Annexed Mediation) Rules, 2022, represents the most comprehensive regulatory articulation of the programme to date, consolidating earlier iterations and extending the reach of mandatory screening, institutional mediator appointment, and penalty-backed compliance.[9]

The 2022 rules: A framework in tension with itself

The 2022 Rules are, on their face, a model of procedural sophistication. They provide for the screening of cases at the close of pleadings, the referral of suitable disputes to mediation by the court at any stage before final judgment, including on its own motion and without the consent of the parties, the appointment of a mediator from the accredited register by the Mediation Deputy Registrar within seven days of referral, and the prescription of strict timelines within which mediation sessions must commence and conclude. Parties who fail to attend mediation sessions face penalties under Rule 28 of the 2022 Rules.[10]

This framework raises a foundational normative question: at what point does the institutionalisation of a consensual process transform it into something categorically different? The 2022 Rules contemplate court referral without consent, registrar-driven appointment of mediators, penalties for non-attendance, and a sixty-day window within which parties are expected to achieve resolution under the supervision

[7]Constitution of Kenya 2010, art 159(2)(c).
[8]Civil Procedure Act (Cap 21), s 1A.
[9]AMG Advocates, 'Court-Annexed Mediation in Kenya: A Solution by You for You' (AMG Advocates, 29 September 2025) <https://www.amgadvocates.com/post/court-annexed-mediation-in-kenya-a-solution-by-you-for-you> accessed 30 June 2026.
[10]Khanna K, 'Court-Annexed Mediation Process Explained' (Scribd, 20 August 2025) <https://www.scribd.com/document/827989431/court-annexed-mediation-process> accessed 30 june 2026.

of an institutional officer. These are not the features of a consensual process. They are, structurally, the features of a compulsory adjudicative mechanism dressed in the vocabulary of consensus.[11]

III. The illusion of party autonomy

The foundational principle

Party autonomy is not merely a procedural preference in ADR. It is the source of ADR's constitutional legitimacy and practical effectiveness. As Kariuki Muigua has observed, voluntariness and party autonomy are the essential characteristics of mediation, they ensure that parties retain power and freedom over the forum, the process, and the outcome, and they generate the psychological investment in the process that makes settlement durable.[12] A mediation settlement reached under coercion is not an expression of self-determination, it is an administrative outcome with a consensual label. The difference matters enormously, not only in principle but in practice: research consistently shows that voluntary mediation produces higher-quality agreements, greater party satisfaction, and better long-term compliance than mandatory referral.[13]

The structural erosions

The 2022 Rules erode party autonomy at four distinct structural levels.

First, Rule 5(1), (2), (3) and (5) of the 2022 Rules provides that a court may refer a matter to mediation on its own motion, at any time before judgment, without the consent of the parties. This provision fundamentally inverts the consensual model.[14] It places the decision to submit a dispute to a party-driven resolution mechanism in the hands of an institutional actor. the court, whose overriding institutional interest is in case clearance rather than party satisfaction. The constitutional mandate to promote ADR does not extend to mandatory referral without consent; and the claim that compulsory referral to mediation, as opposed to compulsory settlement through mediation, is compatible with party autonomy becomes implausible when the referral itself is accompanied by penalties for non-participation and institutional pressure towards settlement.[15]

Second, Rule 13 provides that although parties may jointly select a mediator within seven days of referral, the default position is appointed by the Mediation Deputy Registrar from the accredited register.[16] This default arrangement shifts control over one of the most critical choices in a consensual process, the identity of the neutral third-party facilitator, from the parties to a court administrator. The significance of this shift is not merely symbolic. Mediation theorists have long recognised that party confidence in the mediator's neutrality, competence and sensitivity to the specific dynamics of the dispute is itself a precondition for productive engagement. Where that confidence is displaced by administrative default, the process risks proceeding with a

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[11]Smith J, 'Comparative Analysis of Mandatory Mediation Programs in England and Wales, Australia and the European Union' (VIA Mediation Centre, 2024) <https://viamediationcentre.org/readnews/MTcyNA==/Comparative-Analysis-of-Mandatory-Mediation-Programs-in-England-and-Wales-Australia-and-the-European-Union> accessed 30 June 2026.

[12]Kariuki Muigua, 'Voluntariness and Autonomy in Mediation' (2020) Alternative Dispute Resolution (CIArb Kenya) 45, 52.

[13]Archana R, 'Mediation as an Alternative Form of Dispute Resolution: Comparative-Legal Analysis' (2025) 11(10) EPRA International Journal of Multidisciplinary Research (IJMR) 120 <https://eprajournals.com/IJMR/article/18012/download> accessed 30 June 2026.

[14]Civil Procedure (Court-Annexed Mediation) Rules 2022, r 5(1), (2), (3) and (5).

[15]Alexander N, 'Comparative Mediation Law Mapping Mediation Law with the Mediation Matrix' (2024) XV:4 Comparative Procedural Law and Justice (CPLJ).

[16]Civil Procedure (Court-Annexed Mediation) Rules 2022, r 13.

facilitator in whom one or both parties have no investment, generating the conditions for perfunctory participation rather than genuine engagement.

Third, Rule 28 introduces penalties for non-attendance at mediation sessions. The existence of institutional penalties for failure to participate in a process described as consensual is a structural contradiction. It is the equivalent of describing an arrangement as voluntary while simultaneously providing that failure to volunteer attracts punishment.[17] In the comparative literature on mandatory mediation, this form of coercive scaffolding is described as producing compulsory participation without compulsory agreement, a formulation that, while technically accurate, disguises the extent to which the threat of sanction conditions the party's experience of the process from its inception. Parties who attend mediation under the shadow of penalties are not exercising party autonomy in any meaningful sense; they are performing compliance.

Fourth, the sixty-day timelines within which mediation must be commenced and concluded, while administratively rational from a case management perspective, introduce institutional pressure that is structurally incompatible with genuine party-driven process design. Parties with complex commercial disputes, deeply entrenched relational grievances, or unequal bargaining positions may require a significantly different temporal architecture. The institutional timeline creates a pressured environment in which settlement becomes conflated with speed, and in which mediators, themselves subject to the institutional incentive of case completion, may consciously or unconsciously press towards settlement rather than facilitate genuine exploration of the parties' underlying interests.

Settlement culture and shallow justice

The cumulative effect of these structural features is the gradual emergence of what this article characterises as a settlement-centric culture. A systemic orientation in which mediation is valued less as a consensual justice process and more as a statistical tool for case clearance. The SOJAR Report's celebration of settlement rates as a primary measure of CAM success exemplifies this orientation. Settlement rates tell us how many cases have exited the court register through mediation; they tell us very little about the quality of that exit, whether the settlement reflected genuine party satisfaction, whether parties understood what they were agreeing to, whether the pressure of the mediation environment compromised the freedom of a weaker party, or whether the settlement will be durable in practice.[18]

Maximising case disposition statistics at the expense of party self-determination produces a shallow form of justice. As mandatory mediation studies in Malawi, Australia, and England have demonstrated, high settlement rates under coercive referral programmes frequently mask lower compliance rates, higher rates of post-settlement litigation, and party dissatisfaction that finds expression in downstream legal proceedings.[19] Kenya's

[17] Vallimayil PL and Vaishali R, 'Mandatory vs Voluntary Mediation: Comparative Study of Outcomes' (2025) 11(11) EPRA International Journal of Multidisciplinary Research (IJMR) [first page] <https://eprajournals.com/IJMR/article/18012/download> accessed 30 June 2026.
[18] Judiciary of Kenya, State of the Judiciary and the Administration of Justice Report 2023 (Judiciary of Kenya 2024) 72.
[19] Mlodzinska-Patoga F, 'An assessment of the efficiency and effectiveness of compulsory mediation in Malawi' (2021) 5 Kabarak Law Review 45, 68–70;Trevor CW Farrow, 'Exploring the Role of Mandatory Mediation in Civil Justice' (2014) 37 Dalhousie Law Journal 359, 390–395; David Spencer, 'Mandatory and quasi-mandatory mediation in Australia' (2019) 47 Australian Bar Review 215, 238–242.

CAM programme has not systematically measured these downstream effects. Until it does, the celebration of settlement rates as evidence of success remains epistemically incomplete and, from a rule-of-law perspective, potentially misleading.[20]

IV. The diminished advocate's duty to the client

The structural transformation of the advocate's role

The advocate-client relationship in Kenyan law embodies contractual, fiduciary, and agency elements. The advocate is retained to advance the client's legal interests with zeal, competence, and undivided loyalty. The Code of Standards of Professional Practice and Ethical Conduct (COSOPPEC) and the common law tradition of professional responsibility both locate the advocate's primary duty in the client's interests rather than in the institutional interests of the court or the regulatory interests of the mediation programme.[21]

CAM, as currently structured, disrupts this relationship in at least three distinct and reinforcing ways.

First, Rule 27 of the 2022 Rules requires advocates to encourage cooperation and ensure the speedy resolution of disputes. This provision imports into the advocate's professional obligations an institutional mandate, the promotion of settlement, that may, and frequently will, conflict with the advocate's duty to advance the client's best interests as the client defines them.[22] A client with a strong legal position, who has endured years of delay and who seeks vindication through judgment rather than compromise, is not served by an advocate transformed into a settlement facilitator. The institutional requirement to encourage settlement imposes on the advocate a duty to the process that sits in direct tension with the duty to the client, a tension that the 2022 Rules acknowledge in creating but decline to resolve.[23]

This transformation is not merely formal. It is experienced by clients as a perceptible change in their advocate's orientation. Advocates who find themselves in the uncomfortable position of encouraging cooperation in a CAM session while simultaneously protecting a client who prefers vindication will recognise the practical difficulty: what the institution requires and what the client needs are not always aligned, and the advocate who navigates that gap without transparency to the client risks eroding the very trust and confidence upon which the professional relationship depends.[^2]

Second, the structural compression of the advocate's role within CAM undermines the client's own autonomy in the dispute resolution process. If the advocate's duty includes an obligation to ensure that the client's freedom of choice is actively preserved, including the choice of forum, process, and outcome, then the advocate who acquiesces in a compulsory referral without advising the client of their procedural rights, without challenging the suitability determination where appropriate, and without ensuring that the client's participation in the mediation reflects

[20] Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Report 2023* (Judiciary of Kenya 2024) 72.
[21] Council of the Law Society of Kenya, *Code of Standards of Professional Practice and Ethical Conduct* (Law Society of Kenya 2016) paras 3–5; Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1976) 85 *Yale Law Journal* 1060, 1068–1070.
[22] Civil Procedure (Court-Annexed Mediation) Rules 2022, r 27.
[23] ibid.

genuine choice rather than institutional pressure, has failed that duty. The 2022 Rules create no mechanism for advocates to challenge referral decisions on behalf of clients who have principled objections to mediation in their particular case.[24]

Third, the CAM framework has generated an unresolved and professionally significant tension between advocate mediators and non-advocate mediators that has direct implications for clients. Advocate mediators, whose ranks include practising advocates with full Advocates Act compliance obligations, professional insurance, and regulatory accountability, argue, persuasively, that they are better positioned to facilitate the resolution of disputes involving points of law, interpretation, or technical legal analysis.[25] Their legal training enables them to identify legally unsound settlement terms before they are incorporated into binding agreements, to protect parties from arrangements that appear advantageous in the mediation room but create future legal exposure, and to bring to bear on the facilitation process the professional judgment that clients expect from those who hold practising certificates.

The non-Advocate mediator problem

The proliferation of non-advocate mediators within the CAM framework, currently over 1,515 accredited mediators nationwide, the majority of whom are not practising advocates, has generated a professional crisis that the joint Judiciary-LSK communiqué of 2026 addressed only at its edges.[26] The crisis has three dimensions.

The first is regulatory. Non-advocate mediators operate outside the regulatory framework of the Advocates Act, the Law Society of Kenya's disciplinary jurisdiction, and the COSOPPEC.[27] When a non-advocate mediator facilitates the resolution of a dispute involving title to land, interpretation of a commercial contract, or the validity of a testamentary instrument, the parties receive no assurance that the facilitator has the capacity to identify legally perilous settlement terms, no professional insurance protection in the event of incompetent facilitation, and no disciplinary recourse governed by the standards that protect clients of advocates. The Judiciary's accreditation system under the MAC is, by comparison, a lighter regulatory touch that does not approximate the professional accountability framework of the Advocates Act.[28]

The second dimension is commercial. Non-advocate mediators have in several documented instances established ADR offices through which they advertise services in terms that border on, and in some cases cross the line into, the practice of law as defined under the Advocates Act. The LSK's characterisation of this as Judiciary-aided infiltration of the legal profession reflects a genuine professional anxiety about the redistribution of legal work from advocates to unregulated facilitators, an anxiety compounded by the reality that CAM increasingly handles high-value commercial, succession, family,

[24]ibid.

[25]Advocates Act (Cap 16, Laws of Kenya) ss 9–13; Law Society of Kenya, Professional Indemnity (PI) Insurance Guidelines (LSK 2020); Judiciary of Kenya, Mediation (Accreditation and Certification) Committee – Accredited Mediators List (Judiciary of Kenya 2025).

[26]Judiciary of Kenya and Law Society of Kenya, 'Joint Communiqué on the Regulation of Court-Annexed Mediation Practice' (Nairobi, 15 March 2026).

[27]Advocates Act (Cap 16, Laws of Kenya) ss 4–9, 55–60; Law Society of Kenya, Code of Standards of Professional Practice and Ethical Conduct (Law Society of Kenya 2016) paras 1.2–1.4.

[28]Judiciary of Kenya, *Mediation (Accreditation and Certification) Committee – Guidelines on Accreditation and Discipline of Court-Annexed Mediators* (Judiciary of Kenya 2024); Advocates Act (Cap 16, Laws of Kenya) ss 55–60.

and land disputes that previously generated substantial legal fees for advocates.[29] The joint Judiciary-LSK communiqué acknowledged allegations of misuse of Judiciary logos and unregulated advertising, and committed to investigation, but the structural problem that generates these behaviours remains unaddressed.

The third dimension concerns client exposure. Clients who participate in CAM sessions facilitated by non-advocate mediators in technically complex matters are, in a very real sense, legally exposed. They are engaging in a process that may produce binding legal consequences without the benefit of a facilitator who can identify when a proposed settlement creates future legal liability, enforces rights that were never legally theirs, or waives entitlements that the law would have protected. This is not a hypothetical concern; it is a structural feature of a system that has divorced facilitation from legal knowledge in precisely the category of disputes where legal knowledge most matters.

The young advocate and the shrinking practice space

The impact of the current CAM framework on young advocates entering the profession deserves explicit acknowledgement. The growth of mediation as a principal dispute resolution mechanism, combined with the displacement of advocates from that mechanism by non-advocate mediators, has directly contracted the available practice space for advocates whose career trajectory would historically have included significant courtroom and negotiated settlement work. The flat Ksh 20,000 remuneration per case paid to mediators under the CAM programme, regardless of the value of the dispute, further undermines the economic viability of mediation practice as a professional specialism for advocates who carry the overhead of a law practice. The profession is being reshaped, in part, by a mediation framework designed without adequate regard for its professional consequences.[30]

V. Towards a Principled Recalibration: Recommendations

The analysis above does not support the abandonment of Kenya's Court-Annexed Mediation programme. It supports its recalibration, a principled revision of the regulatory framework to restore the constitutional values that CAM was designed to serve while preserving the institutional efficiency gains that a decade of operation has generated.

First, the court's power to refer matters to mediation on its own motion without party consent, provided in Rule 5 of the 2022 Rules, should be revised. The appropriate model is not mandatory referral but mandatory consideration: courts should be required to consider the suitability of a matter for mediation and to invite parties to consent to referral, with the court recording reasons where parties decline. This preserves judicial case management while restoring the consensual character of the referral decision. Parties who unreasonably decline referral may appropriately face costs consequences, a tool well-established in England and Wales, but coercive referral to a consensual forum is incompatible with Article 159(2)(c).[31]

[29]Judiciary of Kenya and Law Society of Kenya, 'Joint Communiqué on the Regulation of Court-Annexed Mediation Practice' (Nairobi, 15 March 2026); Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Report 2023* (Judiciary of Kenya 2024) 70–72.
[30]ibid.

Second, the default position of Mediation Deputy Registrar appointment of mediators under Rule 13 should be reversed. Party selection of a mediator from the accredited panel should be the default, with registrar appointment as the fallback only where parties cannot agree within the prescribed timeframe. This is not merely a procedural preference; it is a structural requirement of the consensual model. The mediator selection process is itself an exercise of party autonomy, and its administration by a court official as the default mechanism imports institutional control into the most intimate decision of the mediation process.[32]

Third, the penalties for non-attendance under Rule 28 should be restructured to distinguish between bad-faith non-participation and principled objection to the referral decision. Where parties attend mediation and engage genuinely but the process does not result in settlement, no adverse consequence should follow. Settlement rates are not, and should not become, a measure of advocate competence or party cooperation. The institutional anxiety that high non-settlement rates generate should be addressed through quality improvement in mediator training and process design, not through structural pressure on parties to settle.

Fourth, the regulation of mediators operating within the CAM framework requires urgent and comprehensive legislative attention. The pending ADR legislation, which the Judiciary and LSK committed in the 2026 joint communiqué to develop in collaboration with the Attorney-General's office, presents a critical opportunity to establish a unified statutory framework for mediator accreditation, professional accountability, ethical standards, and client protection mechanisms. This framework must, at minimum, address the following: competency standards that are differentiated by dispute category; mandatory professional insurance; a disciplinary framework with genuine enforcement powers; and clear boundaries around the activities that constitute the practice of law, which non-advocate mediators may not perform regardless of their accreditation status.[33]

Fifth, the advocate's role within CAM must be positively defined in a way that preserves, rather than displaces, the duty to the client. The obligation imposed by Rule 27 to encourage cooperation and speedy resolution should be replaced by a formulation that requires advocates to advise clients fully on the mediation process, to represent clients' interests within that process with the same zeal and competence expected in litigation, and to ensure that any settlement reached reflects genuine and informed client consent. The advocate's duty is to the client's informed best interests, not to the institutional metric of settlement.

Sixth, the Judiciary's success metrics for CAM should be expanded beyond settlement rates to include party satisfaction indices, settlement durability (measured by post-settlement enforcement applications and litigation), quality of consent indicators, and mediator competency assessments.

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[31] *Civil Procedure (Court-Annexed Mediation) Rules 2022, r 5; Dunnett v Railtrack plc EWCA* Civ 302, 1 WLR 2434; PGF II SA v OMFS Company 1 Ltd EWCA Civ 1288, 1 WLR 1386; Constitution of Kenya 2010, art 159(2)(c).

[32] Dorcas Quek Anderson, 'The Mediation Act and the Future of Mediation in Singapore' (2017) 29 *Singapore Academy of Law Journal* 275, 280–283.

[33] Civil Procedure (Court-Annexed Mediation) Rules 2022, r 28; Judiciary of Kenya, State of the Judiciary and the Administration of Justice Report 2023 (Judiciary of Kenya 2024) 70–72; Judiciary of Kenya and Law Society of Kenya, 'Joint Communiqué on the Regulation of Court-Annexed Mediation Practice' (Nairobi, 15 March 2026).

These metrics, compiled systematically and published in annual SOJAR reports, would provide a far richer and more constitutionally accountable picture of what CAM is actually achieving, and where it is falling short.

VI. Conclusion: Justice requires more than a statistic

A justice system that resolves disputes is not the same as a justice system that serves disputants. The distinction is not rhetorical; it is constitutional. Kenya's Court-Annexed Mediation programme has, in a decade of operation, demonstrated that institutional mediation can move cases, clear dockets, and return economic value to the productive economy. It has not yet demonstrated that it delivers the form of justice that Article 159 envisions in terms of being faithful to the autonomy of the people it serves.

The structural tensions identified in this article, between institutional compulsion and genuine consent, between settlement facilitation and client representation, between the accredited mediator's neutrality and the advocate's fidelity, are not peripheral anomalies in an otherwise sound programme. They are central features of a framework that has progressively prioritised throughput over self-determination, and administrative efficiency over jurisprudential integrity. They are the features that explain why advocates and non-advocate mediators are in professional conflict, why the LSK and the Judiciary find themselves in urgent negotiations, and why scholars and practitioners are, a decade in, asking the most basic question of all: whose dispute is it?

The answer, in a constitutional democracy grounded in the dignity and autonomy of every person, must be: the parties'. The dispute belongs to the parties. The resolution must belong to the parties. The process must serve the parties not the court register, not the settlement rate and not the institutional appetite for measurable progress. When CAM is designed, evaluated, and regulated on that premise, it will have earned its constitutional mandate. Until then, the statistics remain impressive, and the justice, in important respects, remains illusory.

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The devil's due: Fair hearing, constitutional finality and the jurisprudence of sanctioned infringement in Kenya's impeachment jurisprudence - *A Critical commentary on constitutional Petition No. E565 of 2024 (Consolidated)*

By Shemaiah Clowers

Abstract

On 8 June 2026, a three-judge bench of the High Court of Kenya delivered judgment in the consolidated petitions arising from the impeachment of H.E. Rigathi Gachagua as Deputy President. The Court made a finding of constitutional moment: that H.E. Gachagua's right to a fair trial under Articles 47 and 50 of the Constitution of Kenya 2010 was infringed when the Senate declined to allow an adjournment in his absence. Having made that finding, the Court then held that the infringement did not, and could not, vitiate the impeachment itself. It awarded Kshs. 50 million in constitutional damages and declined to quash the Senate resolution. This article argues that the judgment produces an analytically untenable and constitutionally corrosive proposition: that a non-derogable constitutional right of peremptory normative status may be violated in the course of a State-initiated process without that process being invalidated. It contends that this reasoning represents a retrogression in Kenya's constitutional jurisprudence toward the very pre-2010 culture of constitutional accommodation that the transformative constitutional project was designed to destroy. The article draws on natural justice doctrine, comparative constitutional law, international human rights law, and the theory of transformative constitutionalism to argue that constitutional finality and the right to a fair hearing are not genuinely in tension, and that the Court's resolution of that purported tension, by subordinating rights to constitutional architecture, is constitutionally unsound.

I. Introduction: The devil's due

There is an ancient maxim of natural justice whose provenance is said to predate every constitutional settlement: audi alteram partem or in common terms, hear the other side. The principle is, as Lord Denning once described it, the first principle of good government and the cornerstone upon which all systems of justice are built.[1] Even the most morally compromised party, even one whose guilt is beyond reasonable contestation, is entitled to be heard before condemnation is visited upon

[1] Ridge v Baldwin [1964] AC 40, 68 (Lord Reid). See also Lord Denning MR in R v Gaming Board for Great Britain, ex parte Benaim and Khaida [1970] 2 QB 417, 430: "It is a rule of natural justice of the highest importance that every man shall have an opportunity to be heard before a decision is taken against him."

them. The principle applies equally to the righteous and the wicked. The devil, in the jurisprudence of constitutional states, is entitled to his due process.

It is against this foundational principle that the judgment of Ogola, Mrima and Mugambi JJ, delivered on 8 June 2026 in *Constitutional Petition No. E565 of 2024 (Consolidated)*, must be measured.[2] The Court found that the Senate, in proceeding with the trial of the impeachment of H.E. Rigathi Gachagua in his absence and declining an adjournment, infringed his right to a fair hearing under Articles 47 and 50(1) of the Constitution of Kenya 2010.[3] It then held, applying the doctrine of constitutional finality derived from Article 145(7), that this infringement could not undo the impeachment itself.[4] This is the absurdity that is to be addressed.

This article advances two connected arguments. First, that the proposition that a non-derogable constitutional right can be violated within a constitutional process without invalidating that process is analytically incoherent, constitutionally unsound, and jurisprudentially dangerous. Second, this reasoning exemplifies the phenomenon of constitutional culture lag: the persistence, within post-2010 Kenyan jurisprudence, of reasoning patterns that subordinate rights to institutional convenience in ways that belong to the authoritarian constitutional era that preceded the current constitutional order.

II. The right to a fair hearing: Non-derogability and its peremptory status

A. The constitutional text and its imperative force

Article 50(1) of the Constitution of Kenya 2010 provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.[5] Article 47(1) guarantees every person the right to administrative action that is expedient, efficient, lawful, reasonable and procedurally fair.[6] These rights are not ordinary rights subject to the general limitation clause in Article 24. The right to a fair hearing is specifically listed in Article 25 as one of the rights and fundamental freedoms that *shall no or never be limited*.[7]

The significance of Article 25 cannot be overstated. Unlike the rights in the broader Bill of Rights, which may be limited under Article 24 where the limitation is reasonable and justifiable in an open and democratic society, the rights listed in Article 25, including the right to a fair trial, admit no limitation whatsoever. They are absolutely protected. The Constitution does not say that the right to a fair trial shall not ordinarily be limited, or shall not be limited unless the limitation serves a sufficiently weighty constitutional purpose. It says, categorically and without qualification: it shall never be

[2] Constitutional Petition No E565 of 2024 (Consolidated with Nairobi Petitions Nos E550, E570, E572, E522, E506, E509, E525, E528, E537, E541, E567, E576, E586, E598 of 2024 and Kerugoya Petitions Nos E013, E014,
E015 of 2024) (Media Summary, 8 June 2026) (Ogola, Mrima and Mugambi JJ) (hereafter 'Gachagua Judgment').

[3] Ibid

[4] Gachagua Judgment (n 2) para 11: "We find that H.E. Gachagua's rights were infringed when the Senate declined to allow an adjournment. This violation constitutes both a vindication of his rights and a recognition of the constitutional infirmity in the process but does not undo the impeachment itself, given the finality of Article 145(7) and the constitutional absurdity that would arise from dual incumbency."

[5] Ibid

[6] Ibid

[7] ibid, Art 25(c): "Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited, ... (c) the right to a fair trial."

limited.[8] This means that the courts, the government or any other person should never thing of limiting this right as its limitation violates Article 1 on sovereignty of the people and Article 2(4) of the constitution on the inconsistency with the sovereign charter.

B. The international law dimension: Peremptory norms and non-derogable rights

The status of the right to a fair hearing in international law reinforces this constitutional position. Article 14 of the International Covenant on Civil and Political Rights, to which Kenya is a party, guarantees the right to a fair hearing.[9] The UN Human Rights Committee, in General Comment No. 32, confirmed that certain minimum fair trial guarantees cannot be derogated from even in states of emergency.[10] The African Charter on Human and Peoples' Rights, Article 7, similarly guarantees the right to have one's cause heard.[11]

Article 2(6) of the Constitution of Kenya 2010 makes any treaty or convention ratified by Kenya part of the law of Kenya under the Constitution.[12] The non-derogable character of the right to a fair hearing in international law thus provides additional constitutional reinforcement for the categorical protection in Article 25. The right to a fair hearing in the Kenyan constitutional order is, in the language of international law, a *jus cogens* norm, a peremptory norm from which no derogation is permissible. This means that its limitation violates both the edicts of national and international law.

III. The judgment's peculiar proposition: Sanitising the unconstitutional

A. The logical structure of the court's reasoning

The reasoning of the Court in *Gachagua* can be reconstructed as follows according to the decision. The major premise being that the Senate's impeachment resolution is final by virtue of Article 145(7), which provides that if two-thirds of Senators vote to uphold any impeachment charge, the President or Deputy President shall cease to hold office, and this provision is self-executing and admits of no curial reversal. While the minor premise being that:

H.E. Gachagua's fair hearing rights were infringed. The conclusion being that the infringement is acknowledged and compensated in damages, but the impeachment itself stands. I think this is a weird position in the operation of law.
This syllogism is structurally flawed at the level of constitutional principle. It inverts the constitutional hierarchy established by Article 2 of the Constitution. Article 2(1) declares the Constitution to be the supreme law of the Republic. Article 2(4) declares void any law or conduct inconsistent with the Constitution. The right to a fair hearing, protected by Articles 47, 50, and 25, is part of the Constitution. Article 145(7), which

[8]Daudi Pete v Attorney General [1990] LRC (Const) 435 (Court of Appeal of Kenya), where the Court recognised the special and categorical status of fair hearing rights in the constitutional framework. See also Samuel G. Momanyi & 2 Others v Attorney General & Another [2014] eKLR where the High Court held that the right to a fair hearing goes to the very heart of our legal system.
[9]International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art 14.
[10]UN Human Rights Committee, General Comment No 32: Article 14, Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc CCPR/C/GC/32 (23 August 2007) para 6.
[11]African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Art 7.
[12]Constitution of Kenya 2010, Art 2(6).
[12]Constitution of Kenya 2010, Art 2(6).

provides for the finality of the Senate vote, is also part of the Constitution. But Articles 47, 50 and 25, particularly 25, are hierarchically superior within the constitutional structure, because they admit of no limitation while Article 145(7), as an institutional provision, must be read consistently with the rights it operates alongside.[13] This too is my opinion based on my reading of the sections.

Put differently, the finality of Article 145(7) is the finality of a constitutionally valid Senate vote. The Constitution cannot simultaneously guarantee the right to a fair hearing absolutely (Article 25) and then declare that a process that violates that right produces a final and unreviewable outcome (Article 145(7)). These two propositions are in irreconcilable constitutional tension, and that tension must be resolved in favour of the right, not the institutional outcome, because the right is non-derogable and the institutional provision is not. The irony in this is that the Senate picked the latter position of supporting the institutional outcome.

B. The doctrine of nullity and the constitutional tradition

The classical doctrine of natural justice holds that a decision made in breach of the principle **audi alteram partem** is not merely voidable but void ab initio. As Lord Hodson provided in *Ridge v Baldwin* that the right to be heard before being condemned is so deeply ingrained in English law that there is an automatic nullity where it is denied.14 The House of Lords in that case overturned the dismissal of a chief constable on precisely this ground that the failure to give him an opportunity to be heard rendered the dismissal void, regardless of the substantive merits of the case against him.

The same principle was affirmed by the Privy Council in *Wiseman v Borneman*, where Lord Reid held that the rules of natural justice are not to be applied mechanically but their content must be matched to the gravity of the consequences of the decision.[15] In a proceeding whose consequence is the removal of an elected constitutional officer, the Deputy President of the Republic, the gravity of consequences could not be more severe. The content of natural justice is required at its highest. The Supreme Court of India, in the landmark case of A.K. Kraipak v Union of India, held that the rules of natural justice are not codified or stereotyped norms.[16] They are flexible and applied to achieve justice. But the irreducible minimum is the right to be heard, and its violation vitiates the proceeding entirely.[17] In Maneka Gandhi v Union of India, the Supreme Court further held that Article 21 of the Indian Constitution (the equivalent of our Article 26 and 29) imports the principles of natural justice, and that any procedure which deprives a person of their rights must comply with the principles of natural justice as a minimum constitutional requirement.[18] This should have been the case in this matter.

C. The South African jurisprudence

The Constitutional Court of South Africa provides the most relevant comparative

[13]For the principle that institutional provisions must be read consistently with rights provisions, see Minister of Home Affairs v Fisher [1980] AC 319 (PC) 328, where Lord Wilberforce held that a constitution should be given a generous and purposive interpretation, particularly in relation to individual rights.
[14]Ridge v Baldwin [1964] AC 40, 132 (Lord Hodson)
[15]Wiseman v Borneman [1971] AC 297, 308 (Lord Reid).
[16]A K Kraipak v Union of India AIR 1970 SC 150, 154.
[17]A K Kraipak v Union of India AIR 1970 SC 150, 154.
[18]Maneka Gandhi v Union of India (1978) 1 SCC 248, paras 56–59 (Bhagwati J).

authority on this question. In *Premier, Limpopo Province v Speaker of the Limpopo Provincial Legislature*, the Constitutional Court held that procedural violations in a parliamentary removal process could not be shielded from review merely because the Constitution vested a final decision in a legislative chamber.[19] The Court made clear that the principle of legality, which demands procedural fairness in all exercises of public power, is part of the rule of law that binds all constitutional organs, including Parliament.[20] A constitutionally prescribed outcome achieved through an unconstitutional process is an oxymoron in a transformative constitutional order.

In ***Democratic Alliance v Speaker of the National Assembly***, the Constitutional Court similarly refused to uphold a parliamentary vote where the process had been tainted by a failure to comply with constitutional requirements, holding that the rule of law, in our constitutional democracy, requires compliance with both the letter and spirit of the Constitution in all proceedings before the legislature."[21]

IV. Compensated unconstitutionality: The legal absurdity and its constitutional dangers

A. The impossibility of adequate compensation

The Court's response to the constitutional violation it identified was to award Kshs. 50 million in constitutional damages, payable by the Senate to H.E. Gachagua, to vindicate the Constitution, restore his dignity, and deter future violations.[22] This approach is constitutionally inadequate for several interlocking reasons.

First, and most fundamentally, what H.E. Gachagua lost was not a sum of money. He lost a constitutional office to which he had been elected by the people of Kenya and whose occupant serves a five-year term under Articles 148 and 149 of the Constitution. No monetary award, however large, can substitute for the loss of a constitutional mandate conferred by the sovereign people. The office of Deputy President is not a property right that can be compensated in damages; it is a constitutional trust that can only be restored or vindicated through constitutional process.[23]

Second, the compensatory model presupposes that the right violated can be translated into monetary terms. The right to a fair hearing which is a non-derogable right of peremptory status is not transactable in any way or means possible. Its violation in an impeachment proceeding is not analogous to a tort or a breach of contract. It is a constitutional violation of the most fundamental kind, and the only adequate constitutional remedy for the violation of a non-derogable right in a process of removal from constitutional office is the invalidation of that whole process.

B. The dangerous precedent: A licence for constitutional shortcut

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[19]Premier, Limpopo Province v Speaker of the Limpopo Provincial Legislature [2011] ZACC 25; 2011 (6) SA 396 (CC) paras 33–40.
[20]Ibid
[21]Democratic Alliance v Speaker of the National Assembly [2016] ZACC 8; 2016 (3) SA 487 (CC) para 42.
[22]Gachagua Judgment (n 2) Final Order 5: "The Court awards constitutional damages of Kshs. 50 million to H.E. Gachagua payable by the Senate, to vindicate the Constitution, restore the dignity of the affected party, and deter future violations."
[23]For the distinction between office as a constitutional trust and office as a property right, see Marbury v Madison 5 US (1 Cranch) 137 (1803) 166, where Marshall CJ held: "It is not in any peculiar personal interest of the individual in the case that he builds his claim. It is on a vested legal right, in virtue of an appointment of a public officer, whose functions were to be exercised in furtherance of public duties."

The implications of the Court's approach extend far beyond the immediate case. If the proposition is established that the State may violate the non-derogable right to a fair hearing in removal proceedings, and discharge its constitutional obligation through a subsequent monetary award, then the precedent is extraordinarily dangerous. I emphasize that it is very dangerous to our constitution.

It creates, in effect, a constitutional tariff for the violation of non-derogable rights. Executive and legislative actors now know, with the authority and approval of a High Court judgment, that an impeachment process may proceed in violation of fair hearing rights, and that the constitutional consequence is not nullification but a damages award. The right becomes, in practical effect, a liability to be priced into the political calculus of removal proceedings, not an absolute constraint on the conduct of those proceedings. This is precisely the kind of constitutional accommodation that Makau Mutua identified as the hallmark of the pre-2010 era, the appearance of rights protection combined with the reality of their subordination to political power.[24]

The point can be made more starkly in this way. Under the logic of the *Gachagua* judgment, the Senate could deny a future Deputy President any hearing whatsoever, not merely refuse an adjournment but conduct the entire trial in absentia, refuse all submissions, and hold no proceedings at all. The outcome, on the Court's reasoning, would be the same that the removal stands because Article 145(7) is final, and the constitutional violation is remedied by a damages award. This is not a fanciful extrapolation; it is the logical conclusion of the Court's approach. This is where the danger comes in especially with our understanding of our political structure.

C. The structural constitutional contradiction

The Court acknowledged, in a passage of rare candour, that the doctrine of constitutional dilemma arises from the tension between the constitutional finality of impeachment and the vindication of rights.[25] It further noted that a constitutional amendment clarifying the scope of impeachment finality and the role of judicial review may be warranted.[26]

This acknowledgment is significant, but it does not discharge the Court's constitutional obligation. The acknowledgment that a constitutional contradiction exists does not justify resolving it by subordinating a non-derogable right to an institutional provision. If anything, the recognition that the constitutional architecture produces an irresolvable dilemma is an argument for a constitutional interpretation that avoids the dilemma, and the interpretation that avoids it is the one that holds that Article 145(7) provides for the finality of a constitutionally valid impeachment process, not the finality of any impeachment process regardless of its constitutional validity.

V. Constitutional culture lag: The Gachagua judgment as a mirror of constitutional regression

A. The grundnorm and its claimed limitations

[24]Makau Mutua, "Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya" (2001) 23(2) Human Rights Quarterly 96, 128.
[25]Gachagua Judgment (n 2) para 29.
[26]Ibid

The Court invoked the concept of the *grundnorm*, the foundational norm upon which all legal validity rests, to explain why the constitutional finality of Article 145(7) must be respected:

> *"The Constitution is the grundnorm, and where that grundnorm deliberately and unequivocally withholds authority from the Court, such limitation must be respected."*[27]

This invocation of *Kelsen's grundnorm* is revealing in a way that was perhaps not intended. Kelsen's basic norm is indeed the foundational presupposition of a legal system, but in a constitutional democracy, it is not any provision of the constitution that constitutes the *grundnorm*; it is the constitution as a whole, interpreted as a coherent normative system committed to the values it embeds.[28] When the Court treats Article 145(7) as the *grundnorm* that overrides the non-derogable rights in Article 25, it has inverted the constitutional hierarchy. The Bill of Rights is not subordinate to institutional provisions and institutional provisions must be read consistently with the Bill of Rights.[29] At least in my opinion, I believe this was an overstretch of justifying the absurdity which was unnecessary because they just extended the wrongfulness.

B. The pattern of accommodation: The history of this culture

The Gachagua judgment does not stand alone. It is part of a discernible pattern in which Kenyan courts, when faced with constitutionally difficult choices between institutional outcomes and individual rights, have tended to preserve the institutional outcome while offering symbolic vindication of the right. This pattern was identified and documented, in the context of the pre-2010 judiciary, by Makau Mutua, who demonstrated that the Kenyan judicial culture developed around compliance with institutional power rather than resistance to it.[30]

What is particularly troubling about the *Gachagua* judgment is that it represents the reproduction of this pattern within the post-2010 constitutional framework, using the language and concepts of that framework. The Court does not simply defer to executive power in the crude manner of the Moi-era courts. The court deploys a different tactic to do the same that can be justified and supported legally. The court defers to constitutional architecture, to institutional finality, to the avoidance of constitutional absurdity. The form is sophisticated; the substance is familiar. The ghosts of the old constitutional culture are speaking constitutional vocabulary.

VI. What the constitution required: Towards a transformative resolution

A. Reading Article 145(7) correctly

Article 145(7) provides:

> *"If at least two-thirds of all the members of the Senate vote to uphold any impeachment charge, the President shall cease to hold office."*

[27]Ibid Para 12

[28]Hans Kelsen, Pure Theory of Law (Max Knight tr, University of California Press, 1967) 193–221. For the argument that in a transformative constitution the grundnorm includes substantive values, see Karl Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 South African Journal on Human Rights 146, 155.

[29]This was the approach of the South African Constitutional Court in S v Makwanyane 1995 (3) SA 391 (CC) para 100, where Chaskalson P held that all government action, including that of the legislature, must be consistent with the rights in the Bill of Rights

[30]Mutua (n 16) 110–115.

In my opinion the Court read this provision as establishing the absolute and unreviewable finality of a Senate vote.[31] This reading conflates two distinct questions: whether the Senate has voted, and whether the vote was constitutionally valid. Article 145(7) addresses the first question; it specifies the effect of a valid Senate vote. It does not address the second question, it does not immunise an invalid process from constitutional scrutiny.

The distinction between an act and its preconditions of validity is fundamental to constitutional law. The Court of Appeal of Kenya recognised this in Joho v Nyange and Another, where it held that constitutional finality provisions do not operate to validate processes that have not complied with constitutional requirements.[32] Similarly, the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji*** held that the finality of an electoral process does not preclude inquiry into whether the process was conducted in accordance with constitutional requirements.[33]

A transformative constitutional culture would approach the tension between Article 145(7) and Articles 25, 47, and 50 in the following way, it would ask, not which provision prevails, but how both can be given full and faithful effect. The answer, as argued in this article, is that Article 145(7) provides for finality when the process has been constitutionally conducted, not when it has been conducted in violation of non-derogable rights. This interpretation gives both provisions their full constitutional meaning and avoids the constitutional dilemma that the Court found insurmountable.

B. The remedy the constitution commanded

Having found a violation of a non-derogable constitutional right in the conduct of the impeachment trial, the Constitution required the Court to grant a remedy that was appropriate, just, and effective.[34] As the South African Constitutional Court concluded in *Fose v Minister of Safety and Security*, that an appropriate relief will in essence be relief that is required to protect and enforce the Constitution.[35]

In a case where the violation was found to be a material infringement of a non-derogable right, occurring in the course of the most constitutionally significant removal proceeding available under the Constitution, the appropriate relief was the quashing of the Senate resolution and the remission of the matter for a constitutionally compliant process. Fifty million shillings does not protect or enforce the Constitution. It prices the violation and moves on. It treats the non-derogable right as if it were a compensable harm rather than an absolute constraint. This is and will never be constitutionally unacceptable.

C. The dual incumbency problem: A false dilemma

The Court was significantly exercised by the practical consequences of quashing the impeachment, specifically, the prospect of two serving Deputy Presidents, which it described as a "constitutional absurdity."[36] This concern, while superficially compelling, represents a false dilemma. This is also

[31]Gachagua Judgment (n 2) para 26.
[32]Joho v Nyange and Another & Another [2008] 3 KLR (EP) 500.
[33]Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR (SC) para 165.
[34]Constitution of Kenya 2010, Art 23(3) which empowers the Court to grant appropriate relief including declarations, injunctions, conservatory orders, orders for compensation, and orders of judicial review.
[35]Fose v Minister of Safety and Security [1977] ZACC 6; 1997 (3) SA 786 (CC) para 19.
[36]Gachagua Judgment (n 2) para 43.

coupled up by the fact that it is this court that lifted the conservatory orders that had protected the status quo with the promise that the same can be remedied.

If the Senate's resolution was void *ab initio*, as the doctrine of nullity requires in cases of breach of non-derogable rights, then the appointment of H.E. Kindiki as Deputy President under Article 149(1) would also be constitutionally invalidated, since it was predicated on a vacancy that, in this analysis, never legally arose. There would be one Deputy President, H.E. Gachagua. The constitutional absurdity of dual incumbency is an artefact of the Court's reasoning, not an inherent consequence of the application of correct constitutional principles.

Moreover, courts routinely manage the practical consequences of constitutional invalidity through their remedial jurisdiction. The Constitutional Court of South Africa in Minister of ***Finance v Van Heerden and Doctors for Life International v Speaker of the National Assembly*** demonstrated that courts can craft prospective and structurally sensitive remedies that give effect to constitutional rights while managing transitional consequences.37 The practical complexity of a remedy is not a constitutional reason to deny it.

Conclusion

The judgment in ***Constitutional Petition No. E565 of 2024*** presents itself as an act of constitutional fidelity: a court acknowledging a rights violation, compensating the victim, and respecting the constitutional architecture of impeachment finality. It is, in reality, something quite different. It is a judicial act of constitutional sanitisation, the cleansing of an unconstitutional process through the fiction of monetary vindication, the laundering of institutional violation into acceptable constitutional currency.

The proposition that a non-derogable constitutional right, one that Article 25 declares categorically and without qualification shall not be limited, can be violated in a constitutional removal process without invalidating that process is not constitutionally defensible. It contradicts the text of the Constitution, the doctrine of natural justice, the comparative jurisprudence of transformative constitutional courts, and the fundamental logic of rights as constraints on power rather than liabilities to be discharged in damages.

It also contradicts the spirit and purpose of the Constitution of Kenya 2010. That Constitution was not enacted to create a legal order in which rights are vindicated in form while being overridden in substance. It was enacted to create a constitutional culture, a new way of governing, adjudicating, and relating to power, in which rights are taken seriously as enforceable entitlements, not as aspirational values to be traded away when institutional convenience demands it.

Even the devil, in a constitutional state, is entitled to his due. The State that violates a non-derogable right to condemn the devil has not vindicated the Constitution. It has condemned itself. And no sum of money, not fifty million shillings, not fifty billion, can repair the constitutional damage done when a court declares that a constitutional process which violated a non-derogable right was nonetheless valid. The Constitution does not sanitise what it prohibits. And neither, in a genuinely transformative constitutional order, should its courts.

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[37]Minister of Finance v Van Heerden [2004] ZACC 3; 2004 (6) SA 121 (CC); Doctors for Life International v Speaker of the National Assembly [2006] ZACC 11; 2006 (6) SA 416 (CC) para 230.

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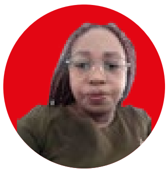
Justice delayed, justice denied: Why plea bargaining matters



By Susan Balongo

How would you feel if you were the victim of a crime and had to wait seven, ten or even twenty years for a case to be concluded in court? Imagine attending mention after mention, hearing after hearing, only for the matter to be postponed repeatedly. The emotional toll would be immense and justice would seem increasingly distant. Now imagine being an accused person awaiting the determination of your case, uncertain about your future as the legal process drags on for years. For both victims and accused persons, delayed justice often feels like denied justice. This is the reality facing many criminal justice systems around the world including Kenya. Courts are burdened with growing caseloads, limited resources and lengthy trial processes.

Traditionally, many people believe that justice is best served in a courtroom where evidence is presented, witnesses testify and a judge delivers a verdict after a full trial. This image has long shaped public perceptions of how the criminal justice system should function. However, while full trials remain an essential component of the justice system, they are not always the most efficient means of resolving every criminal case. It is against this backdrop that plea bargaining emerged as an important tool for the administration of justice. By allowing the prosecution and an accused person to negotiate a resolution, plea bargaining helps reduce delays, ease court congestion, and ensure that cases are concluded in a timely manner while safeguarding the rights of all parties involved.

Unfortunately, plea bargaining continues to be misunderstood. Whenever a high-profile criminal case is resolved through a plea agreement, public debate quickly follows. Some view it as a shortcut that allows offenders to escape punishment. Others see it as a sign that justice has been compromised. However, such perceptions often overlook the purpose and value of plea bargaining within a functioning criminal justice system.

At its core, plea bargaining is simply a negotiated agreement between the prosecution and an accused person. The accused agrees to plead guilty, usually in exchange for a reduced charge, a lesser sentence, or the withdrawal of some charges. What many people fail to appreciate is that a plea bargain still results in a conviction. The offender does not walk free; rather, responsibility for the offence is acknowledged without the need for a lengthy trial.

Kenya formally introduced plea bargaining into its criminal justice system through amendments to the Criminal Procedure Code. This was not done to weaken accountability but to strengthen access to justice. The Constitution requires that justice

An efficient legal system aims to ensure that justice is delivered fairly, impartially, and within a reasonable time.

shall not be delayed. Yet delayed justice remains one of the greatest challenges facing courts across the country. Thousands of criminal cases remain pending, some for years, placing immense pressure on judicial officers, prosecutors, witnesses, victims and accused persons alike.

In such circumstances, plea bargaining offers a practical solution. It enables cases to be resolved more quickly while preserving the rights of all parties involved. Judicial time and public resources that would have been spent on lengthy trials can instead be directed toward more complex and serious cases. Victims and complainants are spared the emotional burden of repeatedly reliving traumatic experiences in court. Communities gain confidence when cases are resolved promptly rather than lingering indefinitely in the justice system.

Critics often argue that plea bargaining favours offenders. Yet one could equally argue that it benefits society as a whole. A justice system that is unable to resolve cases efficiently ultimately serves no one. Courts clogged with backlogs undermine public confidence and delay justice for victims waiting to be heard. Efficiency should not be viewed as the enemy of justice; rather, it is often a prerequisite for justice to be meaningful.

This is not to say that plea bargaining is without risks. Concerns remain that some accused persons may feel pressured into accepting agreements, particularly where they lack adequate legal representation. There is also the danger that innocent individuals could plead guilty simply to avoid prolonged detention or the uncertainty of trial. These concerns are legitimate and should never be dismissed.

However, the answer is not to abandon plea bargaining altogether. Instead, the focus should be on strengthening safeguards. Courts must continue to ensure that agreements are entered voluntarily, that accused persons understand the

Plea bargaining is intended to make the criminal justice system more efficient by resolving cases without a full trial while balancing the interests of the accused, victims, and society.

consequences of their decisions, and that victims' interests are taken into account. Transparency and judicial oversight are essential to maintaining public trust in the process.

Importantly, plea bargaining is not available in every case. In Kenya, sexual offences are generally excluded from plea bargaining arrangements. The law also requires an admission of responsibility before any agreement can be considered. These limitations reflect the need to balance efficiency with public interest and accountability.

Globally, plea bargaining has become a cornerstone of criminal justice administration. Countries such as the United States, the United Kingdom, India, and South Africa have embraced the practice. International institutions like the United Nations Office on Drugs and Crime recognize its value in reducing case backlogs and improving the efficiency of justice systems.

The conversation around plea bargaining should therefore move beyond the simplistic question of whether offenders receive lighter sentences. The more important question is whether justice is being delivered fairly, efficiently, and transparently. In many cases, plea bargaining helps achieve exactly that.

As Kenya continues to reform its justice sector, plea bargaining should be viewed not as a loophole for criminals but as a practical mechanism that helps courts deliver timely justice. The challenge is not whether plea bargaining should exist, but how it can be implemented in a manner that safeguards fairness, protects rights and maintains public confidence in the rule of law.

Ultimately, the true measure of a justice system is not how severely it punishes, but how effectively it balances accountability, fairness and efficiency. Plea bargaining, when guided by clear safeguards, contributes significantly to that balance.

Susan Balongo is an advocate of the High Court of Kenya and a former prosecutor with the Office of the Director of Public Prosecutions (ODPP).

DIGITAL TAXATION

Digital taxation in Kenya: Compliance enforcement, constitutional constraints and the informal digital economy

By Steve Odhiambo

1. Abstract

The Finance Act 2019 amended the Income tax Act to provide for taxation of income accruing through the digital market place as a platform that enables direct Interaction between buyers and sellers of goods and services through electronic means.

Moreover, Kenya has sought to modernize its tax regime to capture revenue from the rapidly expanding digital economy. The Finance Act, 2019 marked the country's first step in this direction by amending the Income Tax Act to include income derived through digital marketplaces defined as electronic platforms that facilitate direct interaction between buyers and sellers. Building on this, the Finance Act, 2020 introduced the Digital Services Tax (DST), effective from 1st January 2021, imposing a 1.5% levy on the gross transaction value of digital services offered to users in Kenya. The DST applies to both resident and non-resident persons, with particular provisions for non-residents without a permanent establishment in Kenya, reflecting global debates around the concept of "digital presence" and permanent establishment in international tax law.

Digital taxation has become an important component of Kenya's tax system as the digital economy expands. The government seeks to balance increased revenue collection with maintaining a business environment that supports innovation and investment.

Whereas these legislative reforms align Kenya with global efforts such as those by the Organization for Economic Co-operation and Development (OECD), Group of 20 (G20) and certain European Union states to address the challenges of taxing digital activity, the practical realities of enforcement and compliance remain complex. This complexity is particularly prevalent in Kenya's extensive informal sector, where digital entrepreneurs often operate outside the formal regulatory framework. The informal sector, a vital component of Kenya's economy, now increasingly overlaps with digital spaces complicating tax compliance, enforcement, and coherence of policy.

This paper explores the efficacy of Kenya's digital taxation framework with a focus on compliance and enforcement mechanisms, and critically assesses the recurrent challenges posed by the informal sector. It centers the discussion within the broader context of international tax trends, bilateral treaty obligations, and the need for inclusive tax policy that balances revenue generation with economic equity and innovation. The paper argues that Kenya's transition from DST to SEPT represents a shift from transaction-based digital taxation to nexus-based profit attribution, but remains constitutionally vulnerable, treaty fragile, and economically regressive unless aligned with OECD Pillar One principles and domestic proportionality safeguards. The paper begins by scrutinizing the legal and policy framework on digital taxation in Kenya. It proceeds to look into the challenges that arise in compliance of these laws in Kenya. The paper then delves into the enforcement mechanisms of these laws and the limitations. It highlights and discusses constitutional and human rights considerations. The paper then magnifies its scope and looks at the international taxation issues pertaining to digital taxation and proposes recommendations for reform. It then concludes.

Introduction

Background of the study

Kenya's business economy has had a substantive shift to the use of technology in the few years past. The question that arises thereon is, how effective are the mechanisms for taxation of the income that is gained through this digital marketplace. The Finance Act 2019 breathed life into the Income tax under section 3 where it amended the Income tax to include taxation of income accruing from digital market place.

Kenya has made a step in the right direction to formulate laws to regulate the digital marketplace. Kenya implemented the Digital Services Tax (DST) under the Finance Act, 2020, effective 1st January 2021, imposing a 1.5% levy on the gross transaction value of digital services supplied to users in Kenya.[1] It applies to both resident and non-resident service providers, including those without a permanent establishment, covering services such as digital marketplaces, online advertising, and streaming. To complement DST, Kenya introduced the Significant Economic Presence Tax (SEPT), effective late 2024 and expanded under the Finance Act, 2025 (effective 1st July 2025), targeting non-residents deriving income from services provided over the internet or electronic networks where the user is in Kenya.[2] SEPT removes the previous KES 5 million turnover exemption and applies broadly to services including digital content, software, cloud computing, AI, data monetization, payments, streaming, and other electronic offerings.

Despite these measures instated by Kenya, the informal sector, increasingly participating in digital commerce, often remains outside formal oversight, revealing systemic limitations in capturing emerging economic activity. This situation raises enduring questions about the adaptability, inclusivity, and effectiveness of Kenya's digital taxation framework in a rapidly evolving digital landscape, where technological innovation, new business models, and cross-border digital transactions continually redefine the

[1] Finance Act 2020 (Kenya) s 4 (inserting Income Tax Act (Cap 470) s 12E).
[2] Tax Laws amendment Act 2024

scope of taxable activity. This paper will point out that there still exists numerous hurdles that need to be bridled for effective implementation of these laws. The work further explores the opportunities that are corollaries for effective compliance with digital taxation in Kenya.

This paper strives to answer the following research questions:

i. To what extent is Kenya's digital taxation framework (DST and SEPT) constitutionally compliant, and economically equitable within the context of its informal digital economy?
ii. Does the transition from Digital Services Tax (DST) to Significant Economic Presence Tax (SEPT) resolve or exacerbate enforcement and compliance challenges?
iii. How does Kenya's unilateral digital tax regime interact with international tax norms, including Double Taxation Agreements and the OECD Two-Pillar Solution?

Kapkai et al argue that the introduction of the Digital Services Tax (DST) was intended to restore horizontal equity by ensuring that non-resident multinationals deriving income from Kenyan users contribute to the domestic tax base despite lacking a physical presence. The subsequent transition from the 1.5 per cent DST to a Significant Economic Presence Tax (SEPT) under the Tax Laws (Amendment) Act 2024, as detailed by Ogembo, reflects both doctrinal evolution and geopolitical pragmatism.[4] This policy shift mirrors the OECD's observation that, in the absence of multilateral consensus, jurisdictions increasingly adopt unilateral digital tax measures to protect their tax bases, notwithstanding the risk of trade retaliation.[5] The conceptual foundation for these reforms is articulated in OECD scholarship, which identifies a structural misalignment between twentieth-century tax architecture and digital business models. The OECD Interim Report highlights three defining characteristics of highly digitalized firms: scale without mass, heavy reliance on intangible assets, and the central role of user data in value creation.[6] Building on this diagnosis, the OECD Pillar One Blueprint proposes a new market-based nexus rule and the reallocation of residual profits ("Amount A") to user jurisdictions. However, the OECD's Economic Impact Assessment cautions that the distributive effects of such reforms depend heavily on negotiated profitability thresholds and allocation percentages.[7] Kenya's DST and subsequent SEPT may therefore be understood as interim domestic responses within a fluid and contested international tax framework.

Kenyan empirical evidence highlights the operational challenges of digital taxation. Opiyo finds that while awareness of DST obligations among e-commerce retailers is relatively high, compliance remains moderate and is strongly influenced by tax knowledge and perceived fairness.[8] Similarly, Kiplagat demonstrates that

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[3] Philip Kapkai and others, 'Enforcement of the Digital Economy Taxation' (2021) 4(1) African Tax and Customs Review https://share.google/ViaX5OBHDi7xd1PKf/ Accessed on 25 February 2026

[4] Dan Ogembo, Evaluating Kenya's Experience with International Tax Standards Adoption, Suitability and Effectiveness (Institute of Development Studies 2025) Available at https://share.google/rJYjW5biJivF2nf0j / accessed 25 February 2026.

[5] OECD, Tax Challenges Arising from the Digitalisation of the Economy – Pillar One Blueprint (OECD 2020), Available at < https://share.google/sBYnpsCbb5RR6C5g6/> Accessed on 25 February 2026

[6] Digitalisation – Interim Report 2018 (OECD 2018) Available at https://share.google/EZ132yo1e56M7MLfj/ Accessed on 25 February 2026

[7] OECD (n 4)

[8] Vallary A Opiyo, Determinants of Digital Service Tax Compliance by E-commerce Retailing Firms in Kenya (MBA thesis, University of Nairobi 2022) Available at https://share.google/cT6bYNAlRkQ9D6B9f/ Accessed on 25th February 2026

effective revenue mobilization depends on proper income characterization and the application of the destination principle.[9] Professional commentary reinforces these concerns. KPMG and Deloitte describe early digital tax frameworks as administratively burdensome and lacking clarity.[10]

Despite this progress, significant gaps persist within African tax scholarship. Ogembo identifies institutional fragilities, including human capital attrition within the Kenya Revenue Authority and limited strategic engagement in treaty negotiations.[11] Meanwhile, broader critical scholarship argues that digital taxation debates frequently overlook the structural dynamics of platform capitalism and the limitations of the independent entity principle in capturing value creation in digital markets.[12] Addressing these underexplored issues of international tax treaty conflicts and the true nature of digital value creation is essential for moving toward a more stable enforcement regime, as this paper discusses.

Theoretical framework: Fiscal justice, constitutional taxation, and digital nexus

This section will seek to establish the prescriptive framework against which the digital taxation regime will be assessed. The section provides the theoretical basis for evaluating whether the DST and SEPT regimes meet the constitutional principles of fairness, equity and proportionality.

Taxation is neither a merely technical instrument of revenue extraction nor a neutral administrative mechanism; it is a foundational institution of the fiscal state. Classical public finance theory, most prominently articulated by Richard Musgrave, conceptualises taxation as serving three interrelated functions. These are, allocation of resources for public goods, redistribution of income to advance equity, and macroeconomic stabilisation.[13] These functions collectively justify the coercive character of taxation within constitutional democracies. The legitimacy of tax law therefore rests not solely on statutory enactment but on fidelity to normative principles that structure the relationship between citizen and state. As Attiya Waris has argued in the Kenyan context, taxation divorced from principle risks degenerating into mere fiscal opportunism, undermining both compliance and constitutional accountability.[14]

Within this normative architecture, two justificatory traditions have historically competed. These are the benefit theory and the ability-to-pay theory. The benefit theory posits that taxation should correspond to the benefits individuals derive from state activity.[15] While intuitively attractive, its application to modern redistributive states has been limited, given the difficulty of quantifying individualised benefits from collective goods. The ability-to-pay theory, by contrast, anchors taxation in distributive justice, requiring that fiscal burdens correspond to economic capacity rather

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[9] Caroline J Kiplagat, Impact of Taxing the Digital Economy on Revenue Collection in Kenya (MBA thesis, United States International University 2022) Available at https://share.google/Kqc35kMdLK8GgdeCP/ Accessed on 25th February 2026
[10] KPMG, 'Kenya Introduces Digital Services Tax' (Tax Alert 2020) 2026 https://share.google/qA6rcUnwcfA1wjn2S/ Accessed on 25th February 2026
[11] Ogembo (n 3)
[12] Michael Kenney and John Zysman, *'The Rise of the Platform Economy'* (2019) Issues in Science and Technology < https://share.google/UZzGwiWC7Xp92vcod/>
[13] Richard A Musgrave, The Theory of Public Finance: A Study in Public Economy (McGraw-Hill 1959) 3–5.
[14] Attiya Waris, 'Taxation Without Principles: A Historical Analysis of the Kenyan Taxation System' (2011) 1 *Kenya Law Review* 272 Available at https://share.google/v5lWYQOMykFlAivZb/ Accessed on 26th February 2026
[15] RA Musgrave and PB Musgrave, *Public Finance in Theory and Practice* (5th edn, McGraw-Hill 1989) 219–223.

than state-provided benefits.[16] Progressive income taxation is the institutional expression of this principle. Contemporary philosophical accounts, such as those advanced by Liam Murphy and Thomas Nagel, further reject the pre-tax baseline assumption and argue that tax burdens are intrinsic to defining property rights themselves.[17]

The digital economy complicates this normative dichotomy. Gross-based digital services taxes and turnover-based significant economic presence rules may approximate a benefit rationale, taxing access to domestic markets rather than reflecting genuine ability to pay. Where liability is detached from net income or profitability, the classical distributive justification of income taxation becomes attenuated. The theoretical question thus emerges whether digital taxation reconfigures fiscal justice away from capacity-based assessment toward market-access exaction. This shift demands explicit justification rather than implicit acceptance.

The tension becomes more acute within international tax law, historically structured around the allocation of taxing rights between residence and source jurisdictions. Traditional doctrine, reflected in the Organisation for Economic Co-operation and Development Model Tax Convention, conditions source taxation upon the existence of a permanent establishment ordinarily requiring physical presence.[18] As standard international tax scholarship notes, this architecture presupposes tangible factors of production and geographically anchored value creation.[19] This continues to happen yet highly digitalised enterprises generate substantial economic value within market jurisdictions without maintaining physical infrastructure therein.

The resulting "nexus crisis" has prompted significant doctrinal reconsideration. The OECD's Base Erosion and Profit Shifting (BEPS) Action 1 Report acknowledged that digitalisation challenges the adequacy of existing permanent establishment standards.[20] Subsequent reform proposals under the OECD/G20 Inclusive Framework particularly Pillar One have sought to allocate taxing rights based on market jurisdiction and user participation rather than physical presence.[21] The emergence of "significant economic presence" rules represents a unilateral or semi-coordinated attempt by states to redefine the taxable nexus in functional rather than physical terms. This re-conceptualisation of nexus raises foundational jurisprudential questions. If taxation is justified by economic allegiance or value creation, what constitutes sufficient participation in a domestic economy to trigger fiscal obligation? Is user engagement a proxy for value generation, or does it merely reflect consumption? And how should unilateral digital taxes be evaluated in light of the long-standing commitment to international tax neutrality and avoidance of double taxation?

Neutrality and efficiency core evaluative criteria within public finance require that tax systems minimise distortions in investment, competition, and innovation. As emphasised

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[16] Simon James and Christopher Nobes, *The Economics of Taxation: Principles, Policy and Practice* (FT Prentice Hall 1999) 28–34.
[17] Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002) 8–10.
[18] OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing 2017) art 5.
[19] Angharad Miller and Lynne Oats, *Principles of International Taxation* (3rd edn, Bloomsbury Professional 2012) 98–115.
[20] OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report* (OECD Publishing 2015) < https://share.google/pOhACQn1NNuU9y2BW/>
[21] OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint* (OECD Publishing 2020). https://share.google/1ilYhvMgCm1Uk2wMA/ accessed on 26th February 2026

in the economic literature on taxation, poorly designed taxes generate excess burden and behavioural distortions that exceed their redistributive gains.[22] Digital taxes that apply selectively to particular business models, impose gross-basis liabilities, or create overlapping claims between jurisdictions risk undermining both capital neutrality and competitive neutrality. The challenge for emerging economies is particularly acute: the pursuit of revenue mobilisation must be balanced against the risk of discouraging technological investment and cross-border digital trade.

Within Kenya's constitutional order, these theoretical tensions assume additional significance. The fiscal provisions of the Constitution embed principles of equity, transparency and accountability in public finance governance.[23] Tax legislation must therefore satisfy not only economic rationality but also constitutional proportionality and fairness. As Waris has observed, taxation in developing contexts is inseparable from broader developmental objectives and questions of fiscal justice.[24] Digital taxation, when framed as a response to base erosion and profit shifting by multinational enterprises, may be defended as an instrument of distributive correction. However, its design must remain consistent with ability-to-pay principles, legal certainty, and administrative feasibility.

Accordingly, the digitalisation of economic activity does not displace classical tax theory; rather, it tests its resilience. The core principles of fiscal philosophy equity, neutrality, certainty, and legitimacy remain the normative benchmarks against which innovations such as significant economic presence and digital services taxation must be assessed. Kenya's digital tax reforms must therefore be situated within this broader theoretical matrix. Only through such grounding can one evaluate whether the redefinition of nexus and tax base in the digital era represents principled adaptation of the fiscal state or a departure from its foundational commitments.

Legal and policy framework on digital taxation in Kenya

As already averred, the rapid rise of the digital economy has necessitated a more adoptive and robust legal framework and policies in Kenya. This chapter delves into the evolution of the legal framework hitherto existing in Kenya amidst the advent of the digital economy. The Finance Act 2020 introduced a digital service tax (DST) which would be deemed to be derived or accrued in Kenya from the provision of services through a digital marketplace. The Finance Act 2020 under section 4 defined a digital market place as a platform that enables the interaction between buyers and sellers of goods and services through electronic means.[25] Furthermore, section 18 of the Act expands the scope of the VAT Act to be applicable to supplies made through a digital marketplace. This definition captures all the entities generating income through digital platforms. The digital service tax applies at a rate of 1.5% of the gross transaction value.

Section 12E of the Finance Act 2020 provides that in spite of any other provision of the Act, a tax to be known as digital service tax shall be payable by a non-resident person whose income

[22] Michael P Devereux and others, 'Taxing Multinational Companies' (Oxford University Centre for Business Taxation Working Paper 2008) 6–12.
[23] Constitution of Kenya 2010, arts 201–210.
[24] Attiya Waris, *Tax and Development: Solving the Fiscal Crisis through Human Rights* (LawAfrica 2014) chs 1–4
[25] Finance Act 2020 (No. 8 of 2020), Laws of Kenya.

from the provision of services is derived from or accrues in Kenya through a business carried out over the internet or an electronic network including through a digital marketplace, Provided that this section shall not apply to a non-resident person with a permanent establishment in Kenya. This formulation reflects a shift from the traditional permanent establishment doctrine toward a functional nexus standard based on digital interaction with Kenyan users. Sub article 2 of the same section further elucidates that a person subject to digital service tax shall submit a return and pay the tax due to the Commissioner on or before the twentieth day of the month following the end of the month in which the digital service was offered.[26] In light of this, the digital service Tax Regulations 2020 expands on some of the definitions. Section 3 of the Regulations outlines what may constitute a digital service. These include the provision of downloadable digital content such as mobile applications, e-books, and films; over-the-top (OTT) services that facilitate the streaming of television shows, music, podcasts, and other forms of digital content; and the sale, licensing, or other forms of monetizing data collected from Kenyan users through their activities on digital marketplaces. Additionally, the law covers the operation of digital marketplaces themselves, as well as subscription-based media services including access to online news, magazines, and journals. Further, DST applies to electronic data management services encompassing website hosting, online data warehousing, file-sharing, and cloud storage solutions. Electronic booking and ticketing services, particularly those involving the online sale of tickets, also fall within the ambit of a digital service. The framework further includes the provision of search engine services and automated help desk services, especially where such services are customized to meet specific user needs. Notably, online distance learning services delivered through pre-recorded media, and any other service provided through a digital marketplace, are also considered taxable under the DST regime, reflecting the evolving nature of digital commerce and the government's effort to expand the tax base within the digital economy.[27]

Indeed the introduction of the Digital Services Tax (DST) and the subsequent transition to the Significant Economic Presence Tax (SEPT) has marked a profound doctrinal departure from the permanent establishment (PE) principle that has governed international taxation for over a century.[28] Traditional tax law necessitates a fixed physical presence such as an office or branch to establish a taxable nexus, however, modern digital firms are characterized by scale without mass, deriving substantial value from Kenyan users through intangible assets and data without any local footprint.[29] By adopting SEPT, Kenya is asserting its rights as a market jurisdiction, aligning its domestic legislation with the broader global movement to tax profits where value is created rather than where entities are physically resident.[30] This shift directly mirrors the objectives of OECD BEPS

[26]The Income Tax Act cap 470

[27]Income Tax (Digital Service Tax) Regulations 2020

[28]Philip Kapkai and others, 'Enforcement of the Digital Economy Taxation' (2021) 4 African Tax and Customs Review 1, 2 [22] https://share.google/FPVbcSMfJscOrp5rp/ accessed on 5th March 2026

[29]OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS (OECD Publishing 2018) 23; Daisy Ogembo, 'Evaluating Kenya's Experience with International Tax Standards: Adoption, Suitability, and Effectiveness' (2025) ICTD Working Paper 232, 29 https://share.google/tFe68W9y31vktwspk/ accessed on 5th March 2026

[30]Daisy Ogembo (n 2) 10-11

Action 1, which identified the inadequacy of physical nexus rules in a digitalized age, and the Pillar One market nexus rule, which proposes a new taxing right based on active and sustained engagement in a jurisdiction regardless of local infrastructure.[31]

The Kenya revenue authority has taken some policy measures in ensuring that the collection of this digital tax is effective. It has played a pivotal role in the administration and enforcement of digital taxation in Kenya, particularly through the implementation of the Digital Services Tax (DST) and the Value Added Tax (VAT) on digital marketplace supplies. Effective from January 2021, these measures target income derived or accrued in Kenya from services offered through digital marketplaces, including business-to-consumer services such as online movies and music. To enhance compliance, KRA has adopted collaborative policies with digital platforms ranging from social media to e-commerce and sharing platforms facilitating initiatives such as PIN/TIN information sharing, system-to-system integration, and formal agreements including Mutual Administrative Assistance in Tax Matters (MAAC). Additionally, the Authority has engaged in capacity building through training and the acquisition of monitoring tools from international partners, enabling better oversight of the digital economy and social media activities. KRA's policy approach is reinforced by its participation in the OECD's Inclusive Framework, aligning with global discussions on the unilateral measures like DST. Operationally, KRA has ensured smooth tax collection through a dedicated team, stakeholder engagement, issuance of guidelines, system implementation, and maintaining a robust legislative framework two-pillar solution while addressing all supported by top management involvement to drive effective enforcement.[32]

Enforcing these new mandates requires an institutional evolution within the Kenya Revenue Authority (KRA), moving toward a digitalized administrative architecture centered on the iTax platform.[33] To facilitate compliance, Kenya implemented a simplified VAT registration framework specifically for non-resident suppliers, allowing them to register and account for taxes without the need for a local permanent establishment.[34] This architecture relies on digital monitoring and platform cooperation, with the KRA seeking to leverage technology such as IP address mapping to track user locations and verify transactional values.[35] Despite these structural advancements, the KRA faces significant institutional hurdles, including the inherent difficulty of tracking decentralized digital markets and platforms that lack local tax representatives.[36] Furthermore, the rise of crypto payments and the "intangible nature of transactions" pose severe tracking and characterization challenges that existing enforcement mechanisms are not yet fully equipped to resolve.[37]

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[31]OECD, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS (OECD Publishing 2020) 10–11 https://share.google/IslnMlz6G66PzgM1z/ acccessed on 5th March 2026

[32]KRA Digital service guidance

[33]Musau Susan Kavuu, 'Taxation and Electronic Commerce: An Assessment of the Kenyan Legal and Regulatory Framework' (LLM thesis, University of Nairobi 2022) 34 < https://share.google/hccfSYMoi6S2lEAVM/> accessed on 5th March 2026

[34]Philip Kapkai and others (n 1) 12

[35]Ibid 4-5

[36]Ibid 14

[37]Ibid 14

Comparative analysis

For developing economies, the stakes are particularly high as far as taxation is concerned. Corporate income taxation constitutes a significant proportion of government revenue, yet digitalized business models frequently escape conventional nexus rules.[38] As a result, digital taxation initiatives are not merely fiscal instruments but mechanisms through which states seek to assert fiscal sovereignty and distributive fairness within an increasingly dematerialized global economy.[39]

A comparative examination of digital taxation regimes provides valuable insight into how different jurisdictions balance revenue mobilization with the risks of double taxation, treaty conflict, and administrative complexity.[40] Such analysis enables a critical assessment of policy effectiveness, institutional capacity, and the broader constitutional and economic implications of unilateral digital tax measures.[41]

The jurisdictions selected for comparison herein are not solely based on geographical similarity but on their relevance to the evolving digital tax architecture in Kenya. India offers a useful comparator because it was among the earliest economies to introduce a unilateral digital tax measure through the Equalization Levy in the year 2016.[42] Nigeria on the other hand has adopted significant economic presence rules and offers comparison through that lense.[43] Indonesia on its part demonstrates a consumption based VAT model.

India

India represents one of the earliest adopters of unilateral digital taxation, introducing the Equalization Levy in 2016 to address revenue losses associated with digital transactions conducted by non-resident firms.[44] Initially limited to online advertising services, the regime was significantly expanded in 2020 to include a 2% levy on the gross revenue of non-resident e-commerce operators.[45]

The conceptual significance of India's model lies in its departure from traditional income tax principles. Rather than attempting to redefine the permanent establishment threshold, the Equalization Levy operates as a gross-based transaction tax, thereby circumventing treaty constraints that typically restrict the taxation of non-resident profits.[46] This approach offers considerable administrative simplicity: the tax is imposed on identifiable revenue streams and does not require complex profit attribution methodologies.[47]

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[38]Ogembo, D. (2025) Evaluating Kenya's Experience with International Tax Standards: Adoption, Suitability, and Effectiveness, ICTD Working Paper 232, Brighton: Institute of Development Studies, https://share.google/c1SGHShSKX7LA5lD2/ accessed on 12th March 2026

[39]Philip Kapkai and Others, Enforcement of the igita Economy Taxation (2021) 4 African Tax and Customs Review 1,8 https://share.google/eKK7RL3PNv07py96s/ accessed on 12th March 2026

[40]OECD, Tax Challnges Arising from Digitization – Economic Impact Assessment : Inclusive Framework on BEPS (OECD Publishing 2020) https://share.google/nrnWOZ0Y2EWKzdls2/ accessed on 12th March 2026

[41]Ibid 108

[42]Shreya Rao, 'The Indian Equalisation Levy: Inelegant but Not Unexpected' (2016) 2(1) National Law School Business Law Review 25, 26 https://repository.nls.ac.in/nlsblr/vol2/iss1/5/ Accessed 9th June 2026

[43]Chimezirim Echendu, 'Nigeria's Significant Economic Presence Income Tax on Digital Economic Activities: Challenges and Opportunities' (2020) 74(9) Bulletin for International Taxation 524.

[44]Ibid 403

[45]Kapkai (n 1) 426

[46]Ibid 432

[47]Ogembo (n 4) 537

However, the model also raises important normative concerns. Because the levy applies to gross revenue rather than net profit, it disregards differences in firm profitability and may result in economic double taxation, particularly where the same income is also subject to corporate taxation in another jurisdiction.[48] This structural limitation has generated tensions with existing bilateral tax treaties and has been criticized for potentially distorting investment decisions.[49]

Kenya's former Digital Services Tax (DST) closely resembled the Indian model in its reliance on a gross turnover approach. Yet Kenya's subsequent transition toward a Significant Economic Presence Tax (SEPT) suggests a policy shift toward profit attribution rather than purely transactional taxation.[50] This transition reflects an attempt to align digital taxation more closely with the underlying principle that taxation should correspond to the location of value creation.

Nigeria

Nigeria provides a particularly instructive comparison for Kenya, as both jurisdictions have moved toward the Significant Economic Presence (SEP) doctrine as a mechanism for establishing digital tax nexus. Nigeria amended its Companies Income Tax Act to permit the taxation of non-resident companies that maintain a sustained and purposeful interaction with the Nigerian market, even in the absence of physical infrastructure.[51]

Under the Nigerian framework, nexus is determined through a combination of revenue thresholds, digital platform engagement, and the scale of local user participation, thereby approximating a form of virtual permanent establishment.[52] The model represents an effort by a developing economy to redefine taxable presence in a manner broadly consistent with emerging international discussions under the OECD Base Erosion and Profit Shifting (BEPS) project.[53]

Despite its conceptual sophistication, the Nigerian model also illustrates the practical difficulties associated with enforcing digital taxation. Revenue authorities frequently face information asymmetries, as they depend on offshore platforms to disclose user data and transaction values necessary for tax assessment.[54] These enforcement challenges are equally evident in Kenya, where the verification of digital economic activity often relies on voluntary compliance by multinational platforms.

Kenya's recently introduced SEPT regime appears even more expansive than Nigeria's framework. By deeming a fixed proportion of turnover as taxable profit and removing several earlier exemptions, Kenya has adopted a comparatively assertive fiscal approach.[55] While this design potentially increases revenue mobilization, it also raises the likelihood of disputes concerning profit attribution and treaty compatibility.

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[48] Ibid 538
[49] Kapkai (n1) 423
[50] Ibid 418
[51] OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS (OECD Publishing 2018) 446 https://share.google/cer4l5wRqKdGH9CE8/ Accessed on 12th March 2026
[52] Kapakai (n 1) 420
[53] Caroline J Kiplagat, 'Impact of Taxing the Digital Economy on Revenue Collection in Kenya' (MBA project, United States International University-Africa 2022) 582 https://share.google/DjvTfcjGAETpAjpby/ accessed on 12th March 2026
[54] Ibid 645
[55] OECD, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS (OECD Publishing 2020) 639 < https://share.google/Bxi1Pcb0ZG13CjsUq/> Accessed on 12th March 2026

Indonesia

Indonesia adopted a markedly different strategy by prioritizing consumption-based taxation through the application of value added tax (VAT) to digital services supplied by non-resident providers.[56] Under this regime, foreign suppliers of digital goods and services including streaming platforms, online marketplaces, and advertising services are required to register with the Indonesian tax authority and collect VAT from domestic consumers.[57]

This model is grounded in the destination principle, according to which consumption taxes should accrue to the jurisdiction in which the final consumption occurs.[58] From an administrative perspective, VAT-based digital taxation offers significant advantages. Because VAT systems are typically integrated with payment infrastructure and consumption records, compliance and enforcement are often more feasible than in the case of profit-based corporate taxation.[59]

Empirical experience in Kenya reinforces this observation. Revenue collected from VAT on digital supplies has significantly exceeded that generated by the former DST regime, indicating that consumption taxes may provide a more reliable source of digital economy revenue in the short term.[60]

Nevertheless, a VAT-only strategy does not address the underlying issue of corporate profit shifting by multinational enterprises.[61] While consumption taxes capture value generated from local users, they do not ensure that multinational firms pay corporate income tax on profits derived from those markets. Consequently, Indonesia's approach emphasizes administrative practicality but leaves unresolved the broader question of profit allocation in the digital economy.

The comparative landscape reveals three distinct models of digital tax nexus. India employs a transaction-based levy targeting specific digital services; Nigeria relies on significant economic presence rules to establish an income tax nexus; and Indonesia focuses primarily on consumption-based taxation through VAT.[62]

Kenya's approach combines elements of each model, integrating VAT on digital supplies with a profit-based SEPT framework.[63] While this hybrid strategy aims to capture value across both consumption and income dimensions of the digital economy, it also introduces a greater risk of doctrinal overlap and regulatory complexity.

A central trade-off in digital taxation lies between administrative simplicity and conceptual accuracy. Gross-based levies such as India's Equalization Levy or Kenya's former DST are comparatively easy to administer but may produce inequitable outcomes for firms with low profit margins.[64] In contrast, profit attribution models such as the SEPT align more closely with traditional income tax principles but require sophisticated data regarding user location,

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[56] Ogembo (n 40)
[57] Kapkai (n 1) 399
[58] Ibid 417
[59] Ibid 410
[60] Ibid 817
[61] Ogembo (n 4)
[62] Kapakai(n1) 466
[63] Ibid 473
[64] Ogembo (n 4) 542

digital engagement, and value creation.[65]

For many developing countries, including Kenya, the principal challenge is therefore not the legal design of digital taxation but the institutional capacity required to enforce it effectively.

Kenya's transition from DST to SEPT illustrates the broader tensions surrounding unilateral digital tax measures. While such reforms aim to enhance revenue mobilization and tax fairness, they also expose states to diplomatic pressure and potential trade retaliation, particularly from jurisdictions where major digital firms are headquartered.[66]

To ensure the sustainability of its digital tax framework, Kenya should pursue three key policy objectives. First, compliance mechanisms should remain administratively streamlined particularly through the continued use of the iTax platform to reduce enforcement costs. Second, regulatory thresholds should be carefully calibrated to avoid imposing disproportionate burdens on small digital entrepreneurs operating within the informal sector. Third, Kenya's domestic legislation should remain adaptable to evolving multilateral reforms, particularly the OECD Pillar One framework, which may eventually supersede unilateral digital taxation measures.[67]

Ultimately, Kenya's SEPT regime represents one of the more ambitious attempts among developing economies to redefine the taxable nexus in the digital economy. However, as the comparative experience of India, Nigeria, and Indonesia demonstrates, the long-term viability of such measures will depend not only on their legal design but also on their administrative feasibility and compatibility with emerging international tax norms.

Compliance enforcement challenges

The practical implementation of the digital service tax posed serious concerns. The issue of compliance has bedeviled the tax administrators and the tax payer alike. Tax payer attitude is central to the challenges met in trying to ensure compliance to the laws in digital taxation in Kenya. Normally each taxpayer desires to be freed from the tax burden they do not mind if it is borne by the others. It is essential that a good tax system should be equitable to all taxpayers. Attitude is also influenced by other factors like the present political situation, natural calamities and the economic situation.[68]

The Kenyan digital landscape is increasingly defined by an expansive informal sector that facilitates approximately 82.7% of national employment, posing a severe structural barrier to tax enforcement.[69] This informality has migrated online, manifesting in Tiktok commerce, Instagram-based boutique businesses, online resellers, and a burgeoning freelance gig economy.[70] Unlike traditional brick-and-mortar entities, these

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[65]Ibid

[66]Organisation for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation* – Economic Impact Assessment: Inclusive Framework on BEPS (OECD Publishing 2020) 20 https://share.google/UVyWb0YXZ4kFFkWXZ/ accessed on 12th March 2026

[67]Organisation for Economic Co-operation and Development, Addressing the Tax Challenges of the Digital Economy – *Policy Note* (OECD 2019) 5–7 https://share.google/35unqFdFz6DK51ema/ accessed on 12th March 2026

[68]Attiya Waris, Taxation without principles: A Historical Analysis of the Kenyan Taxation System, P 275

[69]Philip Kapkai and others, 'Enforcement of the Digital Economy Taxation' (2021) 4 African Tax and Customs Review 1, 13 https://share.google/EVHy4hinjkuu0JbKH/ accessed on 5th March 2025

[70]Vallary Achieng Opiyo, 'Determinants of Digital Service Tax Compliance by E-Commerce Retailing Firms in Kenya' (MBA project, University of Nairobi 2022) xi < https://share.google/H5vHN2rDuVVSNRQrT/> accessed o 5th March 2025

actors often lack formal tax registration, standardized accounting records, or formal contracts, operating instead in a semi-organized and unregulated space.[71] Consequently, the Kenya Revenue Authority (KRA) faces a fundamental enforcement hurdle; without a visible paper trail or local permanent establishment, it becomes practically impossible to apply the Significant Economic Presence Tax (SEPT), VAT, or standard income tax to these micro-level transactions.[72] This creates a fiscal "blind spot" where a significant portion of the digital economy generates value without contributing to the national tax base, ultimately undermining the constitutional principle of tax equity.[73]

Several reports from the big four Audit firms in Kenya portrayed the unconstructive aspects of the Digital service Act. KPMG and Deloitte for instance painted the amendments as crude and tantamount to double taxation to those using the digital platform. They argued that the new tax laws will create a heavy burden for both consumers and platform operators, especially in cases where VAT is applied to online transactions. In this regard, the Act presents several challenges, which are outlined here below.

The practical implementation of the Significant Economic Presence Tax (SEPT), introduced under section 12E of the Income Tax Act (Cap 470, Laws of Kenya) as amended by the Finance Act, 2024, has presented significant challenges for both taxpayers and tax administrators. Although the measure was designed to replace the Digital Service Tax (DST) and align Kenya's tax system with international trends in taxing the digital economy, the process of operationalizing it continues to reveal enduring concerns of compliance and taxpayer attitude.[74]

Taxpayer attitude remains central to the compliance problem within Kenya's digital taxation framework. Many taxpayers view taxation as an undue burden rather than a civic responsibility, preferring to avoid or shift it wherever possible. For a tax system to be sustainable, it must be equitable, transparent, and proportional to the taxpayer's capacity to comply. However, the SEPT regime has been criticized as complex and burdensome, particularly for small-scale digital entrepreneurs.[75]

A profound information asymmetry persists between the KRA and the multinational enterprises (MNEs) that intermediate the digital economy. These platforms control the critical data required for taxation, including precise transaction values, revenue flows, and granular user location data derived from IP addresses and device geolocation.[76] Because many of these platforms are offshore and lack a physical presence in Kenya, the KRA is forced into a position of dependency on platform cooperation.[77] This dependency is fraught with risk, as the rise of encrypted payments, digital wallets, and decentralized cryptocurrencies further obscures the audit trail.[78] Furthermore, the

[71]Kapkai (n 1)
[72]OECD, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS (OECD Publishing 2020) 45–46 < https://share.google/CAhqX0BPliDL9ZAR8/> accessed on 6th March 2026
[73]Kapkai (n 1) 12
[74]Income Tax Act (Cap 470, Laws of Kenya), s 12E, as amended by the Finance Act 2024 (Kenya).
[75]Republic of Kenya, Budget Statement for the Year 2024/2025 (National Treasury and Planning, June 2024).
[76]ibid 11, 13; OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS (OECD Publishing 2018) 23.
[77]Caroline J Kiplagat, 'Impact of Taxing the Digital Economy on Revenue Collection in Kenya' (MBA project, United States International University-Africa 2022) 16 https://erepo.usiu.ac.ke/bitstream/handle/11732/7492/Kiplagat%20Caroline%20J.%20MBA%202022.pdf/ Accessed on 6th March 2026
[78]Daisy Ogembo, 'Evaluating Kenya's Experience with International Tax Standards https://share.google/Hzj40HKdLQ9hcKWgc/ Accessed on 6th March 2026

intangible nature of transactions allows MNEs to exploit the independent entity principle to fragment functions and shift profits to low-tax jurisdictions, leaving the KRA with limited visibility into the true scope of taxable economic activity occurring within Kenyan borders.[79]

Reports by major audit firms such as KPMG and Deloitte have highlighted the double taxation risks and heavy compliance obligations that accompany the implementation of SEPT.[80] Under section 12E(2) of the Income Tax Act, a non-resident person providing services through a digital marketplace or any other electronic network is deemed to have a significant economic presence in Kenya if they meet the thresholds set out in the Income Tax (Significant Economic Presence) Regulations, 2025.[81] The Regulations provide that such persons shall compute a deemed taxable profit equal to 10 per cent of their gross turnover, which is then taxed at the corporate rate of 30 per cent, resulting in an effective tax rate of approximately 3 per cent.[82]

While this framework aims to broaden the tax base, it simultaneously removes the KES 5 million turnover exemption that existed under the DST regime and expands coverage beyond digital marketplaces to include all services provided via the internet or electronic networks.[83] This expanded scope has raised concern among Kenya's youthful digital entrepreneurs, many of whom rely on online platforms to lower business costs. The increased compliance burden, coupled with ambiguous registration, reporting, and nexus rules, may discourage participation in the formal digital economy. The likely outcome is a contraction of digital enterprise growth, contrary to Kenya's stated objective of promoting innovation and inclusion in the digital space.[84]

Additionally, SEPT raises unresolved cross-border taxation issues. The current legal framework does not comprehensively address the risk of double taxation for non-resident investors from countries with which Kenya has existing Double Taxation Agreements (DTAs).[85] Without the amendment of those treaties or clear administrative guidance, non-resident investors face the risk of being taxed both in their home jurisdiction and in Kenya. This uncertainty deters foreign digital investment and complicates Kenya's attractiveness as a regional digital hub.

Compliance attitudes are further influenced by Kenya's broader political and socio-economic conditions. Inflation, unemployment, and limited awareness of digital tax obligations all shape taxpayer perceptions of fairness and legitimacy. Where taxpayers perceive taxation as complex or inequitable, voluntary compliance diminishes, forcing the Kenya Revenue Authority (KRA) into a reactive enforcement posture.[86]

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[79]OECD, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint (OECD Publishing 2020) 46 https://share.google/kNPCEuEqpZ3ZlmsW/ Accessed on 6th March 2026

[80]KPMG Kenya, Tax Newsflash: Public Consultation on the Application of Significant Economic Presence Tax (SEPT) (September 2025) < https://kpmg.com/> accessed on 5 October 2025.

[81]Income Tax (Significant Economic Presence) Regulations 2025 (Draft).

[82]Bloomberg Tax, 'Kenya Tax Agency Seeks Comments on Draft Income Tax Regulations for Significant Economic Presence Tax' (30 September 2025) https://news.bloombergtax.com/ accessed on 5 October 2025

[83]Finance Act 2025 (Kenya), s 24.

[84]Deloitte Kenya, Digital Taxation in Kenya: Navigating the Transition from DST to SEPT (Policy Brief, July 2025).

[85]Organisation for Economic Co-operation and Development (OECD), Addressing the Tax Challenges of the Digital Economy (Action 1 BEPS Report, 2020).

[86]Kenya Revenue Authority, iTax User Guide on the Significant Economic Presence Tax (SEPT) (September 2025) https://kra.go.ke/ accessed 5 October 2025.

The empirical performance of digital taxes in Kenya reveals a stark contrast between initial fiscal expectations and realized collections. Upon the introduction of the Digital Services Tax (DST), the National Assembly anticipated raising KES 2 billion annually.[87] However, Treasury data indicates that realized revenue in the first year of the 2020/2021 financial year was a mere US$ 0.34 million against a target of US$ 6.08 million.[88] While performance has trended upward, reaching US$ 2.57 million in FY 2022/2023, these figures remain marginal compared to the broader tax base.[89] In contrast, VAT on digital supplies (EIS) has proven more robust, realizing US$ 33.45 million in 2022/2023, significantly exceeding its US$ 26.92 million target. Additionally, the KRA's strategic use of information from Automatic Exchange of Information (AEOI) frameworks to support a Voluntary Disclosure Program yielded KSh 8.54 billion (approximately US$ 72 million) by June 2022. This demonstrates that revenue gains in the digital sector are currently driven more by information-led compliance than by the turnover-based DST or SEPT itself.[90]

Taxation and constitutional principles

Article 201 of the 2010 Constitution addresses the nature of public finance. With specific regards to fairness, the Constitution records that the burden of taxation ought to be shared fairly.[91] The Kenyan High Court in ***Keroche Industries Ltd v Kenya Revenue Authority & 5 Others***[92] articulated important limits on administrative power in taxation, particularly in relation to fairness, legitimate expectation, and the rule of law. The dispute arose after the Kenya Revenue Authority (KRA) reclassified the applicant's fortified wine products from tariff heading 22.04, taxed at 45%, to tariff heading 22.06, taxed at 60%. The reclassification was applied retrospectively for five years, resulting in a tax demand of approximately Ksh 1.1 billion issued through a single letter giving the taxpayer only fourteen days to comply. The court observed that for nearly nine years KRA had consistently licensed, supervised, and audited the applicant under the original tariff classification with full knowledge of the product's chemical composition. In light of this administrative history, the court held that the sudden reclassification and retrospective assessment constituted a "monumental abuse of power" and quashed the decision.

The judgment emphasized that taxation must be administered in a manner consistent with fairness and legitimate expectation. Where a taxpayer has organized its affairs in reliance on a consistent administrative practice or representation by a tax authority, a legitimate expectation arises that the authority will not abruptly depart from that position without adequate notice or procedural fairness. The court stressed that responsible public administration requires authorities to act consistently and transparently, particularly where their prior conduct has shaped commercial decision-making. Abrupt and retrospective shifts in tax treatment, especially where a taxpayer is denied a meaningful opportunity to be heard, undermine the principles of natural justice and frustrate legitimate expectations. Equally significant was the court's affirmation that arbitrary tax administration

[87] Kapkai and Others (n 1)
[88] Treasury of Kenya, Economic Survey 2022/2023 (Government printer 2023) 102- 104 https://share.google/PSkg3vLBvAvUyhq6A/ Accessed on 10th March 2025
[89] Ibid 102- 104
[90] Ibid 108
[91] Article 201 (b)(i) 2010 Constitution of Kenya
[92] Keroche Industries V Kenya Revenue Authority & 5 Others (2007) KHC 3680 (KLR)

violates the rule of law. The judgment underscored that certainty and predictability in taxation are essential for business planning and economic stability. While the state possesses a legitimate interest in revenue collection, the exercise of taxing powers must remain strictly within the confines of the law. Administrative authorities cannot rely on extra-statutory formulas or discretionary practices that lack a clear statutory basis, nor can they bypass established procedural safeguards. In the court's view, the issuance of a composite retrospective tax demand without adherence to statutory objection and appeal procedures amounted to an improper exercise of power. The decision therefore stands as a warning that revenue authorities must pursue tax enforcement within legal and procedural limits, ensuring that administrative discretion does not override the rule of law.

In order to promote the rule of law, the Constitution opines that no tax should be imposed, waived or varied except as provided by legislation.[93]

Courts have been at the forefront in declaring tax amendments not in line with Article 201 as unconstitutional. This was the reasoning in Kenya ***Revenue Authority v Waweru & 3 others*** where section 12D of the Income Tax Act as was introduced by the Finance Act, 2020 was declared unconstitutional since it resulted to double taxation which was unfair. This was an upholding of the lower court's decision following an imposition of unfair tax burdens to the taxpayers through the amendment. The High Court's decision in ***Bidco Oil Refineries Ltd v Attorney General (2013)***[95] illustrates the principle that the exercise of taxing powers must remain reasonable and proportionate. In that case, the Kenya Revenue Authority sought to enforce a tax demand exceeding Ksh 1.3 billion based on a revised assessment methodology that the taxpayer argued departed from established statutory valuation principles. Faced with the immediate enforcement of the demand through agency notices that would effectively freeze the petitioner's financial operations, the court granted a stay of collection pending appeal, holding that the interests of justice required safeguarding the taxpayer's undoubted right to challenge the legality of the assessment. The decision underscores that tax administration must not impose economically ruinous consequences before the legality of the assessment is determined, as such enforcement would undermine procedural fairness and the right to effective judicial review. This reasoning has broader implications for contemporary digital tax regimes. In particular, gross-based digital taxes such as those imposed on turnover rather than net profit raise similar fairness concerns where they disregard the actual economic position of the taxpayer and risk imposing disproportionate burdens on businesses operating on thin margins. The case therefore supports the argument that a legitimate tax system must balance the state's revenue objectives with principles of proportionality and reasonableness, ensuring that taxation does not become an arbitrary deprivation of property.

Risks of regressive taxation burdening small entrepreneurs and consumers

Taxation has been generally known to increase the costs of running small business enterprises and thus leading to reduction

[93]Article 210(1) 2010 Constitution of Kenya
[94]Kenya Revenue Authority v Waweru & 3 others; Institute of Certified Public Accountants & 2 others (Interested Parties) [2022] KECA 1306 (KLR)
[95]Bidco Oil Refineries Limited V Arttorney Geeral &3 Others (2013) KHC 6402

in profit margin.[96] Regressive tax has been defined as a tax structured so that the effective tax rate decreases as the tax base increases.[97] This means that low-income earners will pay more taxes than high income earners. This violates that principle of vertical tax equity which refers to the idea that taxes should rise as incomes rise.[98] Regressive tax systems put an additional burden to extremely poor households and make it difficult for them to escape from poverty.[99]

For small business owners, regressive taxes like fuel or energy excise duties substantially increase operating costs.[100] These added expenses reduce profit margins, particularly for small entrepreneurs that lack financial capacity to combat such rises. In return, investments and expansion become stifled.[101] Since start-ups often depend on reinvesting profits to grow, these taxes hinder their progress and make it more difficult for them to compete with larger, established firms.[102] Under the new SEPT regime, there is an indirect burden for local small businesses through the higher costs for the platforms and restricted access to digital tools. Therefore, although SEPT does not tax resident startups directly, these indirect effects like higher service fees from non-resident digital platforms still exert regressive impacts on small entrepreneurs and consumers which raises a question under article 201(b) on equitable sharing of the tax burden.

The constitutional litigation in ***Okiya Omtatah Okoiti v National Assembly & Others(2023)***[103] demonstrates the willingness of Kenyan courts to subject fiscal legislation to rigorous constitutional scrutiny, particularly on questions of public participation, fairness, and legislative regularity. Challenges to the Finance Act 2023 focused on the legality of the Affordable Housing Levy and the broader legislative process through which the Act was enacted. The High Court initially invalidated the levy on the basis that it lacked a proper statutory framework and imposed a discriminatory burden on formally employed individuals. The Court of Appeal subsequently went further, declaring the entire Act unconstitutional after finding that Parliament had failed to meaningfully account for public submissions and had not adhered to constitutionally prescribed legislative procedures. Although the Supreme Court later issued interim orders allowing continued tax collection pending final determination, the litigation underscores a broader constitutional principle: taxation measures must comply not only with fiscal objectives but also with procedural and substantive constitutional requirements. The case therefore illustrates that novel tax regimes including emerging digital taxation frameworks remain susceptible to constitutional challenge where they are enacted without adequate public participation, depart from principles of fairness, or fail to conform to the procedural discipline required by the Constitution.

Proportional, fair and transparent digital taxation

The constitution and jurisprudence advocate for a taxation system that

[96]Richard Isaac Mwangangi, "Mitigating Taxation Effects on Small Business Enterprises Performance in Kenya" Richard Isaac Mwangangi June,2023
[97]Black's Law Dictionary (8th ed. 2004)
[98]Adam Hoffer, Rejeana Gvillo, William F. Shughart II, and Michael D. Thomas, "Regressive Effects Causes and Consequences of Selective Consumption Taxation" March 2015
[99]Xiaobing Wang, Jenifer Piesse, "Inequality and the Urban-rural Divide in China: Effects of Regressive Taxation"
[100]One Money Way, "Regressive Tax"< https://onemoneyway.com/en/dictionary/regressive-tax/> 25th October 2024
[101]ibid
[102]ibid
[103]Okiya Omtatah Okoiti v National Assembly & Others KHC 14435 (2023)

is fair and in line with Article 201. The advocacy for a tax system that promotes proportionality, fairness and transparency of digital taxes cannot be overemphasized. Digital taxation has been implemented in South East Asian countries like Singapore and Malaysia in a bid to level the playing field for local digital services providers to compete equally with foreign firms.[104] A look at the Income Tax (Digital Service Tax) Regulations, 2020 opines that this was the same intention when Kenya introduced the DTS. Much can still be borrowed from how these jurisdictions have implemented the tax system to ensure transparency, economic prosperity and data protection. Section 12 E of the Income Tax Act amended in 2024 provides that notwithstanding any other provision of this Act, a tax known as significant economic presence tax shall be payable by a non-resident person whose income from the provision of services is derived from or accrues in Kenya through a business carried out over a digital marketplace. This transition from the DST to the SEPT framework under section 12 E of the Income Tax Act underscores Kenya's pursuit of a more proportional and transparent approach to digital taxation.

OECD two-pillar solution

The Organisation for Economic Co-operation and Development (OECD), in order to further address the issues in taxing cross-border transactions, was mandated by the G20, to seek proposals to overcome those issues.[105] The two -pillar solution consists of first, to allocate the taxing right to market Jurisdiction and secondly, having tools that ensure multinational enterprises, wherever they operate, pay corporate income taxes of 15% at a minimum.[106] OECD estimated that developing countries would benefit greatly under pillar number one due to the increased revenue impact.[107]

Policy reform recommendations

The evolution of Kenya's digital taxation regime from the initial Digital Services Tax (DST) to the current Significant Economic Presence Tax (SEPT) reflects an ongoing effort to reconcile domestic revenue imperatives with the rapidly evolving architecture of international tax governance. While unilateral digital tax measures provide an immediate mechanism through which market jurisdictions can capture value generated within their economies, they also expose states to diplomatic pressures and potential conflicts with emerging multilateral tax standards. The sustainability of Kenya's digital tax framework therefore depends not only on its ability to mobilise revenue from highly digitalised business models, but also on the extent to which it remains administratively efficient, economically proportionate, and adaptable to global tax reforms. In light of these considerations, several policy reforms are necessary to ensure that Kenya's digital taxation regime remains both effective and resilient.

First, Kenya should align its digital tax framework with emerging multilateral reforms while preserving its current capacity to tax digital economic activity. The global negotiations under the Inclusive Framework on Base Erosion and Profit Shifting (BEPS), particularly the OECD Two-Pillar Solution, seek to redistribute taxing rights over large multinational enterprises and establish a coordinated

[104] Taxamo, "Malaysia digital service tax set for January 2020 introduction."
[105] Vita Apriliasari, "OECD/G20 Two-Pillar Solution: Does It Promote Inter-Nation Equity?"
[106] ibid
[107] Arul Kurian, "The evolution of international tax regime and the OECD Two-Pillar solution: Analysis from a developing country perspective"

global minimum tax regime.[108] However, the implementation of these reforms remains uneven across jurisdictions, creating uncertainty for developing economies that rely on unilateral digital taxation to secure revenue from multinational digital platforms. Kenya should therefore adopt a strategy of legislative flexibility within the Income Tax Act, allowing its unilateral digital tax regime to function as an interim mechanism pending broader international convergence. This may be achieved through the introduction of statutory review clauses requiring periodic parliamentary evaluation of SEPT every three to five years, as well as through the incorporation of a switch-off mechanism that limits the application of SEPT to entities that fall outside the scope of Pillar One's Amount A allocation rules. Such an approach would preserve Kenya's fiscal sovereignty in the short term while signalling its willingness to integrate into the evolving multilateral tax architecture.[109]

Second, the effectiveness of Kenya's digital tax regime depends heavily on the efficiency of its administrative and compliance mechanisms. One of the principal challenges associated with taxing the digital economy is the asymmetry of information between tax authorities and multinational digital platforms, many of which operate across multiple jurisdictions without a traditional physical presence. To address this challenge, the Kenya Revenue Authority (KRA) should further integrate digital tax obligations within the iTax platform, thereby enabling non-resident suppliers to register, declare, and remit both indirect and direct digital taxes through a unified digital portal.[110] Administrative efficiency could be further enhanced through the development of application programming interface (API) integrations that allow major digital platforms to automatically transmit transactional data to the KRA, thereby reducing compliance costs and improving the accuracy of reported revenues. In addition, the publication of comprehensive compliance guidelines for non-resident firms clarifying issues such as the determination of user location and the characterisation of digital income would reduce uncertainty and encourage voluntary compliance. By lowering administrative barriers and improving information flows, such reforms would significantly strengthen Kenya's ability to effectively tax cross-border digital transactions.

Third, Kenya's digital taxation framework must be carefully calibrated to avoid imposing disproportionate burdens on domestic digital entrepreneurs. Although unilateral digital taxes are primarily designed to capture revenue from large multinational enterprises, poorly designed thresholds may inadvertently affect small businesses operating within the domestic digital economy. This concern is particularly significant in Kenya, where a substantial proportion of economic activity occurs within the informal sector and where digital platforms increasingly serve as entry points for small-scale entrepreneurs engaged in e-commerce, online marketing, and gig work.[111] To mitigate these risks,

[108]Organisation for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation – Economic Impact Assessment: Inclusive Framework on BEPS* (OECD Publishing 2020) 24 https://share.google/Vvx8HhwPHFLiihEDm/ Accessed on 12th March 2026

[109]Daisy Ogembo, 'Evaluating Kenya's Experience with International Tax Standards: Adoption, Suitability, and Effectiveness' (2025) ICTD Working Paper 232, 29–33 https://share.google/tGa0dcG3b9j1moUVC/ Accessed on 12th March 2026

[110]Philip Kapkai and others, 'Enforcement of the Digital Economy Taxation' (2021) 4 *African Tax and Customs Review* 1, 12–13 https://share.google/LIFQq7pF2e29TteTL/ Accessed on 12th March 2026

[111]Musau Susan Kavuu, *Taxation and Electronic Commerce: An Assessment of the Kenyan Legal and Regulatory Framework* (LLM thesis, University of Nairobi 2022) 50 https://share.google/hyfmuyaCAlZtZRLdg/ Acccessed on 12th March 2026

The digital economy is transforming how people live, work, and conduct business by relying on digital technologies and internet connectivity. In Kenya, it has become a major driver of economic growth through mobile money, e-commerce, digital services, and innovation, while also presenting new regulatory and taxation challenges.

policymakers should maintain robust minimum taxable turnover thresholds that exempt small and medium-sized digital enterprises from SEPT liability. The current threshold of KSh 5 million provides an important safeguard against the over-taxation of micro-entrepreneurs, including individuals who operate small online businesses through social media platforms and digital marketplaces. Complementary measures such as temporary tax holidays or reduced compliance obligations for early-stage digital start-ups could further support the growth of Kenya's domestic digital ecosystem while ensuring that the primary tax burden remains concentrated on multinational firms with substantial economic presence within the Kenyan market.

Finally, improvements in reporting and enforcement mechanisms are necessary to enhance compliance with Kenya's digital tax obligations. The effective collection of digital taxes depends heavily on the ability of tax authorities to verify the revenue declarations of non-resident digital platforms. However, the cross-border nature of digital commerce often creates enforcement gaps that limit the effectiveness of traditional tax administration tools. To address these challenges, the Kenya Revenue Authority should establish a specialised Digital Economy Tax Unit within its International Tax Office, staffed with experts in platform economics, data analytics, and international tax law.[112] Such a unit could focus specifically on monitoring digital platform activity, analysing transaction data, and

[112]Caroline J Kiplagat, *Impact of Taxing the Digital Economy on Revenue Collection in Kenya* (MBA project, United States International University-Africa 2022) vii; Vallary Achieng Opiyo, *Determinants of Digital Service Tax Compliance by E-Commerce Retailing Firms in Kenya* (MBA project, University of Nairobi 2022) 51

coordinating enforcement strategies against non-compliant taxpayers. In addition, Kenya should strengthen its participation in international tax information exchange frameworks, including the Automatic Exchange of Information (AEOI) and the Common Reporting Standard (CRS), in order to obtain reliable financial data relating to cross-border digital transactions. Enhanced access to global financial information would significantly reduce the "fiscal blind spot" created by digital commerce and improve the government's capacity to enforce compliance among multinational digital service providers.

Taken together, these policy reforms would enable Kenya to maintain a balanced and sustainable digital taxation regime. By aligning its domestic legislation with evolving international tax standards, simplifying administrative procedures, protecting domestic digital entrepreneurs, and strengthening enforcement capacity, Kenya can develop a digital tax framework that not only secures government revenue but also supports the continued growth of the country's digital economy.

Conclusion

The rise of the digital economy has exposed the structural limitations of traditional tax rules built around physical presence, compelling states to reconsider how value created within their markets should be taxed. Kenya's transition from the Digital Services Tax to the Significant Economic Presence Tax represents a deliberate attempt to adapt its fiscal framework to these realities while safeguarding its sovereign right to tax economic activity occurring within its digital marketplace. Yet, as this paper has demonstrated, the challenge of digital taxation extends beyond the enactment of new legal provisions; it requires a careful balance between

The digital economy is the part of the economy that is driven by digital technologies, the internet, and information and communication technologies (ICT). It includes all economic activities that rely on digital platforms, electronic transactions, data, and digital infrastructure to produce, distribute, and consume goods and services.

revenue mobilisation, administrative feasibility, constitutional accountability, and compatibility with emerging international tax norms. The sustainability of Kenya's digital tax regime will therefore depend on its capacity to maintain efficient compliance systems, protect the growth of domestic digital entrepreneurship, and remain responsive to multilateral developments such as the OECD Two-Pillar framework. Ultimately, the debate over digital taxation in Kenya reflects a broader transformation within international tax governance, where developing economies are increasingly asserting their interests in shaping the rules that govern the global digital marketplace. If pursued with prudence and strategic foresight, Kenya's evolving digital tax framework can serve not only as an instrument of fiscal policy but also as a meaningful contribution to the ongoing global effort to establish a fair and effective system of taxation in the digital age.

From village tree to virtual room: Online Dispute Resolution and the quest for access to justice in Kenya

By Linet Sampeyian Nkarabali

Introduction

Long before courtrooms, statutes, and formal legal procedures took root in Kenya, justice was dispensed within the community, where elders gathered in communal spaces to deliberate, reconcile, and restore harmony among disputing parties.[1] Rooted in customary norms, these indigenous systems relied on respected elders to mediate conflicts and guide disputants toward reconciliation.[2] Among the Kikuyu, such deliberations were often conducted beneath the sacred Mugumo tree, which served as an important communal space where elders gathered to hear grievances and restore balance within the community.[3] Similarly, Maasai disputes relating to land, livestock, and family matters were traditionally addressed through councils of *ilpayani* (elders) convened in communal meetings, while the Luo relied on the institution of *jodongo* (elders) to mediate conflicts and maintain social cohesion.[4]

The customary forums were particularly vital in rural areas, providing accessible and culturally legitimate avenues for dispute resolution at a time when formal courts were distant, costly, or entirely absent.[5] The continued relevance of such mechanisms is reflected in the recognition of traditional dispute resolution under Article 159(2)(c) of the Constitution of Kenya which encourages the use of alternative and traditional forms of justice where they are consistent with the Constitution and written law.[6]

Today, however, the landscape of dispute resolution is evolving rapidly.[7] The rise of alternative dispute resolution (ADR), and more recently online dispute resolution (ODR), reflects the growing intersection between law and technology.[8] In that same

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[1]Shamsia Ramadhan, 'Traditional leaders and the quest for sustainable peace in Kenya' in S.M. Kilonzo, E. Chitando and J. Tarusarira (eds) The Palgrave handbook of religion, peacebuilding, and development in Africa, Palgrave Macmillan, Cham, 2023, 419–433.

[2]Maureen Kinyanjui, 'Kenya's village elders poised for formal recognition after years on the sidelines' Eastleigh Voice, 17 April 2025 <https://eastleighvoice.co.ke/national/139344/kenyas-village-elders-poised-for-formal-recognition-after-years-on-the-sidelines> on 14 March 2026.

[3]Nairobi Park Kenya 'Significance of Mugumo tree in Kikuyu culture' https://www.nairobiparkkenya.com/blogs/the-significance-of-mugumo-tree-in-kikuyu-culture/ on 13 March 2026, para 6.

[4]Kennedy Gichobi, 'Alternative dispute resolution in Kenya: mediation, arbitration, and traditional justice systems' Huduma Global, 20 February 2026 <https://hudumaglobal.com/blog/alternative-dispute-resolution-kenya-mediation-arbitration-traditional-justice> on 14 March 2026.

[5]Jude Nsom Waindim, 'Traditional methods of conflict resolution: the Kom experience' Conflict Trends (2018) 45.

[6]Constitution of Kenya (2010), Art 159(2)(c).

[7]Kariuki Muigua, 'The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya' (2022) NCIA Alternative Dispute Resolution Journal Vol 2 No 1

[8]YMG, 'Navigating the Intersection of Artificial Intelligence, Advanced Technologies and Dispute Resolution' CIArb Kenya Panel Discussion (2023) <https://ciarbkenya.org/> on 12 March 2026

spirit of justice, the tradition of communal resolution is being invited into the virtual room through ODR. ODR takes the best of traditional alternative dispute resolution that is mediation, negotiation, arbitration and moves it online.[9] Parties no longer need to travel long distances or wait months for a court date. Instead, they can resolve conflicts through video calls, secure messaging. It allows parties to resolve disputes remotely through digital platforms without physically appearing before a tribunal or mediator.[10]

The promise of ODR is compelling in that it holds the potential to deliver justice that is more expeditious, cost-effective, and procedurally convenient.[11] Yet for millions of Kenyans residing in rural and marginalized regions, this promise remains remote. Structural impediments including unreliable internet connectivity, limited access to smartphones, and inadequate electricity continue to restrict effective participation in digital adjudicatory processes.[12]

This article thus proceeds in three principal movements. It first evokes access to justice as the normative foundation of Kenyan dispute resolution, tracing its historical expression under the village tree and its constitutional entrenchment.[13] It then delineates the current legal and institutional landscape of ADR and the progressive adoption of ODR. Finally, and most critically, it confronts the central structural impediment: the persistent digital divide that effectively excludes the very common *wanainchi* it seeks to serve from participating in technology-mediated justice processes.[14]

Access to justice: From village tree to constitutional guarantee

Access to justice has long been a fundamental pillar of many African societies, including Kenya.[15] In particular, traditional mechanisms administered justice in land matters, inheritance, interpersonal relationships and socio-communal matters extending beyond mere allocation of rights and remedies to encompass restoration of dignity, relationships, and community wellbeing.[16] Justice under the village tree embodied a sophisticated, communitarian theory rooted in interdependence and social harmony. Proceedings were adjudicated in public view, with the community as both witness and stakeholder, ensuring outcomes that reinforced cohesion rather than division.[17] The overriding objective was restorative: to repair fractured relationships, rebalance equities, and reintegrate parties into the social fabric.[18]

Against this backdrop, the 2010 Constitution deliberately reclaimed and elevated this indigenous jurisprudence. Article 159(2)(c) directs courts and tribunals to be guided by the principle of promoting alternative forms

[9]S T Zheng, Electronic Consumer Contracts in the Conflict of Laws, Hart, Oxford and Portland, Oregon, 2009, para 152.
[10]James Ngotho Kariuki, 'Embracing Online Dispute Resolution in Kenya: Feasibility of an Online Dispute Resolution Portal for E-commerce Disputes in Kenya' 3 Journal of CMSD (2019) 63.
[11]United Nations Commission on International Trade Law (UNCITRAL), Technical Notes on Online Dispute Resolution (2017).
[12]M Ethan Katsh and Orna Rabinovich-Einy, Digital Justice: Technology and the Internet of Disputes, Oxford University Press, 2017.
[13]R French, 'Justice in the Eye of the Beholder' (2013) 22(3) The Commonwealth Lawyer 17, 19–20.
[14]M Ethan Katsh and Orna Rabinovich-Einy, 'Digital justice: Technology and the internet of disputes,' Oxford University Press, 2017.
[15]M T Ladan, 'Access to Justice as a Human Right under the ECOWAS Community Law' (Paper presented at the Commonwealth Regional Conference on the Theme: 'The 21st Century Lawyer: Present Challenges and Future Skills,' Abuja, Nigeria, 8–11 April 2010)
[16]Kariuki Muigua and Kariuki Francis, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1(1) Strathmore Law Journal 1, 15 <https://su-plus.strathmore.edu/bitstreams/9a4b3513-c7c1-4c25-b80e-9c70db59a5b0/download> on 13 March 2026.
[17]Adeyemi Johnson Ademowo, 'Conflict management in Traditional African Society' in Adeyemi Johnson Ademowo and Temidayo David Oladipo (eds), Engaging the Future in the Present: Issues in Culture and Philosophy (Hope Publications, Ibadan 2015) para 2.
[18]A M Anderson, 'Restorative Justice, The African Philosophy of Ubuntu and the Diversion of Criminal Prosecution' (2005) 19 Speculum Juris 26.

of dispute resolution, expressly including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.[19] When read together with Article 48 on access to justice, Article 50 on fair hearing, and Article 159(2)(b) that justice shall be done to all irrespective of status, the constitutional framework underscores the importance of broadening pathways to justice beyond the formal court system.[20]

In furtherance of this vision, supporting legislation has given concrete effect to the constitutional directive. The Civil Procedure Act empowers judicial officers to refer suitable matters to mediation.[21] The Arbitration Act 1995 (as amended) provides a comprehensive statutory regime for arbitral proceedings.[22] The Alternative Justice Systems Baseline Policy 2020 further institutionalises the recognition and regulation of traditional mechanisms, ensuring they operate consistently with constitutional values.[23]

Effective use of traditional conflict resolution mechanisms can significantly enhance access to justice, particularly for communities in remote areas where reaching formal courts is difficult and where local disputes may not be easily addressed through conventional litigation.[24] In this context, access to justice refers to a system in which individuals find practical and fair solutions that are affordable, understandable to ordinary people, and delivered without discrimination, fear, or favour. Such systems emphasize speed, fairness, and inclusivity, with alternative dispute resolution playing a central role in broadening the reach of justice.[25]

The multi-door justice system in contemporary Kenya

Turning to contemporary practice, since the formal launch of court-annexed mediation in 2016, empirical evidence has accumulated demonstrating the efficacy of non-adjudicative pathways.[26] By April 2024, the Chief Justice reported that mediation had facilitated the release of approximately Ksh 52.1 billion into the economy through expeditious settlements. Of 18,162 matters referred to Court-Annexed Mediation, 16,770 were concluded successfully, a 92.3% resolution rate with settlement percentages steadily rising to 54.98% in the 2023/24 financial year.[27] These figures, in turn, underscore two structural realities: first, conventional litigation continues to suffer from prohibitive cost, geographic inaccessibility, and systemic delay on a significant proportion of the population. Second, when offered accessible, culturally congruent alternatives, the majority of disputants elect and achieve resolution through consensual mechanisms.[28]

Online Dispute Resolution: The digital evolution of consensual dispute resolution

Online Dispute Resolution refers to the use of digital technologies to facilitate the

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[19]Constitution of Kenya (2010) Article 159(2)(c).
[20]Constitution of Kenya (2010) Articles 48 and 50
[21]Civil Procedure Act (Cap 21) (Revised 2012), s 59A; Civil Procedure (Court-Annexed Mediation) Rules, 2022, rr 4 and 11.
[22]Arbitration Act (No. 4 of 1995) (Revised 2009), Section 6.
[23]Judiciary of Kenya, *Alternative Justice Systems Baseline Policy and Policy Framework* (Nairobi: Judiciary of Kenya, 2020).
[24]Makumi Mwagiru, Conflict in Africa: *Theory, processes and institutions of management*, Centre for Conflict Research, Nairobi, 2006, 40–42.
[25]M T Ladan, 'Access to Justice as a Human Right under the ECOWAS Community Law' (Paper presented at the Commonwealth Regional Conference on the Theme: 'The 21st Century Lawyer: Present Challenges and Future Skills', Abuja, Nigeria, 8–11 April 2010).
[26]Judiciary of Kenya, 'Court Annexed Mediation' Judiciary of Kenya, 2023 <https://judiciary.go.ke/court-annexed-mediation> on 13 March 2026.
[27]Martha Koome (Chief Justice), 'KSh52bn Released Back to Economy through Court Annexed Mediation – CJ Koome' Citizen Digital (2024) <https://www.citizen.digital/news/ksh52b-released-back-to-economy-through-court-annexed-mediation-cj-koome-n340614> on 13 March 2026.
[28]Kariuki Muigua, 'Avoiding litigation through the employment of alternative dispute resolution' Marcus Evans Conference, 8 March 2012.

resolution of disputes through electronic communication and internet-based platforms.[29] It emerged in the late 1990s and early 2000s as a direct response to the limitations of traditional ADR in an increasingly digital world. Pioneering thinkers such as Ethan Katsh and Janet Rifkin conceptualised technology not merely as a tool, but as a 'fourth party' in dispute resolution. Building on this scholars and practitioners have highlighted ODR's potential to manage communication, organise information, and support negotiation in ways a human neutral alone cannot.[30] This framing underscores ODR's capacity to operate at scale while preserving core ADR values of party autonomy, confidentiality, and consensus-building.[31]

The COVID-19 pandemic delivered the decisive push, forcing judiciaries worldwide to adopt digital alternatives to maintain access to justice amid lockdowns and restrictions on physical gatherings.[32] Kenya's judiciary reflected this global shift: after the first confirmed case on 13 March 2020, immediate measures followed.[33] By late March, Chief Justice David Maraga issued Practice Directions on Electronic Case Management, authorising virtual proceedings, scaling down in-person activities, and piloting e-filing to safeguard constitutional rights under Articles 48 on access to justice and 159 on promotion of ADR.[34] As a direct result of these measures, platforms such as Microsoft Teams became standard for hearings, mentions, and even mediation sessions, thereby embedding digital tools into the everyday functioning of the justice system.[35]

By July 2020, the Judiciary formally launched the nationwide Electronic Case Management System (e-filing portal), enabling electronic filing of pleadings, service of documents (including via WhatsApp under amended Civil Procedure Rules), fee payments via M-Pesa, case tracking, and virtual appearances.[36] This marked ODR's official entry into mainstream Kenyan justice, transforming what had been experimental pilots into a mandatory mechanism for continuity during the crisis. In line with this broader digital transition, Court-Annexed Mediation (CAM) also adapted through virtual sessions, ensuring that consensual resolutions could be reached without physical presence and reinforcing the judiciary's commitment to accessible, technology-enabled justice.[37]

Today, ODR in Kenya is no longer an emergency workaround; in fact it has become an integral part of the multi-door justice system.[38] Contemporary platforms support asynchronous messaging, real-time video mediation, secure document upload, automated triage, and multilingual interfaces. In practice, ODR dramatically expands

[29]Kariuki Muigua, 'The evolving alternative dispute resolution practice: investing in digital dispute resolution in Kenya' Kariuki Muigua and Company Advocates, 2022, 1–6.
[30]Ethan Katsh and Janet Rifkin, *Online dispute resolution: resolving conflicts in cyberspace*, Jossey-Bass, San Francisco, 2001, 152.
[31]Kariuki Muigua, 'The evolving alternative dispute resolution practice: investing in digital dispute resolution in Kenya' Kariuki Muigua and Company Advocates, 2020, 12.
[32]Manwa Advocates, 'How legal tech is changing Kenya's courts' Manwa Advocates, 10 September 2025 <https://manwaadvocates.com/how-legal-tech-is-changing-kenyas-courts> on 14 March 2026.
[33]Kenya reports first case of coronavirus in East Africa' Medical Xpress, 13 March 2020 <https://medicalxpress.com/news/2020-03-kenya-case-coronavirus-east-africa.html> on 14 March 2026.
[34]Constitution of Kenya (2010) Articles 48 and 152(2)(c).
[35]Ifeoma Peters, 'Covid-19: sustaining justice delivery – the Kenya Judiciary example' DNL Legal and Style, 4 April 2020 — https://www.youtube.com/watch?v=9nmy6EaGweY&embeds_referring_euri=https%3A%2F%2Fdnllegalandstyle.com%2F on 14 March 2026.
[36]Judiciary of Kenya, 'Judiciary to leverage AI to enhance justice' (August 2025), https://judiciary.go.ke/judiciary-to-leverage-ai-to-enhance-justice. On 13 March 2026.
[37]Kariuki Muigua, Resolving Conflicts through Mediation in Kenya (Chapter Two) 20-35.
[38]M Ethan Katsh and Orna Rabinovich-Einy, 'Digital justice: Technology and the internet of disputes,' Oxford University Press, 2017

geographic reach by eliminating the need for physical attendance at mediation centres, arbitration venues, or courts, a requirement that historically imposed travel costs, time burdens, and barriers for remote or mobility-limited individuals.[39]

The digital divide: Structural exclusion from technology-mediated justice

Despite these compelling advancements, ODR's promise is structurally undermined by the persistent digital divide a multifaceted barrier that excludes the very common *wanainchi*[40] it seeks to serve from technology-mediated justice.[41] While ODR removes physical obstacles inherent in traditional ADR, it introduces new thresholds related to digital infrastructure, literacy, affordability, and connectivity.[42] At the core of this exclusion lies uneven internet availability and digital literacy. Users must possess basic skills to navigate platforms, upload evidence, communicate electronically, and understand interfaces.[43] Populations with low digital literacy including the elderly, less-educated individuals, economically marginalised groups, and many rural residents often find ODR inaccessible without support or training. Moreover, stable and affordable internet is an absolute prerequisite.[44]

In Kenya, this divide is stark.[45] The 2025 joint CA/KNBS report shows national internet penetration at 35.0% (56.6% urban vs. 25.0% rural). Mobile ownership is 53.7% overall (64.6% urban; 48.6% rural), but plummets in ASAL counties: 9.1% internet usage in West Pokot, 12.7% in Turkana, 15.5% in Tana River, 16.3% in Marsabit, and 16.5% in Garissa (vs. 64.7% in Nairobi). Electricity is intermittent in many rural households, and network coverage is disrupted by terrain or weather.[46]

As a direct result, for subsistence farmers, small traders, pastoralists, and low-income families or better identified as the common *wananchi* in this context, in remote areas. ODR remains functionally out of reach.[47] A dispute once resolved under a village tree through face-to-face dialogue now directs individuals to a digital platform they cannot access due to absent broadband, unaffordable data/devices, or insufficient skills. Thus, an efficiency gain for some becomes a barrier for others, reinforcing inequalities.

This exclusion has profound implications for the constitutional right to access to justice. Article 48 of the Constitution of Kenya 2010 guarantees every person the right to have any dispute resolved by the application of law in a fair, expeditious and cost-effective manner, and imposes a positive obligation on the State to ensure that this right is not impeded by unreasonable barriers.[48] In

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[39]Kariuki Muigua, 'The evolving alternative dispute resolution practice: investing in digital dispute resolution in Kenya' Kariuki Muigua and Company Advocates, 2020. P 1-10

[40]*Wanainchi* (Swahili): citizens, the people, or ordinary members of the public.

[41]Ministry of Information, Communications and the Digital Economy, 'CA invests KES 250 million to digitize Kenya's Judiciary, connecting 42 law courts to local area networks' Ministry of Information, Communications and the Digital Economy, 13 June 2025 <https://ict.go.ke/ca-invests-kes-250-million-digitize-kenyas-judiciary-connecting-42-law-courts-local-area-networks> on 14 March 2026.

[42]Pacta Lexis, 'The rise of online dispute resolution (ODR): mediation in the digital era' Pacta Lexis, 18 September 2025 <https://pactalexis.com/2025/09/18/the-rise-of-online-dispute-resolution-odr-mediation-in-the-digital-era> on 14 March 2026.

[43]M Ethan Katsh and Orna Rabinovich-Einy, Digital justice: Technology and the internet of disputes, Oxford University Press, 2017.

[44]D Fitzpatrick, 'Dispute resolution: mediating land conflict in East Timor' in AusAID, Making land work: reconciling customary land and development in the Pacific, vol 2, 'Case studies on customary land and development in the Pacific', AusAID, Canberra, 2008, 175–197.

[45]KIPPRA Discussion Paper No 354 (2024).

[46]Communications Authority of Kenya, 'Urban-Rural Digital Divide Hinders ICT Uptake, Joint CA and KNBS Survey Shows' CA News, 12 August 2025 <https://www.ca.go.ke/urban-rural-digital-divide-hinders-ict-uptake-joint-ca-and-knbs-survey-showson> on 26 April 2026.

[47]Pacta Lexis, 'The rise of online dispute resolution (ODR): mediation in the digital era' Pacta Lexis, 18 September 2025

[48]Constitution of Kenya (2010) Article 48.

***John Harun Mwau v Attorney General & 2 others* (2012)**, the High Court affirmed that access to justice is a fundamental right that must be practically available to all citizens and cannot be rendered illusory by systemic or structural barriers.[49] Similarly, in ***Republic v Chief Justice of Kenya & 6 others ex parte Moijo Mataiya Ole Keiwua* (2010)** the Court underscored the importance of removing obstacles that hinder citizens from accessing judicial services.[50] When Online Dispute Resolution (ODR) systems exclude large segments of the population due to lack of reliable internet, electricity, devices or digital literacy, they risk creating a new form of unconstitutional barrier that undermines the very purpose of Article 48.[51]

The danger is particularly acute because traditional community-based justice mechanisms were historically developed to overcome precisely such barriers of distance, cost and formality. In Kenya National Commission on ***Human Rights v Attorney General* [2018] eKLR**, the Court emphasised the State's duty to take positive steps to ensure meaningful access to justice for marginalised and underserved populations.[52] If ODR is allowed to become the dominant mode of dispute resolution without deliberate hybrid measures such as community-based access centres, it may not expand access to justice but instead deepen the existing justice gap between urban and rural Kenyans. Kenya must therefore ensure that the transition from the village tree to the virtual room does not leave the majority of its citizens behind.

Recommendations: Towards Inclusive digital justice

To ensure that Online Dispute Resolution (ODR) genuinely expands access to justice rather than creating new exclusions, Kenya should prioritise hybrid models that blend digital innovation with community-based structures.

First, the national and county governments, in partnership with the Judiciary and civil society organisations, should establish Community-Based ODR Access Centres in familiar public spaces such as chiefs' offices, community halls, ward offices, and sub-county facilities. This initiative can be enabled under Article 48 and Article 159(2)(c) of the Constitution, read together with the Alternative Justice Systems Baseline Policy (2020). These centres would serve as physical entry points to digital justice, ensuring that rural and marginalised populations are not excluded. It is expected that within two years, at least 100 such centres will be operational, leading to a measurable increase in ODR uptake in underserved counties.

Second, the responsible institutions should equip these centres with reliable infrastructure, including stable internet connectivity, shared devices such as computers or tablets, and power backup solutions such as solar panels or generators. This recommendation is anchored in the Communications Authority of Kenya's Universal Service Fund framework and the Judiciary's digital transformation strategy. The measurable outcome would be reliable access to ODR platforms for at least 70% of users in pilot counties, significantly reducing the current digital divide barriers.

Third, stakeholders should integrate traditional mediators virtually by enabling

[49] John Harun Mwau v Attorney General and 2 others [2012] eKLR.
[50] Republic v Chief Justice of Kenya and 6 others ex parte Moijo Mataiya Ole Keiwua [2010] eKLR.
[51] Constitution of Kenya (2010) Article 48.
[52] Kenya National Commission on Human Rights v Attorney General [2018] eKLR.

Online Dispute Resolution is an innovative approach to resolving disputes using digital technology. It improves access to justice by making dispute resolution faster, less expensive, and more convenient, particularly for disputes arising from the digital economy and cross-border transactions.

elders and local mediators to join ODR proceedings via video or voice. This hybrid participation, supported by the Alternative Justice Systems Baseline Policy (2020) and Article 159(2)(c) of the Constitution, would preserve cultural trust and restorative principles while leveraging digital efficiency. The expected outcome is the maintenance of community legitimacy in at least 60% of resolved cases handled through these centres.

Finally, the government, through the Judiciary and county governments, should launch targeted pilots and capacity building programmes in high-deprivation counties such as Turkana, West Pokot, Tana River, and Marsabit. These pilots should be implemented under the Judiciary's Strategic Plan 2023–2027 and the Alternative Justice Systems Policy. The programmes will equip judicial officers, mediators, and community leaders with training on ODR platforms and case management tools. Success will be measured by increased resolution rates, user satisfaction surveys, and a documented rise in participation from rural and ASAL communities within 18 months.

Conclusion

The journey from the village tree to the virtual room reflects Kenya's broader transition towards a more modern, efficient, and technology-driven justice system. Online Dispute Resolution offers immense potential to reduce costs, overcome geographical barriers, and enhance the speed of dispute resolution. Yet technological advancement alone does not guarantee access to justice. If significant portions of the population remain excluded by lack of connectivity, digital literacy, electricity, or affordable devices, then the promise of digital justice risks becoming an illusion for those who need it most.

A justice system cannot call itself accessible simply because it is online. For millions of Kenyans, the distance from the village tree to the virtual room remains measured not in kilometres, but in connectivity, affordability, and digital literacy. The true measure of progress is therefore not how sophisticated justice technologies become, but whether they remain accessible to the ordinary *mwananchi*.

As Kenya continues to embrace digital justice, it must ensure that innovation does not come at the expense of inclusion. The constitutional promise of access to justice under Article 48 demands more than technological efficiency; it requires a justice system that reaches every citizen, regardless of geography, income, or digital capability. The ultimate test is whether the values that once guided justice beneath the Mugumo among the Kikuyu, the Oltepesi among the Maasai, the Oremo among the Luo, and the Mogoiyweet among the Kalenjin can endure in the digital age. If the virtual room is to become the new seat of justice, it must remain as open, accessible, and responsive to the needs of the people as the village tree once was.

The law that promised justice to all: Has the Legal Aid Act 2016 been delivered?

By Ian Kerina

Abstract

What does justice look like when the law that promises it cannot afford to deliver it? In April 2016 Kenya enacted the legal aid act and it commenced in May 2016 and this is a landmark piece of legislation born from over a decade of civil society advocacy and anchored in the constitutional guarantee that every person has the right to access to justice. The act established the National Legal Aid Service, provided for a Legal Aid fund and envisioned a network of Justice Advisory Centres stretching across all forty-seven counties. It was by any measure an ambitious promise to the ordinary Kenyan who cannot afford a lawyer, who does not speak the language of the courts and who has historically had to choose between justice and survival. A decade later that promise remains largely unkept. This article takes a hard look back at the Legal Aid Act 2016 and examines whether the institutional, financial and structural frameworks it created have meaningfully advanced access to justice in Kenya. Drawing on legislative texts, civil society audits, institutional reports and empirical data on justice consumption in Kenya the article argues that the Act's failure is not one of design but of political will and fiscal neglect. The legal Aid fund has never been operationalised. The National Legal Aid service operates in just five of forty-seven counties. A majority of its activities are bankrolled by foreign donors rather than the Kenyan state. Paralegals the Act's intended frontline soldiers remain legally unrecognised in practice. The article concludes with a reform agenda insisting that a law without resources is not a right, it is a rumour. Ten years is long enough to know the difference.

Introduction

To kick start this article In ***Thomas Alugha Ndegwa v Republic*** [2016] eKLR, the Court of Appeal confronted precisely a situation of a man convicted of a serious offence, unrepresented before levels of court who finally arrived at the Court of Appeal to ask for the first time for a lawyer. The court confirmed that the right to legal representation at state expense is a fundamental human right essential to a fair trial.[1] The Legal Aid Act 2016 was supposed to ensure that no Kenyan would ever have to wait that long to ask that question

[1]Thomas Alugha Ndegwa v Republic [2016] KECA 21 (KLR).

Kenya currently holds approximately 59,000 adult prisoners of whom over 22,000 are on remand legally presumed innocent, yet awaiting trial without any legal support whatsoever. These are not statistics. They are people and they are in a very real sense, the people the Legal Aid Act of 2016 was supposed to reach.[2] The Act did not arrive easily. The journey towards establishing a comprehensive legal aid system in Kenya was long and winding, culminating in the enactment of the Legal Aid Act in 2016 a pivotal moment in the country's commitment to fulfilling its constitutional obligation of providing state-funded legal aid as outlined in Article 48 of the Constitution.[3] Civil society had spent over a decade pushing, lobbying and waiting. When the President finally assented to it in April 2016 it felt like a turning point, a legislative acknowledgement that justice in Kenya could no longer remain the preserve of those who could afford it.[4] Ten years on the question this article asks is a simple but uncomfortable one: has anything actually changed for that man standing alone in court?

A significant number of Kenyans go through life having their fundamental rights and freedoms violated and due to ignorance of the law have no avenue through which to seek justice, the few who are aware of their rights cannot afford legal representation or advice at any level. This is the landscape into which the Legal Aid Act 2016 was born. This article argues that while the Legal Aid Act 2016 established a progressive constitutional and statutory framework for access to justice, its implementation has been fundamentally undermined by inadequate financing, institutional underdevelopment, donor dependency and the state's failure to operationalise critical mechanisms such as the Legal Aid Fund. Consequently, despite the transformative vision embodied in the Act, access to justice for millions of indigent Kenyans remains more aspirational than real. What the Law Promised, the Vision of the Act.

To understand how far Kenya has fallen short, you first need to appreciate how far the Act was trying to reach. Before 2016 the state's idea of legal aid was extraordinarily narrow. Legal aid services were limited to capital offences only. In civil matters a person could technically sue as a pauper but the procedures involved were so daunting that they effectively shut out most indigent persons. The government's assistance to indigents was paltry and the fees paid to lawyers were so minimal they were unattractive to practicing advocates compromising quality of service at the very point it was most needed.[5] If you were poor and your problem was a land dispute, a domestic violence case or a wrongful arrest on a minor charge the state simply was not coming to help you. You were on your own.

The Legal Aid Act 2016 was designed to end that era completely. Its preamble, guiding principles and objects were anchored in the constitutional provisions and spirit of Article 19 on fundamental freedoms, Article 48 on the right to access justice and Article 50(2)(g) and (h) on the right to choose counsel and to be informed of legal

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[2] JURIST, *"Tilted Scales: How Poverty Undermines Justice in Kenya"*, jurist.org, April 2026. Available at: https://www.jurist.org/commentary/2026/04/tilted-scales-how-poverty-undermines-justice-in-kenya/.

[3] Constitution of Kenya (2010) art 48.

[4] ICJ Kenya (Elsy C. Sainna, Deputy Executive Director), "Access to Justice: *Reflections on Salient Features of the Legal Aid Act 2016"*, icj-kenya.org, February 2017. Available at: https://icj-kenya.org/news/access-to-justice-reflections-on-salient-features-of-the-legal-aid-act-2016/

[5] Egerton University Law Journal, "Evolution of Legal Aid in Kenya", eujournal.egerton.ac.ke, July 30, 2021. Available at: https://eujournal.egerton.ac.ke/index.php/elj/article/view/43

representation at the expense of the state.[6] The courts have confirmed this reading emphatically. In Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another a person convicted and sentenced to life imprisonment for defilement challenged their conviction without legal representation. The High Court drawing on *Thomas Alugha Ndegwa*, the Legal Aid Act 2016 and comparative jurisprudence from South Africa, held that the appellant was eligible under Section 41 of the Legal Aid Act to apply for legal aid and that if unrepresented in the circumstances of the case, substantial injustice would result. The court ordered that the sentence be set aside and the matter reheard. Critically, the court confirmed that courts must invoke Section 43(1) of the Act the duty to inform unrepresented accused persons of their rights and refer them to NLAS and that the framework to do so is already in place. The case thus directly exposes the gap between the law's framework and NLAS's capacity to deliver.[7] The Act was thus anchored in case law that had already begun dismantling the old, exclusionary regime. This was not merely bureaucratic language. It was an explicit legislative declaration that the right to justice, real, practical, affordable justice belonged to every Kenyan not just those who could retain a lawyer. The architecture the Act put forward was by any measure ambitious. Five interlocking pillars would carry the vision. First, the establishment of the National Legal Aid Service as a state agency to coordinate and regulate legal aid provision nationally. Second, a dedicated Legal Aid Fund to finance the entire enterprise from the public purse. Third, a network of Justice Advisory Centres devolved across the country bringing legal services directly into communities. Fourth, the formal recognition and accreditation of community paralegals as frontline legal aid providers the Act's intended foot soldiers in the justice gap. Fifth, an expanded mandate to promote legal literacy, public interest litigation and alternative dispute resolution for those who could not navigate the courts at all.

The Act envisioned services including legal education, aid, advice and litigation for children in conflict with the law, training in self-representation for capital offenders and alternative dispute resolution with an emphasis on mediation.[8] It also formally recognised the role of paralegals as legal aid providers opening the door for community-based organizations to expand legal aid provision particularly in areas with high incidences of violence against women and children.[9] Read on paper it was a genuinely transformative framework. The question as it always is in Kenya was never whether the vision was worthy. The question was whether the will to execute it would follow.

What has actually been built

It would be dishonest to say that nothing has happened in the decade since the Act was passed. Something has been built. The question and it is an important one is whether what has been built is enough and whether it can stand on its own. Start with the institution itself. In 2017, NLAS launched its first National Action Plan on Legal Aid 2017–2022 with the support

[6]Constitution of Kenya (2010) art 50 (2)(g), (h).
[7]Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another; Office of the Director of Public Prosecutions & another (Interested Parties) [2021] KEHC 4855 (KLR) .
[8]Legal Aid Act No 6 of 2016 section 2 and 7.
[9]ASF, *"Legal Aid in Kenya: Tracing the Evolution, Progress and Gains"*, asf.be, August 28, 2024. Available at: https://asf.be/legal-aid-in-kenya-tracing-the-evolution-progress-and-gains/

of the International Development Law Organization (IDLO).[10] The Board was inaugurated by the Attorney General in April 2017, giving NLAS its first formal leadership structure.[11] Regulations to operationalize the Act followed in 2020 when the Legal Aid General Regulations were gazetted providing at last a procedural framework for how aid would actually be applied for and granted.[12] These were not small things. Bureaucratic as they sound, they were the basic scaffolding without which nothing else could function.

The geographic footprint modest as it is also represents real progress from a near-zero baseline. NLAS offices are currently located in five regions: Nairobi, Kisumu, Mombasa, Nakuru and Eldoret meaning that for the first time in Kenya's history a person in each of those cities can walk into a government office and ask for a lawyer without paying for one.[13] In one recent year alone NLAS handled over two million cases, an indicator that the demand for legal aid in the country is enormous.[14] That figure is striking. It tells you not just about capacity but about appetite. Kenyans want this service. They are showing up for it. The institution is simply struggling to show up for them in equal measure.

Then there is PLEAD the Programme for Legal Empowerment and Aid Delivery which deserves serious credit for keeping the legal aid enterprise alive during its most fragile years. Launched in March 2018 as a five-year EUR 34.15 million partnership between the European Union, the Government of Kenya, UNODC and UNDP,[15] PLEAD is the most extensive justice programme funded by the EU in Sub-Saharan Africa.[16] It did not just inject money it injected structure. PLEAD funded mobile legal aid clinics that took state counsels out of Nairobi offices and into communities, targeting indigent and vulnerable citizens in twelve counties who could not afford advocates and had no realistic means of seeking redress in court.[17] When PLEAD's first phase ended a second chapter followed. PLEAD II launched with a €35.3 million budget expanded to nineteen counties and brought in new partners including the Kenya Prisons Service, the Directorate of Children's Services and the National Police Service.[18] The programme's ambition grew because the need had not shrunk.

Beyond the state, civil society has quietly carried much of the weight that the government was supposed to bear. Organizations like Kituo Cha Sheria, FIDA Kenya, the International Justice Mission, and the Law Society of Kenya run pro bono programs and legal aid clinics that serve communities the NLAS has not yet reached.[19] FIDA Kenya alone has over more than thirty-seven years, provided legal assistance to over four million Kenyans.[20]

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[10] *Idlo -Supported National Action Plan To Boost Kenya Legal Aid*: https://www.idlo.int/news/highlights/idlo-supported-national-action-plan-boost-kenya-legal-aid.
[11] The Place of Pro Bono and Legal Aid in the Kenyan Legal Profession", kimanthi.co.ke. Available at: https://kimanthi.co.ke/the-place-of-pro-bono-and-legal-aid-in-the-kenyan-legal-profession/
[12] The Legal Aid (General) Regulations, 2020.
[13] National Legal Aid Service Organisation Profile, Grassroots Justice Network, grassrootsjusticenetwork.org. Available at: https://grassrootsjusticenetwork.org/connect/organization/national-lega-aid-service/.
[14] Grace Thuku (NLAS Board Chairlady), quoted in Kenya News Agency, *"Mobile Legal Aid Clinic Launched to Enhance Justice"*, kenyanews.go.ke, 20 September 2022. Available at: https://www.kenyanews.go.ke/mobile-legal-aid-clinic-launched-to-enhance-justice/ .
[15] Programme for Legal Empowerment and Aid Delivery (PLEAD): https://www.unodc.org/roea/en/program-for-legal-empowerment-and-aid-delivery-plead.html
[16] EU launches PLEAD programme to ensure equal justice for all Kenyan: https://www.eeas.europa.eu/node/41108_en.
[17] EU launches PLEAD programme to ensure equal justice for all Kenyan: https://www.eeas.europa.eu/node/41108_en.
[18] Programme for Legal Empowerment and Aid Delivery (PLEAD): https://www.unodc.org/roea/en/program-for-legal-empowerment-and-aid-delivery-plead.html.
[19] M-Wakili, *"How Lawyers in Nairobi Can Leverage Free Legal Resources"*, mwakili.com, September 2, 2024. Available at: https://mwakili.com/blog/lawyers-leverage-free-legal-resources-nairobi

In 2023, the Legal Resources Foundation reached over 24,000 prisoners across multiple facilities, resulting in favorable outcomes including lenient fines, withdrawal of cases and successful appeals.[21] These numbers represent real people whose lives were touched by a system that without civil society would have left them entirely in the dark.

So yes, something has been built. Institutions exist. Programmes have run. Cases have been handled. Lives have been changed even if not enough of them. But here is the uncomfortable truth that sits underneath all of this progress: almost none of it rests on a stable, state-funded foundation and a house built on borrowed money and donor goodwill is not a house. It is a tent.

The reality: Where the Act has failed

Despite the progressive institutional architecture established under the Act the practical realities of implementation reveal a significant gap between constitutional aspiration and operational reality. If Section III was the Act's best defence, this is its honest reckoning. The progress described above the offices, the clinics, the PLEAD millions sits atop a foundation that the Kenyan state has never properly built. Strip away the donor programmes and what remains is an institution running on borrowed money and borrowed time.

The legal aid fund: A promise on paper

The single most important mechanism in the entire Legal Aid Act is the Legal Aid Fund. It was designed to be the financial engine of everything by paying legal aid providers, covering expenses for aided persons and financing NLAS's operations at scale. Without it, the rest of the architecture is decorative and yet, nearly a decade since the Act was passed the Fund has never been operationalized. The National Treasury has yet to allocate and disburse funds into the Legal Aid Fund thus hindering its full operationalization. The absence of these funds has far-reaching limitations and the failure to operationalize the Fund hinders the operations of NLAS, primarily in meeting expenses incurred in representing persons granted legal aid and in the remuneration of legal aid service providers.[22] It gets worse. There is no subsidiary legislation to provide for the procedural implementation of the Fund, posing a regulatory gap and there are no clear guidelines on how the Fund will be governed.[23] In other words, there is not just no money. There is no plan for the money either. The courts have confirmed this reading emphatically. In Criminal Appeal 115 of 2015, the High Court of Kenya explicitly rejected the previously narrow interpretation that the right to state-funded legal representation applied only to capital offences. The court held that the protection embedded in Article 50(2)(h) goes beyond capital offence trials that the operative standard is whether substantial injustice would otherwise result, a test wide enough to encompass any accused person who cannot afford representation.[24] The Act was thus anchored in case law that had already begun dismantling the old, exclusionary regime.

[20] FIDA Kenya, *Annual Report 2022*, fidakenya.org, published May 2023. Available at: https://fidakenya.org/2023/05/05/annual-report-2022/.
[21] Avocats Sans Frontières (ASF), "Legal Aid in Kenya: Tracing the Evolution, Progress and Gains", asf.be, August 28, 2024. Available at: https://asf.be/legal-aid-in-kenya-tracing-the-evolution-progress-and-gains/.
[22] National Legal Aid Service, Strategic Plan 2023-2027.
[23] Damaris Kemunto (Programme Officer, ICJ Kenya), *"Legal and Regulatory Gaps Inherent to the Implementation of the Legal Aid Act"*, ICJ Kenya, 6 March 2024. Available at: https://icj-kenya.org/news/legal-and-regulatory-gaps-inherent-to-the-implementation-of-the-legal-aid-act/
[24] MM v Republic [2019] KEHC 5834 (KLR).

Donor dependency: A house built on borrowed foundations

Because the Legal Aid Fund does not exist in practice, NLAS has been kept alive largely by foreign donors. That is not a criticism of the donors rather it is a damning commentary on the state. A majority of NLAS activities are supported by development partners who are bound by time and specific targets.[25] What that means in practice is that when a programme ends, services disappear. When targets shift, priorities shift with them. The people the Act was designed to serve are not targets on a donor log-frame; they are Kenyans with constitutional rights. A rights-based institution cannot be funded like a project.

The justice advisory centres: Still unbuilt

One of the Act's most visible promises was a nationwide network of Justice Advisory Centres, community-level spaces where ordinary Kenyans could walk in and get legal guidance without travelling to a city. A decade later they do not exist. Due to limited budgetary allocation, provisions of the Legal Aid Act that remain unrealized include the operationalization of the Legal Aid Fund, accreditation of community paralegal and legal aid providers, establishment of justice advisory centres and expansion of the legal aid scheme nationwide.[26] For the forty-two counties that have no NLAS office and no Justice Advisory Centre, the Act might as well not exist.

The paralegal recognition gap: The foot soldiers without boots

Paralegals were always the Act's most realistic hope for grassroots reach, trained community members who could deliver basic legal guidance where advocates would never go. The Act formally recognized them. The problem is that the Act and its own regulations then created contradictory definitions of who a paralegal is leaving the recognition hollow. The Legal Aid Act recognises a paralegal as a person employed by NLAS or an accredited legal aid provider who has completed a training course in an institution approved by the Council of Legal Education. But the 2022 Legal Aid Regulations state that a person is eligible for accreditation as a paralegal if they are a member of a duly registered association of paralegals.[27] These inconsistencies in legislation create a gap in the recognition of paralegals who are critical to offering legal assistance in communities and this recognition gap directly hinders the provision of legal aid in Kenya. This is not a technicality. Thousands of community paralegals working in rural Kenya today are doing the Act's work without the Act's protection.

The digital divide: A new barrier dressed as progress

The government has pointed to digital justice as evidence of modernisation. Scrutinise that claim and it starts to crack. Justice services have been digitized in only 13 out of Kenya's 47 counties. The digital platforms for filing civil cases are purely in English language, disability unfriendly and complex for digitally illiterate litigants.[28] Digitization without inclusion is not access, it is just a different kind of exclusion. For a

[25]Open Government Partnership Kenya, *"Improving Access to Justice and Legal Aid (KE0039)"*, opengovpartnership.org. Available at: https://www.opengovpartnership.org/members/kenya/commitments/KE0039/

[26]National Legal Aid Service, Strategic Plan 2023-2027.

[27]Legal Aid Act No 6 of 2016 section 2.

[28]Judiciary of Kenya, state of the judiciary and administration of justice Annual Report 2022-2023.

widow in Marsabit, a subsistence farmer in Tana River or a person with a visual impairment in Kwale a platform that does not speak to them and does not work for them is no platform at all.

Taken together, these are not isolated shortcomings. They form a consistent pattern of a state that enacted the law, inaugurated the institution, welcomed the donor money and then declined to fund what it promised. The Act is not failing because it was poorly designed. It is failing because it has not been genuinely prioritised.

Structural causes:
Why is this happening?

The failures documented in the previous section do not exist in a vacuum. They are symptoms of deeper, older, more stubborn problems that predate the Act and that the Act alone was never going to fix. To understand why the Legal Aid Act 2016 has underdelivered, you need to look honestly at the structures it was trying to work within and the political culture it was trying to change.

This is not the first time Kenya has done this

Here is an uncomfortable truth that gets buried in the optimism surrounding the 2016 Act. NLAS is not Kenya's first attempt to institutionalise legal aid. Before it came NALEAP the National Legal Aid and Awareness Programme established in 2007 and launched in April 2008 with six pilot projects running across the country between 2009 and 2013.[29] NALEAP was not a bad programme. It was simply never given the resources to be a good one. NALEAP was deprived of sufficient funds by the state and this greatly watered down its efforts and impetus.[30] NLAS, then, is the second attempt to institutionalise legal aid in Kenya. If the country's attitude toward NALEAP is anything to go by, the risk of repeating exactly the same pattern with NLAS is not hypothetical, it is already happening.

Inadequate financing:
A budget that tells the real story

A government's stated priorities and its actual priorities are two different things. You find the truth not in speeches but in budget lines. Access to justice for the majority of Kenyans remains a challenge due to inadequate financing of key government institutions such as the National Legal Aid Service and the Judiciary, the very institutions charged with implementing the Legal Aid Act 2016. The result has been that budgetary allocation was substantially reduced in previous financial years, severely limiting the scope of access to justice work.[31] At the same time, the National Legal Aid Service has been severely understaffed and hence incapacitated to fully fulfil its mandate.[32] This is not an accident of oversight. It is a consequence of sustained deprioritisation. A state that genuinely believed access to justice was a constitutional obligation would not allow the institution charged with delivering it to operate understaffed, underfunded and structurally dependent on foreign donors year after year.

[29]National Legal Aid Service, *"Background Information"*, nlas.go.ke. Available at: https://www.nlas.go.ke/background-information
[30]Legal Aid Act, 2016", Nairobi Law Monthly, nairobilawmonthly.com, 22 March 2023. Available at: https://nairobilawmonthly.com/legal-aid-act-2016/
[31]Parliamentary Budget Office, Budget Brief on Governance, Justice and order Sector.
[32]Open Government Partnership Kenya, *"Implement Legislation to Increase Access to Justice (KE0030)"*, opengovpartnership.org. Available at: https://www.opengovpartnership.org/members/kenya/commitments/KE0030/

The cost of justice vs. The reality of poverty

Even if NLAS were perfectly funded and staffed, it would be fighting against a structural economic reality that dwarfs any single institution. In 2019, the Hague Institute for Innovation of Law Justice Index estimated that to access court, a Kenyan needs at least USD 80.[33] That figure is jarring on its own. For those people, the Legal Aid Act is not a safety net, it is the only door to justice that exists. And that door, as this article has shown, is mostly still locked.

The constitution made a promise the state has not budgeted for

There is a deeper legal tension at the heart of all of this. The Constitution of Kenya 2010 entrenched access to justice as a fundamental right. The state is obligated under Article 48 to ensure that justice is accessible to all persons and that any fee required shall be reasonable and shall not impede access to justice.[34] That is not an aspirational language. It is binding law and yet the state has treated it as aspirational, enacting legislation to give effect to the obligation, then declining to fund that legislation adequately enough to make the obligation real. The constitutional implications of this failure are significant. Article 48 imposes a positive obligation upon the state to ensure that justice is practically accessible to all persons, not merely theoretically available. Where indigent persons are unable to obtain legal representation due to institutional underfunding, questions arise as to whether the state is in continuing violation of its constitutional obligations. The persistent underfunding of NLAS therefore raises concerns not only of policy failure, but of constitutional non-compliance.

The most common challenge is failure by the state to allocate sufficient funds and because certain aspects of legal aid support are constitutionally protected the state ought to know it is required to provide enough funds to discharge its minimum constitutional obligation especially under Article 50(2)(h).[35] The state does know. It simply has not acted accordingly.

Taken together these structural causes tell a consistent story. The failures of the Legal Aid Act are not primarily a problem of design, capacity or even public awareness. They are a problem of political will: a state that made a constitutional promise, passed a law to give it shape and then quietly declined to give that law the resources it needed to breathe.

Comparative perspectives

Kenya's challenges in implementing legal aid are not unique. However, comparative experiences demonstrate that sustainable legal aid systems are achievable where sufficient political and financial commitment exists. In South Africa, Legal Aid South Africa operates as a publicly funded national institution with an extensive network of justice centres and salaried legal practitioners. The institution receives substantial annual state funding and has become a central component of South Africa's constitutional commitment to fair

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[33]Hague Institute for Innovation of Law (HiiL), Justice Needs and Satisfaction in Kenya (2019).
[34]Constitution of Kenya (2010) art 48.
[35]*Legal Aid and Access to Justice Under the Constitution — Part Two*", The Star, the-star.co.ke, 21 March 2015. Available at: https://www.the-star.co.ke/siasa/2015-03-21-legal-aid-and-access-to-justice-under-the-constitution-part-two/

trial rights and access to justice.[36] India similarly provides an instructive model. Under the Legal Services Authorities Act, legal aid has been expanded through community legal services, legal awareness camps and alternative dispute resolution mechanisms.[37] Indian courts have repeatedly affirmed that legal aid forms part of the constitutional right to a fair hearing.

These comparative experiences illustrate that legislative enactment alone is insufficient. Access to justice requires sustained institutional financing, nationwide infrastructure and long-term political commitment."

What needs to happen: A reform agenda

Criticism without direction is just noise. This article has spent considerable time mapping the failures of the Legal Aid Act 2016 because they are real, documented and consequential. But the aim is not simply to indict, it is to insist on something better. There are clear actionable steps that the Kenyan state, Parliament, county governments and civil society can take. Some of them are already underway. What they need now is not goodwill speeches but sustained, funded commitment.

Operationalize the legal aid fund: Now, not eventually

This is the single most important thing that needs to happen, and it has been said loudly enough by enough credible voices that there is simply no excuse for continued inaction. The Kenya Open Government Partnership commitment KE0039 explicitly states the ambition to achieve increased financing for NLAS to operationalize the Legal Aid Fund. The Fund is not a nice-to-have. It is the legal engine that the Act was designed to run on. Without it, NLAS cannot remunerate legal aid providers, cannot cover expenses for aided persons and cannot expand its reach beyond the five counties it currently serves. Parliament must move beyond passing resolutions and do the one thing that actually matters: place a dedicated, ring-fenced budget line for the Legal Aid Fund in the national budget and direct the National Treasury to disburse it without delay.[38]

There is in fact recent precedent that makes the excuse of impossibility very hard to sustain. The Judiciary Fund provided for in the Constitution of Kenya 2010 was finally operationalized in 2022 twelve years after the Constitution was promulgated. Twelve years. And yet it was eventually done. The Legal Aid Fund has been waiting for nearly a decade. The lesson from the Judiciary Fund is not that these things take time, it is that they happen when there is sufficient political pressure to make them happen.[39] That pressure must now be applied to the Legal Aid Fund with equal force.

Resolve the paralegal recognition gap through legislative harmonization

Kenya currently has thousands of trained community paralegals working in counties that NLAS has not reached serving communities that advocates will never visit doing the exact work the Act envisioned and doing it without the legal recognition the Act promised them. ICJ Kenya has been

[37]Legal Services Authorities Act 198 (India).
[38]Open Government Partnership Kenya, *"Improving Access to Justice and Legal Aid (KE0039)"*, opengovpartnership.org. Available at: https://www.opengovpartnership.org/members/kenya/commitments/KE0039/
[39]Open Government Partnership Kenya, *"Improving Access to Justice and Legal Aid (KE0039)"*, opengovpartnership.org. Available at: https://www.opengovpartnership.org/members/kenya/commitments/KE0039/

unambiguous about what needs to happen, full implementation of the Legal Aid Act will ensure that paralegals receive accreditation and supporting the relevant government agencies to actualise the Legal Aid Act is an urgent priority[40] The ambiguity should be cleared promptly because this is an exercise that once completed will unlock the recognition, protection and remuneration of thousands of frontline justice workers. It should not take another decade.

Build on the legal aid centre model but fund it domestically

One of the most encouraging recent developments has been the rollout of Legal Aid Centres across counties under Attorney General Dorcas Oduor. Beginning with the launch of the first centre in Machakos County in October 2025, themed "Justice at Your Doorstep", the AG announced a nationwide rollout designed to dismantle barriers preventing citizens from realising their constitutional right to justice.41 This momentum is real and it deserves credit. But the critical question, the one that every previous initiative has eventually stumbled on, is sustainability.

County governments must step in

Kenya's devolved system of government gives county governments both the mandate and the proximity to deliver justice services at the grassroots. Kenya's Vision 2030 framework already identified the need to operationalize a countrywide legal aid scheme and establish fully functional legal resource centres with an explicit call to streamline the training, certification, accreditation and remuneration of paralegals.[42] County governments are closer to the people, closer to the disputes and closer to the communities that the Act was designed to serve. The Mombasa County Government's involvement in access to justice commitments is a positive model.[43] It needs to become a national norm, not a Mombasa exception. Every county government should be required to co-fund at least one Justice Advisory Centre within its territory making justice delivery a shared constitutional obligation, not a Nairobi problem.

The verdict: Conclusion

When the Legal Aid Act received presidential assent in April 2016, the Katiba Institute posed a question in a public commentary that has aged with uncomfortable accuracy. The article was titled simply Legal Aid: New Hope or False Dawn?[44] years later standing at the decade mark we can say with evidence and honesty that the answer remains uncomfortably close to the latter.

The statistics alone should give us pause. A survey by the Judiciary together with the Hague Institute for Innovation of Law found that only 10 percent of Kenyans use the formal justice system to resolve their disputes.[45] Even more starkly, Afrobarometer data reveals that among Kenyans who had

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[40]Damaris Kemunto (Programme Officer, ICJ Kenya), *"Legal and Regulatory Gaps Inherent to the Implementation of the Legal Aid Act"*, ICJ Kenya, 6 March 2024. Available at: https://icj-kenya.org/news/legal-and-regulatory-gaps-inherent-to-the-implementation-of-the-legal-aid-act/

[41]The Star, *"Attorney General to Launch Legal Aid Centres Countrywide"*, the-star.co.ke, October 7, 2025. Available at: https://www.the-star.co.ke/news/2025-10-07-attorney-general-to-launch-legal-aid-centres-countrywi

[42]Kenya Vision 2030, *"Legal Aid and Awareness"*, vision2030.go.ke. Available at: https://vision2030.go.ke/project/legal-aid-and-awareness/

[43]Open Government Partnership Kenya, "Improving Access to Justice and Legal Aid (KE0039)", opengovpartnership.org. Available at: https://www.opengovpartnership.org/members/kenya/commitments/KE0039/

[44]Katiba Institute, *"Legal Aid: New Hope or False Dawn?"*, katibainstitute.org. Available at: https://katibainstitute.org/legal-aid-new-hope-or-false-dawn/

[45]Hague Institute for Innovation of Law (HiiL), Justice Needs and Satisfaction in Kenya (2019).

justice-related problems only 3 percent resolved their conflicts in formal courts or tribunals with the majority relying instead on family, community elders or informal settlement.[46] Think about that for a moment. A decade after a landmark legal aid law was passed to bring ordinary Kenyans into the justice system, 97 percent of those with justice problems are still finding their resolution outside it. The law was supposed to close that gap. It has barely touched it.

This is not a counsel of despair. The Legal Aid Act 2016 is as this article has argued throughout a well-designed piece of legislation. Its failures are not of vision but of execution, a distinction that matters enormously because it means the remedy is political not legislative. Equal access to justice remains a challenge for most people in Kenya. Aside from the limited provision of state-funded legal aid, a large number of Kenyans have few options to access the judicial system with proper representation, unable to navigate complex legal procedures, lacking knowledge of their rights or simply unable to afford the cost.[47] That reality has not changed substantially since 2016. And it will not change until the state moves from treating legal aid as a constitutional decoration to treating it as a budgetary obligation.

The Legal Aid Act 2016 did not fail because Kenya lacked constitutional vision. The Act established a potentially transformative framework capable of significantly expanding access to justice for indigent and vulnerable populations. Its central failure has instead been the state's unwillingness to adequately finance and institutionalise the system it created. Nearly a decade later, access to justice for millions of Kenyans remains contingent not on constitutional entitlement, but on geography, donor funding and personal financial capacity. Until legal aid is treated not as charity or temporary development programming but as a binding constitutional obligation, the promise of Article 48 will remain more aspirational than real.

The Legal Aid Act, 2016 (Cap. 16A) is the primary law governing the provision of legal aid in Kenya. It was enacted to implement the constitutional right of access to justice under Articles 19(2), 48, and 50(2)(g) and (h) of the Constitution. The Act came into force on 10 May 2016 and establishes a framework for providing legal assistance to persons who cannot afford legal services.

[46]Afrobarometer, "AD442: *Most Kenyans Seek and Find Justice Outside Formal Court System*", afrobarometer.org, April 16, 2021. Available at: https://www.afrobarometer.org/publication/ad442-most-kenyans-seek-and-find-justice-outside-formal-court-system/
[47]Global Access to Justice Project, *"Global Overview Kenya"*, globalaccesstojustice.com. Available at: https://globalaccesstojustice.com/global-overview-kenya/

Death by a thousand cuts: How partner states are undermining the East African Community common market

By Alvin Kubasu

Introduction

It is true that the journey of a thousand miles begins with a single step, it is also true that the fall of a giant wall begins with a single crack, ignored unnoticed and termed irrelevant before the wall comes tumbling down. Questions start, fingers pointed but through it all it's already too late with all relevant parties faced with massive and often catastrophic consequences. For the East Africa Community, it is easy to look at the status quo and point out a few challenges here and there and say that in the grand scheme all is well. When the EAC first came crashing down in 1977,[1] it was attributed to political indifferences, mistrust and unequal economic distribution, political instability and personality conflicts among the Heads of State.[2] However, the truth of the matter is that, these reasons creeped up independently and each was ignored, the Heads of State then perhaps drew from philosophy of 'time heals everything,' and indeed chose to kick each bucket down the hill. And just as one falls asleep slowly and then all at once, in February 1977, the Kenya Tanzania border was closed and with that the EAC Common Market came to a halting end and with it the EAC as it was known then.[3]

The East African Community (EAC) is a regional intergovernmental organization of East African countries that promotes economic, political, social, and cultural integration.

It is important that this past is not lost to the Partner States, recently the EAC Partner States' actions and some utterances although isolated are threatening the relations that have been enjoyed by the EAC citizens, Partner States and by extension the economies of the EAC. First, it was the unlawful detaining of activists Boniface Mwangi and Agather Atuhaire in 2025 by

[1]Maureen Gathoni Kariuki, *The East African Community: the Rise, Collapse, and Revival* (MA thesis, United States International University–Africa 2012) https://erepo.usiu.ac.ke/handle/11732/7958 accessed 25 June 2026.
[2]Ibid.
[3]Tibelius Amutuhaire, 'The East African Community: Past Experiences and Lessons for the Future' (African Legal Studies Blog, 5 July 2024).

the Tanzanian government after the two had gone to follow the court proceedings of the embattled leader of opposition, Tundu Lissu.[4] It was later reported that the two were sexually assaulted and tortured in the hands of the Tanzania government. During President Ruto's visit to Tanzania in May 2026, President Samia Suluhu of Tanzania seemed to imply that more 'discipline' (violence) should be meted against those who question and disagree with the governments across the region.[5] In June 2026, the Member of Parliament for Dagoretti North constituency was on record saying that there are many Burundians working in Kenya especially in the Construction industry, she went on to warn that if any construction site is found to have employed Burundians it will be shut down. More recently on the 22nd of June 2026, Senior Council Martha Karua was denied entry into Uganda after she had gone to attend the court proceedings on the bail application of Mr Lukwago, the lead defence counsel in the case against Dr. Kizza Besigye who is facing charges of misprision of treason.[6] The Uganda authorities went on to declare Martha Karua SC persona non granta in Uganda,[7] effectively eliminating her future involvement in the cases against both Mr. Besigye and Mr. Lukwago.

Looked at individually, these are just isolated cases of EAC Partner States doing what they deem best to their individual States and their people, but looked at holistically these are acts of regression that more than ever threaten the very existence of the EAC as a community that is founded on rule of law, free movement of people, and the right of establishment. This article will be looking at these recent developments in light of the EAC as a Common Market in a bid to bring to light how these actions' impact transcends the interest of the individuals in issue.

Tanzania's President Samia Suluhu

The legal architecture of the EAC common market

The Treaty Establishing the East Africa Community (EAC Treaty) is the main legal instrument which governs the East Africa Community (EAC). With the community revamped at the backdrop of the need to have a people centred community, Article 2 of the EAC Treaty lays a promise for a Customs Union and a Common Market which are poised to be integral to the

[4]Wycliffe Muia and Alfred Lasteck, 'US Sanctions Tanzanian Police Official over "Torture" of Rights Activists' (BBC News, 22 May 2026) https://www.bbc.com/news/articles/cn4p8m3r1glo accessed 25 June 2026.
[5]'Samia Suluhu Hassan's Comments on Gen Z Highlight Rising Tensions over Civic Space' (EU SEE, 20 May 2026) https://eusee.hivos.org/alert/samia-suluhu-hassans-comments-on-gen-z-highlight-rising-tensions-over-civic-space/ accessed 25 June 2026.
[6]'Kenya's Martha Karua Denied Entry to Uganda Ahead of Lukwago Bail Ruling' (The EastAfrican, 22 June 2026) https://www.theeastafrican.co.ke/tea/news/east-africa/martha-karua-denied-entry-uganda-ahead-of-lukwago-bail-ruling-5504834 accessed 25 June 2026.
[7]Ibid.

EAC.[8] On the objectives of the Community, Article 5 presents the clarion call to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields for the mutual benefit of the Partner States.[9] Among the key elements to this is the development and strengthening of the Common Market.[10] In the realization of the objectives, Article 6 of the EAC Treaty emphasizes on the need for the EAC to be guided by certain fundamental principles including the adherence to rule of law, accountability and equal opportunities for all.[11] Moreover, the EAC Treaty underscores the need for a market driven cooperation, adequate and appropriate enabling environment, such as conducive policies and basic infrastructure, the principle of variable geometry which allows for progression in cooperation among groups within the Community for wider integration schemes in various fields and at different speeds, and the principle of asymmetry.[12] At the same time cautioning Partner States from taking any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of the EAC Treaty.[13] The East Africa Court of Justice (EACJ) has consistently held including in the case of ***The Managing Editor, Mseto and Another v Attorney General of the United Republic of Tanzania***, that the fundamental principles under Article 6 and the operational principles under Article 7 of the EAC Treaty are not merely aspirational but rather binding, and create an obligation to every Partner State to respect those sacrosanct principles.[14]

To set the ground rolling on the Common Market, Article 104 of the EAC Treaty guaranteed free movement by providing that the Partner States should adopt measures aimed at achieving the free movement of persons, labour and services as well as ensuring the enjoyment of the right of establishment and residence of EAC citizens within the community.[15] This was operationalised further by the coming into force of the Common Market Protocol in 2010, which in addition to free movement and right of establishment, called for the EAC Partner States to ensure non discrimination of EAC citizens based on their nationalities by ensuring, the entry of the EAC citizens into their territory without a visa, their free movement within the Partner State territory, allowing EAC citizens to stay in their territory and allowing them to exit their territories without restrictions.[16]

This notwithstanding, the right to free movement is not absolute and thus can be subjected to limitations by the host Partner State. The Common Market Protocol provides that this right can be limited on the basis of public policy, public security or public health[17] Additionally, any Partner State that is imposing any of the grounds for limitation has an obligation to inform the

[8]Treaty for the Establishment of the East African Community (signed 30 November 1999, entered into force 7 July 2000) 2144 UNTS 255, as amended on 14 December 2006 and 20 August 2007 (EAC Treaty), Article 2.
[9]EAC Treaty, Article 5.
[10]EAC Treaty, Article 5 (2).
[11]EAC Treaty, Article 6.
[12]EAC Treaty, Article 7.
[13]Ibid
[14]The Managing Editor, Mseto and Another v Attorney General of the United Republic of Tanzania Ref No 7 of 2016 (EACJ First Instance Division, 21 June 2018) para 107.
[15]EAC Treaty, Article 104.
[16]Protocol on the Establishment of the East African Community Common Market (signed 20 November 2009, entered into force 1 July 2010) (EAC Common Market Protocol), Article 7(2).
[17]EAC Common Market Protocol, Article 7 (5).

other Partner States of this limitation,[18] thus lifting the possibility of these limitations being used arbitrarily against EAC citizens.

These provisions were subjected to the EACJ's interpretation in the case of S***amuel Mukira Muhochi v Attorney General of Uganda*** with the court providing a much needed interpretation to free movement in the EAC. The Applicant had travelled from Kenya to Uganda on the 13th of April 2011 as part of the delegation of the International Commission of Jurists - Kenya Chapter. However, upon arriving in Uganda, he was not allowed beyond the immigration checkpoint with the immigration officers terming him as a prohibited immigrant, and in accordance with the Ugandan laws on immigration he was turned away without offering any further explanation. The main issue before the court was whether the EAC Treaty and the Common Market Protocol take away the sovereignty of Uganda to deny entry of unwanted persons into their territory.The Applicant argued that Uganda remained a sovereign nation but the exercise of their sovereignty was subject to the provisions of the Treaty and the Protocol and therefore a State cannot arbitrarily invoke provisions devoid of any legal justification.

The EACJ was of the opinion that indeed prior to the EAC Treaty coming into force, the applicable law was the domestic law (which Uganda had submitted was the reason why the Applicant was denied entry into Uganda). However, with the Treaty coming into force that was no longer the case and with Uganda ascending to the Treaty it effectively modified their laws. Accordingly, the EACJ stated that the EAC Treaty and the Common Market Protocol accorded EAC citizens a wide ranging, preferential and superior treatment and rights in relation to movement, establishment, residence and working within the EAC. Therefore the EACJ noted that in cases of conflict between the national laws on immigration on one side and the EAC Treaty and the Common Market Protocol on the other, the latter takes precedence.[19]

The rationale being that by ascending to the EAC Treaty (without reservations), Uganda ceded their sovereignty to deny entry of EAC nationals to the extent that such a denial has to be qualified and governed by the EAC treaty provisions.[20]

In relation to denial of entry, the EACJ found that the immigration officials had an obligation to apply the limitations of the freedom of movement strictly given how pivotal free movement is to the EAC Common Market and the integration process. That boat having sailed, the Applicant was entitled to redress and remedies as contemplated under Article 54 of the Common Market Protocol,[21] This included being given sufficient reasons as to why their right to free movement was being limited, affording him an opportunity to be heard, and taking their reasons into account when making a final decision.

The Human and Economic Costs of Fragmentation

Every day the EAC borders are a beehive beaming with activities from traders in both goods and services to school going children to those seeking health services

[18]EAC Common Market Protocol, Article 7 (6).
[19]*Samuel Mukira Muhochi v Attorney General of the Republic of Uganda* Reference No 5 of 2011 (First Instance Division, East African Court of Justice, 17 May 2013) para 48.
[20]Ibid
[21]EAC Common Market Protocol, Article 54.

to local tourists visiting a new destination among many other activities. What a particular Partner State lacks in capacity, the free movement has allowed the citizens to dream, go and get it. While the impact of the free movement of people within the EAC can be demonstrated in the number of jobs created, the numerical quantification through the growth of the EAC Partner States' economies, and the general spread of the different cultures across the EAC Partner States, this is just a tip of the iceberg since the actual value of the common market cannot really be quantified with any metric scale.

To buttress this assertion, you have to take a step back to 2019, when there was a diplomatic breakdown between Rwanda and Uganda, that saw the Uganda Rwanda border be closed.[22] First, the impact was extremely personal to the locals around the border, peoples' means of earning a living were greatly affected, many who live in poverty. From border traders, cargo porters, and labourers they all had to find an alternative source of livelihood.[23] Then there was the issue of food, many people would cross from one border to the other looking to buy food, the closure of the border meant that people had to start sneaking around.[24] These factors alone threaten the existence of other people in the off chance that the need to survive pushes people into crime. Then there was the effect that was felt by bigger businesses whose products were enroute in trucks, and while these trucks were being allowed to move, they experienced significant delays and these translated to losses. Perishable goods could not get to the market while fresh, non perishable goods took longer than expected on the road which pushed up the initial cost of getting the goods and therefore, products became more expensive to the ultimate consumer.[25] There were also visible incidents of strained relations between the two Partner States when a Rwandese MTN general manager was arrested and deported with Uganda citing undermining of their security.[26]

In 2020, Kenya banned flights from Tanzania in the advent of the Covid-19, Tanzania retaliated by equally banning flights from Kenya.[27] The sheer potential of the inconveniences that that banning of flights presented despite reduced traffic due to Covid-19 pushed the two Partner States to move swiftly and sort out the issue and within three days the status quo had been reinstated.[28] While is important to acknowledge that disputes will always occur and to appreciate the haste with which that particular dispute was handled, there is something that is important that should be taken note of, the EAC Partner States being almost ready to close down their borders at the sight of inconvenience and their reluctance to either learn from the past or employ better approaches to solving disputes.

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[22]Catherine Byaruhanga, 'How the Rwanda-Uganda Border Crossing Came to a Halt' (BBC News, 9 March 2019) https://www.bbc.com/news/world-africa-47486072 accessed 26 June 2026.

[23]Ibid

[24]Abdallah Saidi Mpawenimana, Sultan Juma Kakuba and Stanley Babalanda, 'Rwanda-Uganda Border Closure: The Border-Users Socio-Economic and Security Experiences' (2024) 18(3) *African Journal of Political Science and International Relations* 107.

[25]Abdallah Saidi Mpawenimana, Sultan Juma Kakuba and Stanley Babalanda, 'Rwanda-Uganda Border Closure: The Border-Users Socio-Economic and Security Experiences' (2024) 18(3) *African Journal of Political Science and International Relations* 107.

[26]Byaruhanga (note 22).

[27]Reuters, 'Tanzania Says It Withdraws Approval for Kenya Airways Flights' (15 January 2024) https://www.reuters.com/business/aerospace-defense/tanzania-says-it-withdraws-approval-kenya-airways-flights-2024-01-15/ accessed 26 June 2026.

[28]Al Jazeera, 'Tanzania Bans Kenya Airways from Flying into Country' (1 August 2020) https://www.aljazeera.com/news/2020/8/1/tanzania-bans-kenya-airways-from-flying-into-country accessed 26 June 2026.

Photo by Anthony Siame/MaxPPP

The heads of state and government of the member countries of the East African Community gathered in Dar es Salaam, Tanzania, on 8 February 2025.

More recently in 2025, the President of Tanzania, Samia Suluhu through a government order, The Business Licensing (Prohibition of Business Activities for Non-Citizens) Order, 2025 which took effect immediately, prohibited non-citizens from obtaining or renewing business licences for 15 specified activities.[29] These activities included, Retail and wholesale trade (excluding supermarkets and specialised outlets), mobile money transfer services, mobile phone and electronics repair, salon businesses (except within hotels or tourism linked operations), domestic and commercial cleaning services, small-scale mining, local postal and parcel delivery, tour guiding within Tanzania, broadcasting services (radio and TV), curio shops and museums, real estate and business agency services, clearing and forwarding, crop purchasing (on-farm and off-farm), ownership or operation of gambling machines outside casinos, and operation of micro and small-scale industries.[30] The Tanzanian Trade minister said that the move was meant to protect opportunities that should be reserved for Tanzanian citizens, saying that since most of those businesses require little to no capital investment they are better suited for Tanzanians with the government looking to create a space for the economy to grow.[31]

Granted most of the banned businesses fall outside of Tanzania's commitments under the EAC schedule of commitments on the liberalization of trade in services;[32] This directive brings to light several concerns. First, what is the scope of micro and medium (retail) businesses in Tanzania? Is the word 'foreigner' construed to mean a citizen who is from a country out of the

[29] Shemane Amin, Geofrey Dimoso, Chris Green and Edward Williams, 'Tanzania Restriction on Non-Citizens from Certain Business Activities Under New Licensing Order' (ALN, 11 August 2025).
[30] Ibid.
[31] 'Tanzania Bans Foreigners from Informal Trade' (Channel Africa, SABC, 31 July 2025) http://web.sabc.co.za/sabc/home/channelafrica/economy/details?id=f98b3faa-c134-484e-aee1-b1f884088664&title=Tanzania%20bans%20foreigners%20from%20informal%20trade accessed 26 June 2026.

Martha Karua

EAC and those from EAC Partner States? And where does this leave the EAC Treaty obligation on equal opportunity, non-discrimination, and not jeopardising the realization of the objectives of the Community? Shouldn't we be creating more opportunities for all EAC citizens to thrive instead of shutting particular sectors?As these questions remain greatly unanswered, it is evident that 26 years later after the EAC Treaty came into force and 16 years after the Common Market Protocol came into force free movement of people, goods, services and labour, and the right of establishment are still closely held to the chest cards by the Partner States. Whereas the Customs Union has offered a much needed key to unlock the trade potential of the region, the Common Market presents an even greater potential for either building the community or disintegrating it altogether.

The EAC as presently constituted is a far cry from the hidden paradise that the EAC Treaty promised and the Protocols sought to realize, since there is still a lot more to be done. However, free movement of people, services and labour should not be viewed in isolation and its effect measured according to a certain scale, because plainly put there exists no scale that truly captures the impact that it has on the EAC.

Conclusion

In conclusion, Uganda's denial of Martha Karua's entry into their country is the most recent jab on the EAC as a Common Market and it's easy for anyone to dismiss Uganda's actions as political, but tomorrow it will be members of parliament chasing away Burundians from Kenya, and another Partner State retaliating and another and before anyone realizes, the EAC is on the verge of collapsing.

Indeed these words have almost become cliché, but it is paramount that the words of Martin Niemöller ring clear to all who believe and ascribe to the *jumuiya*; First they came for the Communists and I did not speak out Because I was not a Communist then they came for the Socialists and I did not speak out Because I was not a Socialist Then they came for the trade unionists and I did not speak out Because I was not a trade unionist Then they came for the Jews and I did not speak out Because I was not a Jew Then they came for me and there was no one left to speak out for me.

Any action taken by any Partner State that threatens the free movement of people across the region should be condemned and redressed immediately. By ignoring these isolated events the Partner States are being enabled in their quest to ultimately frustrate the aspirations and the gains of the EAC Treaty and the Common Market Protocol.

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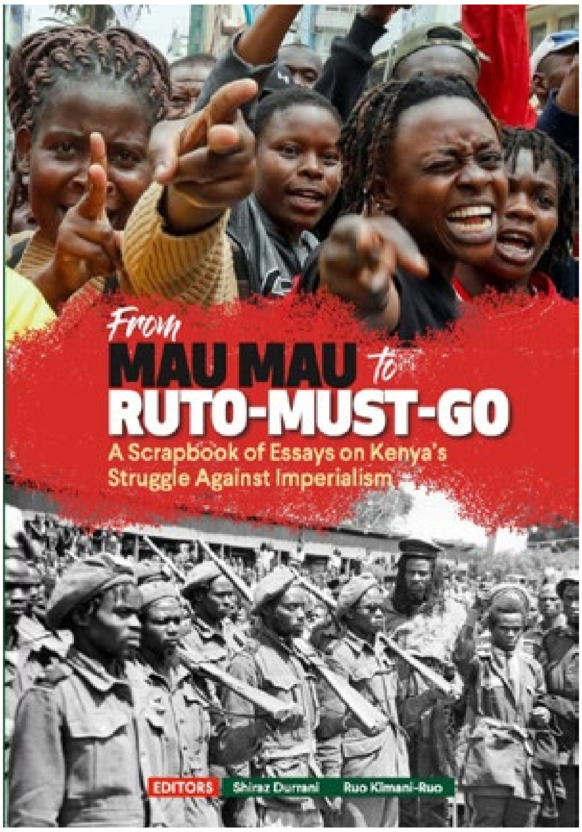
[32]A later article will address the EAC schedule of commitments on the liberalization of trade in services

BOOK REVIEW

From Mau Mau to RutoMustGo: A scrapbook of essays on Kenya's struggle against imperialism

By Teddy Odira

"From Mau Mau to RutoMustGo: A Scrapbook of Essays on Kenya's Struggle Against Imperialism" is not merely a book about protests. It is an audacious attempt to stitch together Kenya's long, unfinished war with imperialism into a single, combustible narrative that runs from the forest camps of Mau Mau to the digital battlefields of Gen Z hashtags. It reads less like a conventional history text and more like a manifesto-cum-archive: an unruly scrapbook in which testimonies, analysis, street reports and political theory jostle for space, insisting that what Kenya lived through in 2024 was not unrest but class struggle carried forward from 1963 and still unresolved.



A book born in the streets

The book's origin story already signals its refusal to separate scholarship from struggle. We are told that the first edition appeared as a pamphlet in October 2024, with more than 300 paper copies printed and distributed free of charge to activists and ordinary citizens, before being expanded and reworked into the present volume. This genealogy matters. The text is not an intellectual exercise retrofitted onto a movement, but something that literally grew out of the protests themselves, tested in smoky streets and police cordons before finding its way into bound pages.

Edited by Shiraz Durrani and Ruo Kimani-Ruo, the book situates itself unapologetically on the side of resistance. It examines important developments in Kenya leading up to the 2024 protests and the ongoing struggles, foregrounding June 2024 when the RutoMustGo and Gen Z resistance took to the streets against the IMF-inspired Finance Bill and the broader architecture of neoliberal austerity. In doing so, it refuses the comfort of detached commentary. This is history written with tear gas still in the lungs.

From colonial land theft to contemporary class war

One of the most striking passages in the excerpt you shared states that *"what is happening in Kenya is no less than a class struggle against the takeover of the government by a small ruling class, which has had the support of imperialism since independence in 1963."* That sentence is a thesis in miniature. The book insists that contemporary budget fights, tax hikes and police violence cannot be understood without a return to the original sin of colonial land expropriation and the comprador elite fashioned in its wake.

The editors bring the question of land to the centre of the narrative and that this piece had to be added to the current edition because almost all the problems faced by working people are tied to losing land twice, first under British colonialism and again under post-independence regimes. Here, the book consciously walks in the footsteps of Walter Rodney and other radical historians who insisted that material dispossession, not abstract governance failure, is the true engine of African crises.

By anchoring the RutoMustGo moment in a long arc of land struggles, the book sidesteps the temptation of treating Gen Z protests as a spontaneous outburst of online anger. Instead, it shows how a digitally savvy generation inherited unresolved land questions, widespread unemployment, and a political class fattened on the spoils of privatization. The result is a narrative where a TikTok livestream from a protest is not an isolated event but the latest installment in a saga that began with colonial land ordinances and Mau Mau detention camps.

RutoMustGo as class struggle and as warning

The chapter "#RutoMustGo is a Class Struggle" by Shiraz Durrani crystallizes the book's political stance. Durrani traces the evolution of the movement from a pamphlet into a mass-based campaign and frames the current moment in terms that echo anti-imperialist literature across the Global South. The Ruto government, he argues, has become more ruthless, with methods reminiscent of the Moi era, resorting to shooting on sight those vocal in condemning misrule and using kidnapping and disappearance to silence dissent.

Yet, the chapter is not simply an indictment of state violence. It is also a warning to both ruling class and activists. Durrani describes the movement as one of the most important resistance movements in recent times, but emphasises that it can never be destroyed as long as the demands of the working class remain unmet. The metaphor of a simmering volcano ready to blow up the ruling class sooner or later, even with imperial support, gives the book a prophetic register. It imagines history not as a gentle reformist arc but as an accumulation of unaddressed grievances that must eventually erupt.

This is where the book feels closest to classic revolutionary literature. It combines documentation with an almost geological sense of inevitability. The tone recalls Frantz Fanon's insistence that colonial violence breeds counter-violence, or the Cuban slogan *"Patria o muerte"* referenced in Willy Mutunga's preface to the book, where he urges radical parties and movements to continue thinking through the practice of struggle for a liberated planet.

A scrapbook form that mirrors a fragmented struggle

Formally, “From Mau Mau to RutoMustGo” announces itself as a scrapbook of essays and that label does serious political work. The volume assembles street reports, analytical essays, historical reflections, endorsements, images and social media-inflected narratives rather than following a linear, single-author structure. This polyphony reflects how the 2024 protests themselves were leaderless, networked, and crowdsourced, relying on mutual aid, online mobilization, and decentralised organising instead of traditional party structures.

Contributors include those active in the streets and within the digital sphere, capturing events and voices unlikely to be found in government archives or mainstream research centres. The book is full of images showcasing activists who have used social media and protest art to invent new ways of resisting government oppression. This blend of text and image recalls the aesthetics of zines and underground pamphlets. The design invites readers not to sit back as passive consumers but to see themselves as participants in a living archive that is still being written.

The scrapbook approach also allows contradictions to coexist. There is space for sober class analysis, emotive testimonies of grief, and sharp denunciations of police brutality, alongside endorsements from figures like Zach Patterson and Willy Mutunga, who frame the volume as both a tool for organisers and an intervention in debates on imperialism and the ecological crisis. To read the book is to experience the movement’s own rough edges rather than a polished narrative smoothed for academic respectability.

Gen Z, land and the future of resistance

One of the most compelling threads in the excerpts is the particular attention to Gen Z. The text warns that “the danger to Gen Z and the RutoMustGo movement is real,” acknowledging both the state’s repression and the generational stakes of the struggle. At the same time, it credits young people with making June 2024 into a turning point, where parliamentary procedure itself was disrupted by youth storming the precincts in protest against the Finance Bill.

Here, the book captures a paradox: Gen Z is depicted as both vulnerable and indispensable. They are the ones facing police bullets, forced disappearances, and digital surveillance; yet, they are also the demographic that turned hashtags like #RejectFinanceBill2024 and #RutoMustGo into material force, raising hundreds of thousands of dollars through mutual aid and shifting the national conversation from mere tax grievances to questions of corruption, misrule, and popular sovereignty.

The decision to insert the land question into a discussion of Gen Z protests is particularly astute. It challenges the lazy trope of youth activism as purely urban and digitally driven, showing instead that the class background of many protesters – precarious employment, rural ties, informal settlements – is inseparable from historical dispossession. In this sense, the book pushes readers to see memes and protest songs as expressions of a deeper agrarian and urban crisis, rather than as ephemeral online culture.

Why this book matters now

“From Mau Mau to RutoMustGo” arrives at a moment when many Kenyans fear that the trauma of 2024, the funerals, the disappearances, the cabinet reshuffles, the

The Gen z movement gained national and international attention during the 2024 protests against the proposed Finance Bill, which evolved into broader calls for government accountability and reform.

presidential concessions will be buried under the next news cycle. The book insists that forgetting is itself a political act that serves imperial and ruling-class interests.

By archiving testimonies, essays and images, the editors create what Willy Mutunga calls a revolutionary book that will help radical parties and social movements in Kenya and beyond to continue to think through the practice of our struggles for a planet we wish to see. It is both record and roadmap, both memory and mechanism for future mobilisation. For Gen Z activists, it offers recognition and continuity, for older generations, it offers a reminder that their unfinished tasks have been taken up by new hands.

In a country where political commentary is often trapped between pessimistic cynicism and shallow optimism, this book proposes a third path. Sober, historically grounded hope rooted in the understanding that resistance is a long relay not a single race.

Final verdict

To call "From Mau Mau to RutoMustGo" a "scrapbook" is accurate but incomplete. It is a living archive of Kenya's struggle against imperialism, an education in class politics and a love letter to those who refused to be silent in 2024. It will frustrate readers looking for neat conclusions or neutral tone. It is unapologetically partisan, emotionally charged and intellectually militant.

For legal professionals, organisers and digital strategists alike, the book offers not only content but a method. Centre the working class, name imperialism, pay attention to land and honour the creativity of young people who turned social media into an instrument of popular power. In doing so, it asks a simple but uncomfortable question. Will we treat the RutoMustGo moment as an episode, or as a chapter in a much longer book of Kenyan resistance whose ending we are still writing?

Teddy Odira is a Kenyan lawyer, legal researcher and emerging public-interest scholar whose work traverses human rights advocacy, constitutional and public law, economic governance and AI regulation.