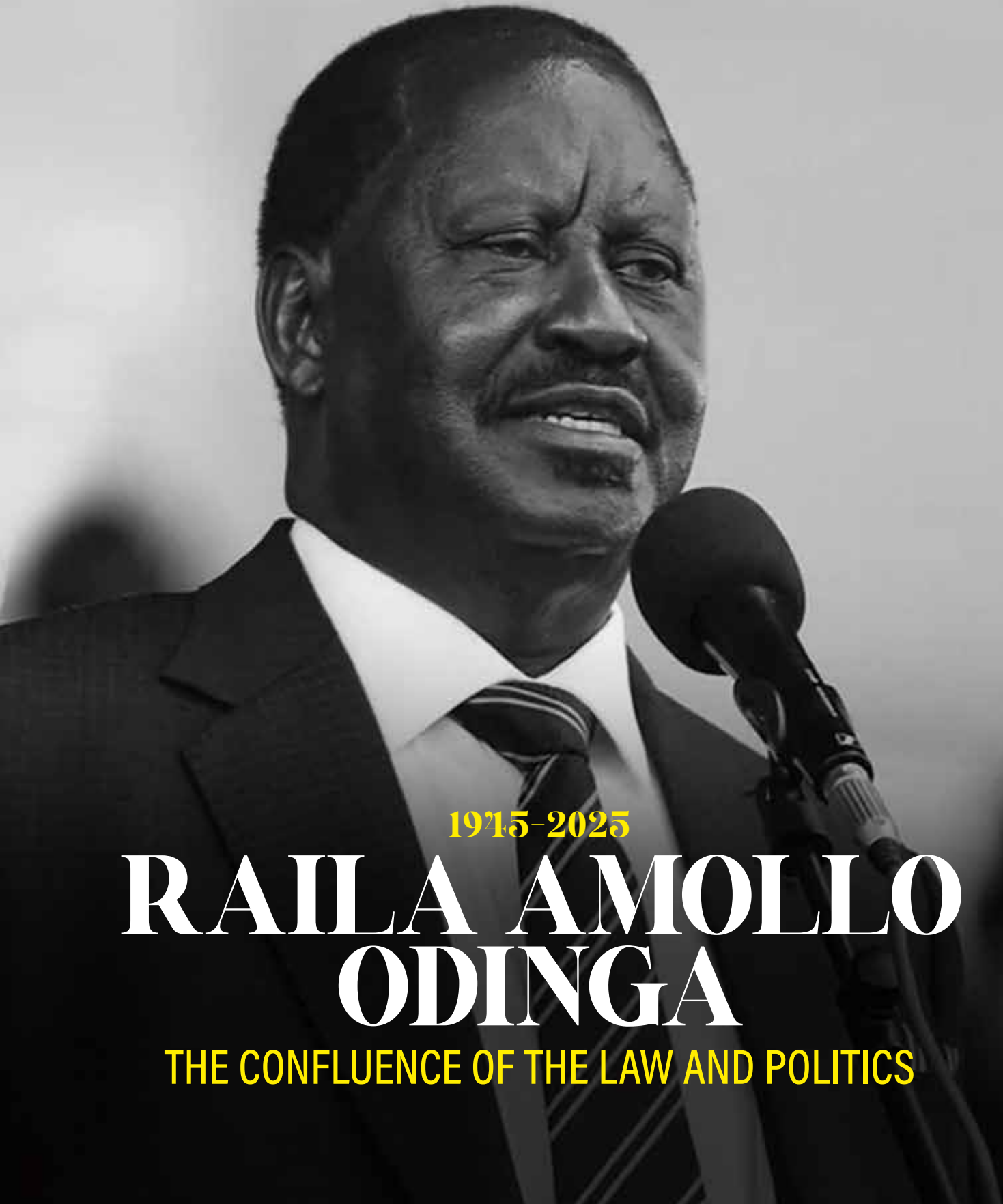


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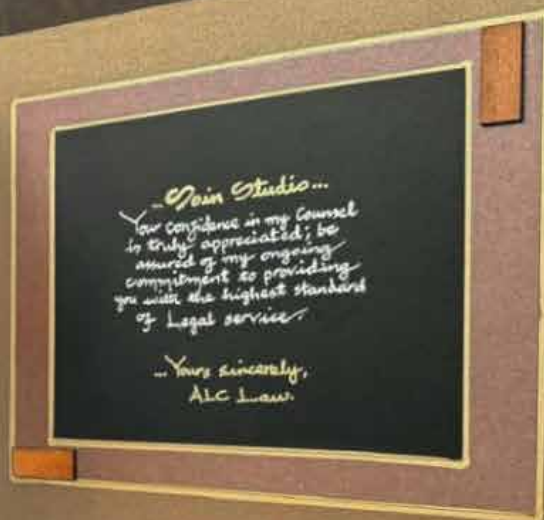
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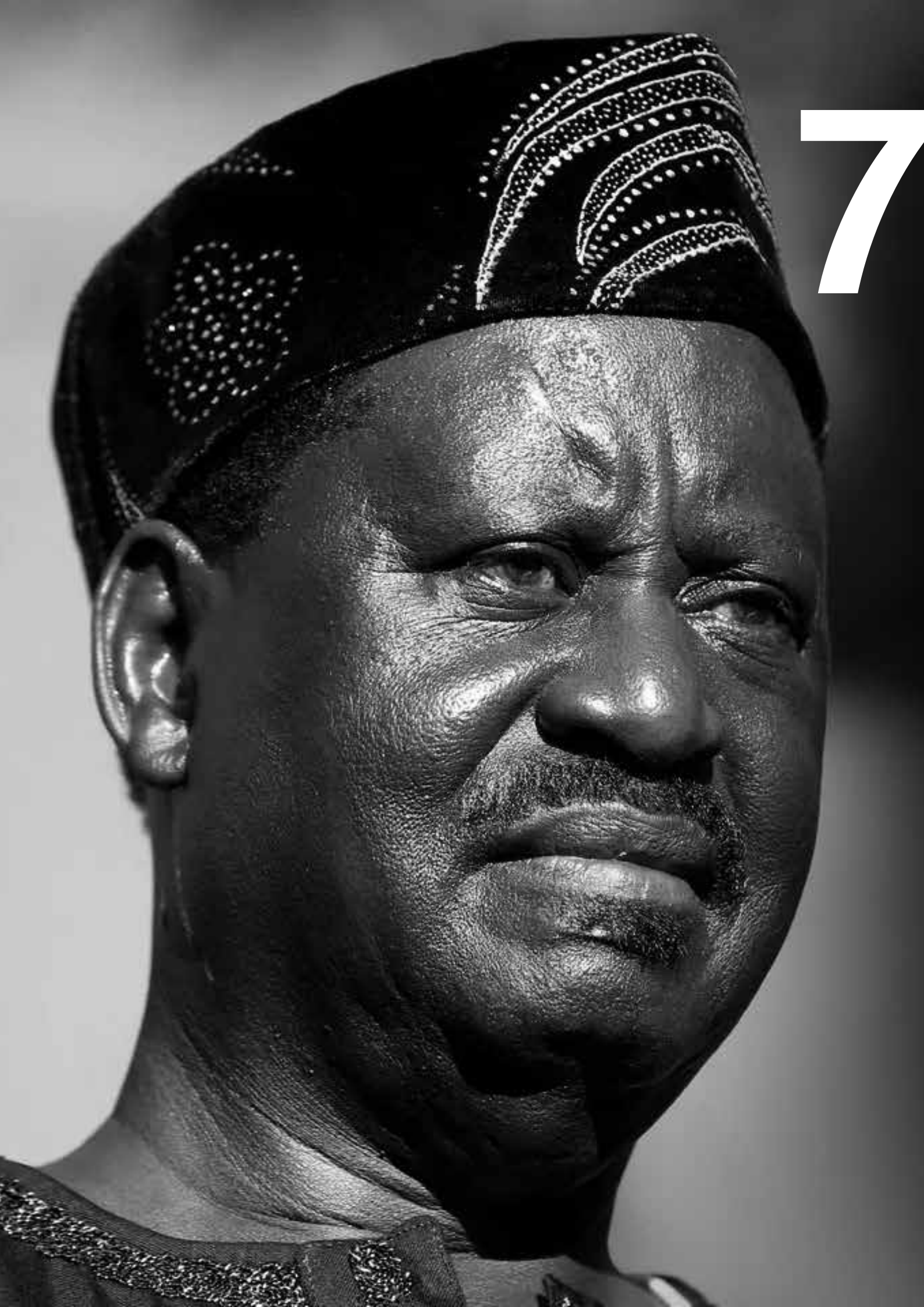
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EDITORIAL

THE DEMOCRATIC LEGACY OF **RAILA AMOLLO ODINGA**

A reflection on leadership, resistance, and
constitutional transformation in Kenya





The Late Prime Minister Raila Odinga

There are few figures in Kenya's post-independence history whose names evoke as much reflection, admiration, and debate as that of Raila Amollo Odinga. For over four decades, his life has been deeply intertwined with Kenya's protracted and often turbulent journey toward democracy. To examine his legacy is to engage with the broader narrative of a nation's resilience—its capacity to reinvent itself through struggle, sacrifice, and the unrelenting pursuit of freedom and justice.

Raila Odinga's political career has been defined by defiance—less the defiance of personal ambition, and more the principled defiance that emerges from a moral refusal to submit to injustice. His political trajectory, forged under conditions of detention, persecution, and exile, stands as an enduring testament to conviction and civic courage. From his opposition to the authoritarian excesses of the Moi regime to his central role in the fight for multiparty democracy, Odinga has embodied the moral and intellectual

resistance that prevented Kenya from descending into autocracy and silence.

The political struggles of the 1980s and 1990s are a reminder that democratic freedoms in Kenya were not granted by benevolent authority but were won through collective resistance, often at great personal cost. Odinga's years of detention without trial, the accusations of treason, and the inhuman conditions he endured underscore both the repressive nature of that era and his extraordinary resilience. Remarkably, upon release, Odinga transformed his suffering into political purpose. He became a principal architect of the *Second Liberation*—the popular movement that demanded pluralism, restored civic consciousness, and reasserted constitutionalism as the foundation of legitimate governance.

Arguably, Raila Odinga's most profound contribution to Kenya's public life lies not in the offices he has held, but in the expansion of the nation's democratic imagination.

Through his vision, politics has often transcended the narrow contestation for power to become a moral discourse on justice, equity, and inclusion. His consistent advocacy for constitutional reform—from the early calls for a new democratic order in the 1990s, through the 2005 referendum, and culminating in the 2010 Constitution—illustrates a political philosophy grounded in the belief that governance should serve as a vehicle for social transformation.

The 2010 Constitution of Kenya, widely regarded as one of the most progressive in Africa, bears the imprint of Odinga's vision and activism. Its provisions on devolution, the Bill of Rights, and the institutional architecture of checks and balances reflect principles he championed long before they gained mainstream traction. Even when denied electoral victory, Odinga's political setbacks often translated into moral triumphs that reshaped national discourse, advancing the cause of reform and justice. Few African political leaders have so profoundly influenced their country's constitutional and democratic trajectory without occupying the presidency.

Like many transformative figures, Raila Odinga's political journey has not been without controversy or contradiction. He has faced criticism for populism, perceived inconsistency, and at times, for being simultaneously too confrontational and too conciliatory. Yet these tensions underscore the complexity of democratic politics itself. Democracy is not an orderly or perfect process; it is an evolving project that demands both idealism and pragmatism. In navigating Kenya's highly volatile political landscape, Odinga has demonstrated a distinctive capacity for resilience—an ability to rise above personal loss to prioritize the broader project of national unity and reform.

His decision in 2018 to enter into a political rapprochement with President Uhuru Kenyatta—popularly known as “the handshake”—is illustrative.

Though interpreted variously as political accommodation or statesmanship, it ultimately represented an act of national responsibility at a moment when Kenya was deeply polarized. The gesture reflected a mature understanding that reconciliation is not capitulation but an essential element of democratic consolidation. It reaffirmed the principle that the ultimate purpose of leadership is not personal victory but the preservation of peace and national cohesion.

Beyond the realm of formal politics, Raila Odinga's influence has been profoundly cultural and symbolic. He has articulated the frustrations and aspirations of communities historically marginalized from state power, particularly the Luo, while simultaneously transcending ethnic boundaries in his appeal for an inclusive national identity. His political discourse—anchored in notions of justice, accountability, and participatory citizenship—has consistently challenged the ethno-political logic that has shaped much of Africa's postcolonial governance. In this respect, Odinga's contribution lies not only in his advocacy for democracy but also in his effort to redefine patriotism itself as the courage to dissent in defense of the public good.

Odinga's role on the continental and international stage further attests to his stature as a democrat of Pan-African significance. In his capacity as the African Union High Representative for Infrastructure Development, he extended his long-standing commitment to connectivity and development beyond national borders. His advocacy for integrated infrastructure across Africa reflected a belief that the continent's transformation must be driven by cooperation, human development, and shared prosperity. Odinga's Pan-Africanism is neither rhetorical nor nostalgic; it is pragmatic and forward-looking, grounded in the conviction that democratic governance and economic interdependence are mutually reinforcing pillars of Africa's renaissance.



What renders Raila Odinga's legacy particularly distinctive is his enduring faith in possibility. Repeatedly underestimated, frequently defeated at the ballot, and often misunderstood, he has persisted not merely as a political contender but as a moral presence in Kenya's public life. His resilience reflects an almost philosophical acceptance of struggle as an inherent part of democratic evolution. It is this steadfastness—this refusal to succumb to despair—that underscores a central truth about democracy: that it is a process rather than a destination, sustained not by victories alone but by the courage to continue striving for justice.

As Kenya contends with contemporary challenges—rising inequality, endemic corruption, youth disenfranchisement, and the erosion of public trust—Raila Odinga's legacy offers both guidance and caution. It underscores that democracy is a continuous enterprise requiring vigilance, ethical leadership, and moral imagination. His insistence on constitutionalism, accountability, and the rule of law remains a reference point for the nation's ongoing democratic experiment.

History will undoubtedly continue to debate Odinga's political methods, alliances, and

near-successes. Yet his influence on Kenya's democratic architecture is indelible. He has expanded the boundaries of what it means to be an opposition leader in Africa, transforming opposition politics from mere resistance into a vehicle for reform and nation-building. He has humanized the struggle for democracy, reminding Kenyans that freedom is not an abstract ideal but a lived, collective experience grounded in sacrifice and moral purpose.

Raila Odinga's enduring significance lies in his embodiment of Kenya's democratic contradictions—the coexistence of triumph and frustration, hope and disillusionment, idealism and pragmatism. To many young Kenyans, he represents resistance against structural injustice; to the older generation, he remains the bridge between the independence struggle and the ongoing project of democratic deepening. In this sense, Odinga is both a symbol of continuity and change—a figure who connects the historical aspirations of liberation with the contemporary pursuit of good governance.

Whether history ultimately remembers him as *the president who never was* or *the democrat who always will be*, it is clear that Kenya's democratic evolution cannot be narrated without reference to Raila Odinga. His political life has redefined leadership as moral stewardship rather than mere power. His legacy reminds us that the true measure of a statesman lies not in tenure but in transformative impact—how deeply he reshapes the conscience of his nation.

For all his imperfections and controversies, Raila Amollo Odinga endures as the moral compass of Kenya's democratic journey—a figure whose commitment to justice and equality continues to inspire public faith in the unfinished promise of democracy. His legacy affirms a simple yet profound truth: that power may pass, but conviction endures. And in that endurance lies the true legacy of a democrat.



13th C. B. Madan Awards & Memorial Lecture

Date

Thursday, 11 December 2025

Venue

*Strathmore University Law School,
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We are pleased to announce the 13th edition of the C. B. Madan Awards and Memorial Lecture, an annual celebration of judicial excellence inspired by the life and thought of Justice C. B. Madan. This year's memorial lecture will be delivered by **Dr Willy Mutunga, former Chief Justice of Kenya**

Lecture Topic

**Growing Up with Pheroze Nowrojee:
The Lawyer as Shield and Torch**

Dr Mutunga's reflections draw on a lifetime of friendship, mentorship, and public service, offering a rare, personal window into the moral imagination and public spiritedness of Senior Counsel Pheroze Nowrojee. Expect a talk that blends memory with challenge and calls the legal community to courage, craft, and care.

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The awards commemorate the distinguished public service career of
CHIEF JUSTICE OF KENYA THE HON. MR JUSTICE CB MADAN

Raila Odinga: The confluence of the law and politics



By Paul Mwangi

I was in private practice in 2011 when an aide of Raila Odinga came to me and offered me the job as the Legal Advisor to the Prime Minister. By that time, I had twenty years of experience under my belt, had served as an editor-in-chief of the University of Nairobi law journal, a managing editor of the prestigious Nairobi Law Monthly, and was a renowned columnist and television political analyst.

But that was just about the only positive elements of my qualifications. In all other ways, my appointment was a risky political venture for both Raila Odinga and myself. The most outstanding issue was my ethnicity. We hailed from two competing ethnic communities that had a history of bad political engagements. Indeed, at that time, the country was in the midst of a coalition government between Raila Odinga as Prime Minister and Mwai Kibaki as President; a coalition that had very strong ethnic undertones from these two communities.

The coalition government was characterized by very acrimonious interactions and I was expected to advise the Prime Minister on the legal aspects of their relationship.



The Late Raila Odinga

The problem was the fact that I came from Mwai Kibaki's ethnic community. Mwai Kibaki was not only Raila's adversary in the coalition but also the Member of Parliament for Othaya where I trace my roots. And to crown it all was the other fact that at the time of my appointment, the country was headed for a general election in which the expected competitor to Raila Odinga was also from my ethnic community.

On one hand, I was as qualified a lawyer as was needed and, if I may say, a competent



The Late Raila Odinga with his long-time lawyer Paul Mwangi.

legal adviser with a national reputation that befitted the office. But on the other hand, I was a risky and in the eyes of many an unnecessary addition to Raila's political space in the most inopportune time.

I sat uncomfortably at this confluence of the law and Raila's politics and it did not take long for the first clash to arise. In July 2012, barely six months in office, my predecessor, the indefatigable Miguna Miguna, published a book entitled "Peeling back the mask" which was an insiders account of the people and politics around Raila Odinga. The book was not kind.

Many allegations were made against many of Raila's political allies and lieutenants. Published exactly one year to the general election, the book was treated as a political assault, with top political leaders in the anti-Raila factions mostly allied to Mwai Kibaki attending the launch.

Some very powerful persons who were Raila's political allies and lieutenants and who were targets of Miguna Miguna's poison

pen decided that some counter action was necessary.

Raila was on a foreign trip when the final decisions was arrived at that a defamation suit against Miguna Miguna must be filed. There were also people pushing an agenda that an indictment on a charge of criminal libel be preferred against the author.

My opinion was not sought by the planners. I would be right to say that it was viewed as irrelevant. This was a purely political matter.

I wrote an opinion to the Prime Minister and when he landed at Jomo Kenyatta International Airport, I walked to him as he sat at the government VIP lounge and handed it to him. He passed it on to his personal protection officer with instructions to give it to him when they got to the car.

My advice to Raila was that he must not sue. Firstly, I alerted him of the legal pitfalls he would face fighting it out in a defamation suit with an advisor who had served him for so many years. Secondly, I reminded him

that he was the Prime Minister and that unsavoury accusations came with the public nature of his office.

As you can imagine, my motivations came under scrutiny. I was accused of protecting Miguna Miguna and weakening Raila in the middle of a political war. But despite the overwhelming pressure from the political forces around him, Raila took my advice.

I was not really surprised that he did. Over the few months I had worked for him and over several years analysing his political and legal philosophy, I had come to understand he was always at the confluence of law and politics.

On one hand, he was a democrat and a reformist. He fought for fundamental rights and freedoms, for democracy, for constitutionalism in governance and for equity in development.

On the other hand, he was a political gladiator: a cunning strategist, skilled swordsman and ambitious general.

The law is almost always a great inconvenience to political manoeuvre. When the schemers in Shakespeare's Henry VI, Part 2, Act 4, Scene 2 said "First let's kill all the lawyers", they knew that the lawyers will stand against whatever nefarious schemes they were laying. Even now as then, the law and lawyers can be a real drag to political strategies.

I came to learn that Raila always followed the political strategies that factored in the law in their planning. If the legal imperatives were too outstanding, Raila would go with a political strategy that was primarily based on a legal scheme that worked towards his political objective.

If the political imperatives were too outstanding, he would go with the political strategy that was primarily based on political manoeuvring but that factored in the law.

For a politician to work with the law, he needs to understand it, its purpose and its workings. He must understand the legal



profession, the motivations of lawyers and judges and the philosophy of the rule of law.

This Raila did very well. He once wrote:

"The correlation between the Rule of Law and the health of the legal profession is undeniable. Lawyers are first and foremost the "Knights of the Rule of Law". They are commissioned to fight in the battles where bad people attempt to oust the law and rule by their passions; where legal processes, procedures and institutions are being knelt on by bad men, or manipulated to assist in the pursuit of nefarious objectives.

"On a wider perspective, the legal profession in the nursery in which the Judiciary is raised. Judges, on their part, are the custodians of the Rule of Law. It is their mandate to superintend the law and ensure that it always is effective in creating and maintaining a society where no person is above the law and that all persons enjoy equal protection of the Law.

"The first step at establishing and protecting the Rule of Law must therefore be addressing the health of the legal profession. There can be no Rule of Law without a healthy legal profession. Without lawyers fighting against those who promote bad governance and judges pro-actively ensuring that those battles are won, the citizen is left defenceless and at the tender mercies of unscrupulous politicians and merchants who ransack taxes and other public resources."

He was therefor always at ease seeking legal opinions and discussing how the law factored in his political work. The legal advice he valued was not the one that showed him how to sabotage the law. Rather, it was the one that showed him how to work with it to achieve his objectives.

Possibly the classic yet must controversial of such instances was the launching of peoples' assemblies in November 2017 following the disputed elections that year. The National

Super Alliance (NASA), the coalition that Raila had formed to run for the presidency, had resolved that it would not grant the new government legitimacy through recognition but would instead only recognize the new county governments which they had elected.

In respect of the national government, they wanted to chart a new direction that would excuse them from allegiance to the presidency that they said was imposed on them, first by the rigging of the first election, and secondly by the holding of a re-run despite the boycott by the NASA.

Raila turned to his lawyers. He wanted to know how to carry out this protest to the fullest extent and not fall outside the legal boundaries.

The answer we gave him was Article 1 of the Constitution. Article 1 (1) states that: "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution."

And Article 1 (2) then says: "The people may exercise their sovereign power either directly or through their democratically elected representatives."

We therefor advised him to convene the people at the counties to discuss how they wished to exercise their sovereign authority, now that they had not delegated it to the National Government. We advised that each supporting County Assembly pass a resolution establishing a People's Assembly, which would act as a constituent assembly, and begin the discussion on the delegation of their sovereign power.

All the delegates would then convene in Nairobi for a national peoples' assembly.

The movement was launched on 2nd November, 2017. By the end of that month, sixteen counties had established these assemblies. 1. Siaya County 2. Vihiga County 3. Homabay County 4. Kakamega County 5.



Busia County 6. Bungoma County 7. Migori County 8. Kisumu County 9. Mombasa County 10. Kitui County 11. Makueni County 12. Kilifi County 13. Kwale County 14. Machakos County 15. Mandera County 16. Kisii County

It was rebellion at its best: Belligerently political and faithfully constitutional; the perfect confluence of law and politics.

Many observers regarded these political moves as reckless and even criminal. What they did not know is that they were all seriously deliberated upon and that their approval by Raila was based on the confidence that we were on the right side of the law.

The rebellion culminated in us swearing in Raila as “The peoples’ president”, another rebellious move that had been validated as within the confines of the law.

The law was always a factor in Raila’s politics. Many times, it was one of his weapons. Other times, one of his tools. At no time in my fourteen years as his legal adviser did he ever dismiss the law as an

inconvenience to him. When he did not agree with the law, he sought to amend it.

It was apt that in the tribute by the Kenya Judiciary titled “A Statesman Whose Struggle and Sacrifice Gave Form to Kenya’s Constitutional Conscience”, the Chief Justice said in the foreword:

“In every nation’s journey, there arise figures whose convictions are so deeply bound to the ideals of justice that they leave an indelible imprint upon its constitutional soul. The late Rt. Hon. Raila Amolo Odinga, C.G.H., belongs in that rare company. His life’s work intertwined politics with principle, dissent with discipline, and power with moral restraint”

The epilogue to the tribute said:

“The Judiciary of Kenya honours him as one whose lifelong pursuit of justice helped define the nation’s legal identity, and whose faith in the rule of law will forever illuminate the path of our Republic.”

That was Raila Odinga, the quintessential confluence of law and politics.

The 2025 C.B. Madan

Citation for Hon. (Mr.) Justice Chacha Mwita

The C.B. Madan Awards Committee and the Platform Magazine are proud to announce that the 2025 C.B. Madan Prize awardee is Hon. (Mr.) Justice Chacha Mwita.

By honouring Justice Chacha Mwita with the C.B. Madan Prize 2025, we celebrate a jurist whose jurisprudence exemplifies the ideals that animated Justice C.B. Madan's life: an unswerving fidelity to the Constitution, a humane insistence on dignity, and an exacting commitment to the rule of law in service of the public good. In a distinguished tenure since his appointment to the bench in 2014, Justice Mwita has demonstrated, quietly, firmly, and with intellectual clarity, that constitutional promises are not ornamental texts but living commitments that guide and discipline the exercise of power.

Serving as a Judge of the High Court of Kenya, Justice Mwita has consistently protected fundamental rights and the constitutional architecture that secures them. He has acted decisively to restrain unlawful state action and legislative overreach; to vindicate freedoms of expression, media, and privacy; to require meaningful public participation and transparency in law-making and other governance processes; and to safeguard the separation of powers and due process. His jurisprudence has reinforced constitutionalism in practice: halting extra-legal surveillance measures; suspending and striking down provisions and directives that violate the Bill of Rights; insisting that public authority be exercised lawfully, and accountably; and affirming that even the most urgent policy aims must proceed within constitutional bounds. Across a range of legal areas, from



Justice Chacha Mwita

election law, administrative justice, access to information, to equality, his decisions have strengthened the integrity of Kenya's democratic project and deepened the culture of justification that our Constitution demands.

Justice Mwita's judicial opinions are marked by doctrinal rigour, principled reasoning, and a practical sensitivity to the lives the law touches. He reads statutes through the Constitution's lens; he demands fair process as a matter of right, not grace; and he treats limits on power as safeguards for all Kenyans, not impediments to governance. In moments of pressure, he has modeled judicial independence—showing that courage in defence of legality is itself a public service.

For giving real and enforceable meaning to constitutional rights; for fortifying good governance through transparency, accountability, and public participation; and for exemplifying the Judiciary's role as guardian of our constitutional order, Hon. (Mr.) Justice Chacha Mwita embodies the spirit and legacy of Justice C.B. Madan. In recognition of his exemplary service, we present him the C.B. Madan Prize 2025.

The 2025 C.B. Madan Student Awards – Citations



Caleb Kipruto Mutai
University of Nairobi

In the September edition of *Platform Magazine*, Caleb Kipruto Mutai published a commentary titled ***"Defining Present Injustice: Conceptualizing the Meaning of Present Land Injustices in the Constitution of Kenya and its Grasp by the National Land Commission."*** In this piece, he argues that Kenya's legal and policy focus on historical land injustices has overshadowed the pressing reality of present land injustices that continue to shape communities' lives and futures. While Article 67(2)(e) of the Constitution mandates the National Land Commission (NLC) to investigate both present and historical land injustices, public discourse and institutional practice have disproportionately emphasized historical claims. Through this commentary, Kipruto initiates a timely and necessary interrogation of this neglected dimension of the NLC's mandate. For this critical contribution, *Platform Magazine* awards **Caleb Kipruto Mutai the C.B. Madan Student Prize 2025.**



Darryl Isabel
Kabarak University

In the August edition of *Platform Magazine*, Darryl Isabel published a commentary titled ***"Realizing the Right to a Clean Environment: The Legal Struggle of Owino Uhuru Residents."*** The article critically examines the landmark Owino Uhuru case. The commentary explores how public interest litigation was deployed to challenge both state inaction and corporate impunity. Isabel highlights the transformative potential of constitutional litigation while underscoring the barriers to effective redress. Her analysis offers vital lessons on strengthening environmental governance, advancing environmental rights, and deepening constitutional accountability. For this incisive work, *Platform Magazine* awards **Darryl Isabel the C.B. Madan Student Prize 2025.**



Ayaga Max
University of Nairobi

In the May edition of *Platform Magazine*, Ayaga Max published a commentary titled ***"Pheroze Nowrojee SC's Enduring Charge: Teargas, Tyranny, and the East African Union's Fragile Egos of Human Rights Abuse."*** This piece offers a bold critique of the escalating authoritarian repression across East Africa, with a particular focus on Kenya, Uganda, and Tanzania. Using contemporary case studies, the commentary argues that the region is witnessing a systematic assault on civil liberties under the guise of democracy. Ayaga warns that unless citizens and institutions confront this creeping autocracy, fear will replace freedom and conformity will be enforced through state-sanctioned violence. For this courageous and critical intervention, *Platform Magazine* awards **Ayaga Max the C.B. Madan Student Prize 2025.**

Justice Enock Chacha Mwita's Haiti Judgment: A defining chapter in the story of Kenya's Constitution



By Caren Nalwenge Mudeyi



By Joy Cherono Kemboi

Abstract

Have you ever wondered what happens when a nation's goodwill clashes with its own laws? Picture Haiti, a Caribbean island ravaged by gang warfare, where daily life is a battle for survival, and now envision Kenya, volunteering to send police across oceans to restore peace. In 2023, President William Ruto's bold commitment to lead the United Nations-backed Multinational Security Support mission was hailed as a humanitarian milestone, yet it sparked a fierce constitutional inferno back home.¹ At the epicenter stands Justice Enock Chacha Mwita, whose electrifying landmark judgement in *Aukot & 2 others v National*



Justice Enock Chacha Mwita

Security Council & 5 others [2024] KEHC 336 (KLR),² which declared the deployment of police to Haiti unconstitutional due to the absence of a reciprocal agreement and a misinterpretation of “national forces” under Article 240(8) of the 2010 Constitution and sections 107 to 109 of the National Police Service Act, 2011.³ This judgement underscored the constitutional distinction between the Kenya Defence Forces and the National Police Service, affirming that only the KDF qualifies as “national forces”

¹Gettleman, J., & Specia, M. (2023, October 2). Kenya to lead international force in Haiti amid gang violence. The New York Times. <https://www.nytimes.com/2023/10/02/world/americas/kenya-haiti-police-un.htm>.

²*Aukot & 2 others v National Security Council & 5 others*; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR)(Constitutional and Human Rights) (26 January 2024) (Judgment).

³National Police Service Act (2011), Sections 107.



Kenya offered to lead a multinational police mission in Haiti. In March 2024 Kenya signed an agreement with Haiti to deploy up to 1,000 police officers as part of the Multinational Security Support Mission in Haiti (MSS). The mission was authorised by the United Nations Security Council (UNSC) via Resolution 2699 in October 2023.

for international deployments,⁴ while NPS operations are limited to domestic functions unless under specific reciprocal arrangements. This comprehensive article dissects the escalating Haitian crisis, marked by armed gangs controlling up to 90% of Port-au-Prince, over 5,600 deaths in 2024, mass displacement of hundreds of thousands, blocked aid routes, and acute hunger affecting six million people half the population with projections of further deterioration by mid-2026.⁵ This article addresses the gripping journey through Haiti's chaos, the courtroom drama of Mwita's unyielding verdict with an exhaustive focus on why the police deployment was fundamentally

unconstitutional the government's cunning pivots, and the mission's bittersweet legacy as of October 2025.⁶

Introduction: A constitutional clash on the global stage

What happens when a nation's international humanitarian aspirations collide with its constitutional safeguards? Haiti's spiral into anarchy following President Jovenel Moïse's 2021 assassination, with gangs dominating 80% of Port-au-Prince, prompted Kenya's President William Ruto to commit 1,000 police officers to lead the UN-authorized MSS mission in July 2023.⁷ Framed as a "mission for humanity," this initiative

⁴Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 145-148 <https://new.kenyalaw.org/akn/ke/judgment/kehc/2024/336>.

⁵United Nations World Food Programme. (2025, April 17). Record hunger in Haiti amid rising needs. United Nations Geneva. Retrieved from <https://www.ungeneva.org/en/news media/news/2025/04/105465/record-hunger-haiti-amid-rising-needs>.

⁶Kenya High Court. (2024, January 26). Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023 [2024] KEHC 336 (KLR). Kenya Law. <https://new.kenyalaw.org/akn/ke/judgment/kehc/2024/336/eng/2024 01 26>.

⁷Ruto, W. (2023, October 14). Statement by His Excellency President William Ruto on the participation of the National Police Service in the Multinational Security Support Mission to Haiti pursuant to UNSC Res. 2699 (2023). The Official Website of the President of the Republic of Kenya. <https://www.president.go.ke/statement-by-his-excellency-president-william-ruto-on-the-participation-of-the-national-police-service-in-the-multinational-security-support-mission-to-haiti-pursuant-to-uns-c-res-2699-2023-14th-october>.

drew on Kenya's peacekeeping experience but unleashed a domestic constitutional storm. Justice Enock Chacha Mwita's January judgement in *Aukot & 2 others v National Security Council & 5 others* not only invalidated the deployment but also invoked presidential immunity, striking President Ruto's name from the case.

This expanded article delves deeply into Haiti's crisis, Mwita's comprehensive verdict with detailed scrutiny of the unconstitutionality of police deployment to Haiti and one of the issues of contention in the case which was on presidential immunity, the government's adaptive responses,⁸ the mission's evolving impact through October 2025, and its enduring implications. We integrate X user insights, analyses from *Kenya's Constitution: An Instrument for Change* (2011) by Yash Pal Ghai and Jill Cottrell's,⁹ and the Judiciary's advocacy for purposive interpretation of the constitution.¹⁰ Mwita's decision, grounded in Articles 240(8),¹¹ 243(3),¹² and 143(2),¹³ reinforced the Constitution's demilitarization of police and immunity protections, questioning whether global goodwill can override legal constraints. As the mission transitions to the UN's Gang Suppression Force amid persistent challenges, this narrative underscores the judiciary's critical role in preserving constitutional integrity.

The crisis in Haiti: From assassination to international plea

Envision a country where gangs orchestrate daily terror, with kidnappings and massacres claiming over 5,000 lives in 2023 alone, as per UN documentation.¹⁴ Haiti's turmoil escalated after Moïse's assassination, empowering groups like G9 and G-Pep to control vast urban territories and extend into rural areas by 2025, worsening food insecurity for millions.¹⁵ Prime Minister Ariel Henry's unelected government appealed for global aid, resulting in UN Security Council Resolution 2699 (2023) greenlighting the MSS.¹⁶

Kenya's involvement was bold yet contentious, Ruto's pledge positioned Kenya as a trailblazer in cross-continental solidarity, leveraging its AMISOM¹⁷, and its South Sudan successes.¹⁸ Domestically, however, figures like Ekuru Aukot and the Katiba Institute criticized it as diverting resources from local threats like North Rift banditry and Al-Shabaab.¹⁹ Vanda Felbab-Brown's 2024 Brookings report cautioned against superficial interventions ignoring corruption and poverty, evoking MINUSTAH's failures, including cholera outbreaks and exploitation allegations.²⁰ X discourse was polarized, most netizens labelled it a 'reckless venture' prioritizing

⁸Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 163 <https://new.kenyalaw.org/akn/ke/judgment/kehc/2024/336>.

⁹Ghai, Y. P., & Ghai, J. C. (2011). *Kenya's constitution: An instrument for change*. Katiba Institute.

¹⁰In the Matter of the Interim Independent Electoral Commission [2011] eKLR, paragraph 86.

¹¹Constitution of Kenya (2010), article 240(8).

¹²Constitution of Kenya (2010), article 243(3).

¹³Constitution of Kenya (2010), article 143(2).

¹⁴United Nations Report of the Secretary-General on the Situation in Haiti (Jan 2024), S/2024/62, paras 2-3.

¹⁵Amnesty International. "Haiti: Gang Violence and the Human Rights Crisis." Amnesty International, 2025. <https://www.amnesty.org/en/projects/gang-violence-in-haiti/>.

¹⁶United Nations Security Council. (2023, October 2). Resolution 2699 (2023): Haiti (S/RES/2699 (2023)). United Nations. <https://digitallibrary.un.org/record/4022890>.

¹⁷Ministry of Defence (Kenya), Kenya in AMISOM (Operation Linda Nchi) (Government of Kenya, 2024) <https://mod.go.ke/kenya-in-amisom/>.

¹⁸United Nations Mission in South Sudan (UNMISS), Troop and Police Contributors: Kenya (United Nations, 2023) <https://peacekeeping.un.org/en/mission/unmiss>.

¹⁹Zamzam Jama, "Ekuru Aukot: Haiti Mission Is a Big Mistake for Kenya, Even Ruto Has Not Clarified It," Citizen Digital (3 October 2023) <https://www.citizen.digital/news/ekuru-aukot-haiti-mission-is-a-big-mistake-for-kenya-even-ruto-has-not-clarified-it-n328576>.

²⁰Vanda Felbab Brown, Haiti in 2023: Political Abyss and Vicious Gangs, Brookings Institution, 3 February 2023.

international prestige over Kenyan security, while other Kenyan netizens praised it for enhancing global standing.²¹ By October 2025, despite MSS efforts, gangs retained 80% of Port-au-Prince, with no recent Kenyan casualties confirmed, paving the way for the UN's Resolution 2751 establishing the 5,550-strong Gang Suppression Force²².

The Controversy: The unconstitutional deployment of the National Police Service

The controversy arose because the Executive's decision to deploy 1000 police officers to Haiti gave rise to fundamental questions concerning the scope of the National Security Council mandates²³ and the principle of Constitutional supremacy.²⁴ It is for these reasons that the petitioners invoked the High Courts's jurisdiction²⁵ to determine if the deployment effort, though motivated by international obligations²⁶, possessed the necessary constitutional and statutory foundation. Justice Mwita, in determining the constitutionality and legality of the deployment hinged his reasoning upon specific, intertwined legal issues, which form the structure of this analysis:

i. The distinction between 'Forces' and 'Service' (The Interpretation of Article 240(8))

To first of all understand who can be deployed and where they can be deployed to, it is important to look at the provisions

of article 240(8) of the Constitution whose objective and goal is to provide for the security organ(s) that could be deployed outside the country, by whom and under what circumstances. In that spirit, the article identified national forces for deployment out of the country and assigned the mandate to deploy those forces to the Council, subject to approval by Parliament. The forces could only be deployed out of the country for regional or international peace or other support operations.²⁷

Despite this, the words 'national forces' as used in the constitution are not explicitly defined and its interpretation must therefore adhere to the established principles of legal interpretation with the basic one providing that the ordinary meaning of the words to be applied while considering both the text and the broader constitutional context.²⁸ In this regard, in the three national security organs provided for in article 239, only Kenya Defence Forces were forces. The other two national security organs, National Intelligence Service and the National Police Service were services.²⁹

It was the opinion of the learned judge that from the reading of the constitutional text, one could not legitimately argue that national security organs were the national forces, even though the heads of the three security organs were members of the Council³⁰ and that one could not also argue that national forces included the National Intelligence Service and the National Police Service.

²¹Kim Heller, "Ruto's Haiti Intervention: A Costly Misstep for Kenya," IO L (17 October 2025) <https://iol.co.za/pretoria-news/opinion/2025-10-17-rutos-haiti-intervention-a-costly-misstep-for-kenya>.

²²United Nations Security Council. (2025, September 30). Resolution 2793 (2025). S/RES/2793 (2025). United Nations. <https://documents.un.org/doc/undoc/gen/n25/253/82/pdf/n2525382.pdf>.

²³Constitution of Kenya (2010), article 240(8).

²⁴Constitution of Kenya (2010), article 2(1), (4).

²⁵Constitution of Kenya (2010), article 165 (d) (i) and (ii).

²⁶Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 160.

²⁷Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 13.

²⁸Constitution of Kenya (2010), article 259.

²⁹Constitution of Kenya (2010), article 239(1).

³⁰Constitution of Kenya (2010), article 240 (2).



Article 240(8) of the Constitution of Kenya restricts the deployment of Kenyan forces abroad to the Kenya Defence Forces (KDF) under the National Security Council. The National Police Service (NPS), which is a civilian law-enforcement institution, cannot legally be deployed abroad under this provision.

Therefore, the mandate of the National Security Council under article 240(8) is strictly limited to deploying the Kenya Defence Forces and not the National Police Service or the National Intelligence Service.³¹ He further noted that when looking at the intention of the framers of the Constitution, had they intended for the Council to also deploy the NPS or NIS under this article, they would have stated the mandate clearly. Since the framers did not explicitly do that, the Council cannot deploy the National Police Service outside the country under article 240 (8) as that mandate is strictly restricted to the Kenya Defence Forces.³²

This interpretation is further reinforced by statutory provisions enacted by Parliament.

In the Kenya Defence Forces Act, the Council's authority to deploy the KDF under article 240 (8) is explicitly supported and even reiterated using the same language as the constitution.³³ On the other hand, Parliament did not import article 240 (8) into the National Police Service Act or the National Intelligence Service Act. This intentional omission further shows that the Constitution did not contemplate deployment of these services outside the country under that specific article.

The NPSA provides for the deployment of the NPS only in the defence of Kenya during an emergency and the procedure to be followed in such a scenario would be the one highlighted in Article 58 of the

³¹Ian Wafula, 'Kenya court blocks police deployment to Haiti' BBC News, 26 January 2024- <<https://share.google/9EaLmsN90ibwVjLye>> on 21 October 2025.

³²Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 17.

³³Kenya Defence Forces Act (No. 25 of 2012), section 18.

Constitution.³⁴ Other than in this context of internal defence during emergencies, the National Security Council has no mandate to deploy the NPS either locally or internationally.

Justice Mwita concluded by clarifying that the lack of authority for the Council under article 240 (8) does not preclude the deployment of the NPS outside Kenya entirely. Neither that article nor Section 6 (2) of the KDF Act forbids such deployments. Instead, Part XIV of the NPSA properly provides for the appropriate procedure, mechanisms and authority to be followed when deploying the NPS outside the country, which requires that the deployment is only to a reciprocating country.³⁵

Consequently, while the Council is not mandated by article 240(8) to deploy the National Police Service outside the country, such deployments are permissible under the specific procedures set out in Part XIV of the NPSA.

ii. Statutory compliance (reciprocity arrangement)

The only legal pathway for the National Security Council to internationally deploy the National Police Service is through a reciprocity agreement between countries as provided for in the National Police Service Act. It stipulates when and under what circumstances National Police Service can be deployed outside Kenya.

A ‘reciprocating country’ in this context means any country which the President may,

being satisfied that the law of that country contains provisions reciprocal to this Part and that Kenya is or shall be declared a reciprocating country for the purpose of those provisions, by notice in the *Gazette*, declare to be a reciprocating country.³⁶ Once this relationship has been established between two countries, the President may order a number of police officers to proceed to a reciprocating country for service upon application by the government of the reciprocating country and is intended for the purpose of assisting that country’s police service during a temporary emergency.³⁷ Moreover, this agreement allows for the President to apply to a reciprocating country to send its police officers to Kenya under similar reciprocal arrangements when circumstances require requesting for those officers.³⁸

In the present case, the petitioners approached the court seeking among other orders a declaration that Sections 107, 108 and 109 of the National Police Service Act which provide for mutual reciprocity arrangements were unconstitutional.³⁹ Their core argument was that, by allowing the deployment of the National Police Service outside the country under reciprocal arrangements, these sections were inconsistent with articles 240 (8) and 243 (3) of the Constitution which only allow the deployment of the Kenya Defence Forces outside Kenya.⁴⁰

It was the petitioner’s view that the sections of the NPSA were inconsistent with article 240(8) arguing that the later provided only for the Kenya Defence Forces which falls under the category of ‘national forces’ to be

³⁴The National Police Service Act (No. 11A of 2011), section 6(2).

³⁵Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 21.

³⁶The National Police Service Act (No. 11A of 2011), section 107.

³⁷The National Police Service Act (No. 11A of 2011), section 108 (1).

³⁸The National Police Service Act (No. 11A of 2011), section 109 (1).

³⁹Kimani Waweru, ‘Haiti and the Kenya Police’ The Kenya Socialist (2024) 8.

⁴⁰Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 10.

deployed outside the country. They further argued that the National Police Service is a national service whose operations are limited within Kenya.⁴¹ They contended that allowing deployment of the National Police Service outside the country violates this constitutional mandate.

In addition, the petitioners averred that the deployment to Haiti was unlawful because there was no existing reciprocity arrangement between Kenya and Haiti⁴² and that there was no formal request from the government of Haiti for the deployment of the NPS to that country even on reciprocal arrangement.⁴³ The Law Society of Kenya although arguing that the sections were constitutional, agreed with the petitioners view regarding the absence of the reciprocal arrangement between Kenya and Haiti and held the position that the proposed deployment is void.⁴⁴

In his analysis, Justice Mwita focused on whether sections 107, 108 and 109 of the NPSA were inconsistent with the Constitution as required by article 2(4) of the Constitution. In analysing article 243(3) which mandates the NPS to function throughout Kenya, he determined that the article does not state or imply that police officers cannot be deployed outside

Kenya.⁴⁵ The NPS serves throughout Kenya thus establishing its identity as a 'national service'. He pronounced that the petitioners had failed to show that this article prohibits deployment of the NPS outside Kenya.⁴⁶ In reading article 240(8), Justice Mwita opined that he found nothing⁴⁷ that prohibits the deployment of police officers outside Kenya.⁴⁸ In his judgement, the learned judge provided that the impugned sections providing for deployment under reciprocal arrangements are constitutional as they do not violate either articles 243(3) or 240(8) of the constitution of Kenya.

There being no existing reciprocal agreement between Kenya and Haiti at the time of the proposed deployment, the court determined that the attempt to deploy officers must fail⁴⁹ for lack of constitutional and legal foundation as there was no compliance with the requirements set out in Section 107, 108 and 109 of the National Police Service Act.⁵⁰

Presidential immunity: Safeguarding executive function amid constitutional accountability

Another essential issue in *Aukot & 2 others v National Security Council & 5 others* [2024] (KLR), centred on presidential immunity

⁴¹Constitution of Kenya (2010), article 243 (3).

⁴²Ken Opala, 'Delays and new court challenge threaten Kenya's police deployment in Haiti' Global Organized, 24 May 2024- <https://share.google/hlnvuZxbIN0HGelA7> > on 21 October 2025.

⁴³Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 11.

⁴⁴Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 57.

⁴⁵Caroline Kimeu, 'Kenya high court rules against plan to deploy hundreds of police to Haiti' The Guardian, 26 January 2024- <https://share.google/vLWtqtpGxJsZkcBo8> > on 21 October 2025

⁴⁶Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 114.

⁴⁷Guatam Bhatia, 'Text and Transformation: The High Court of Kenya on the Extraterritorial Deployment of the Police' Issues in Contemporary Constitutional Law, with a Special Focus on India and Kenya, 26 January 2024- <https://share.google/AYNegdxKwBUlsn0pn> > on 21 October 2025

⁴⁸Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 116.

⁴⁹Wallace Nderu, 'Respect Court Decision on Deployment of Police to Haiti' Daily Nation, 11 March 2024- <https://share.google/f4KF7e0jw3zoQwTVa> > on 21 October 2025.

⁵⁰Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 158.

under Article 143 of the Constitution of Kenya, 2010.⁵¹ The petitioners Dr. Ekuru Aukot, Miruru Waweru, and the Third way Alliance Kenya named President William Samoei Ruto as the 4th respondent in both his personal and official capacities,⁵² alleging that his public announcements and commitments to deploy Kenyan police to Haiti violated constitutional provisions on national security and police functions. Justice Enock Chacha Mwita, however, judged that the President could not be sued while in office for actions performed or omitted in an official capacity, striking Ruto's name from the proceedings to uphold the constitutional protections designed to shield the executive from undue litigation that could hamper governance.

Article 143(2) confers absolute immunity from civil proceedings during the President's tenure and clarifies that Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.⁵³ This clause ensures no court process issues against the President for official acts, thereby protecting the head of state from lawsuits that might impede executive duties and undermine the separation of powers. Justice Mwita emphasized the provision's purpose: to avert distractions from governance, while directing challengers to pursue remedies through institutional channels, such as suits against government entities or judicial review of executive decisions, rather than personal claims against the President. This aligns with broader constitutional



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jurisprudence, as seen in *Chepsiror v Ruto & another* (Civil Case E007 of 2024) [2025],⁵⁴ where the High Court dismissed a suit as unconstitutional under Article 143(2), reinforcing that civil proceedings cannot target a sitting President for official conduct.

In his purposive interpretation aiming to balance immunity with accountability Mwita drew on precedents like *Uhuru Muigai Kenyatta v Inspector General of Police & Others* (2022),⁵⁵ which affirmed Article 143's role in ensuring unimpeded governance, though it excludes criminal proceedings under international treaties per Article 143(4).⁵⁶ PLO Lumumba and Luis Franceschi,⁵⁷ endorse this equilibrium, contending that immunity averts frivolous suits paralyzing the executive but must not engender impunity, instead it channels scrutiny via mechanisms like judicial review under Article 165,⁵⁸ enabling proxy accountability through state organs. Mwita's

⁵¹Constitution of Kenya (2010), article 143.

⁵²Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, Para 51.

⁵³Constitution of Kenya (2010), article 143(2)

⁵⁴Chepsiror v Ruto & another (Commercial Civil Case E007 of 2024) [2025] KEHC 9194 (KLR) (27 June 2025) (Ruling).

⁵⁵Uhuru Muigai Kenyatta v Inspector General of Police & 6 others (Petition E001 of 2022) [2022] KEHC 187 (KLR), para 45.

⁵⁶Constitution of Kenya (2010), article 143.

⁵⁷Lumumba, P.L.O., & Franceschi, L.G. (2014). *The Constitution of Kenya, 2010: An Introductory Commentary*. Nairobi: Strathmore University Press.

⁵⁸Constitution of Kenya (2010), article 165.



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judgement embodied this by dismissing claims against Ruto yet permitting the petition to advance against respondents like the National Security Council and Attorney General. In *Kenya's Constitution: An Instrument for Change* (2011) by Yash Pal Ghai and Jill Cottrell, further contextualize this as part of the 2010 Constitution's transformative agenda, limiting executive privileges to foster democratic governance while preserving operational efficacy.

The scope of immunity: Insights from the Ndii (BBI) case and beyond

To further elucidate the scope of presidential immunity particularly its application to potentially unconstitutional executive actions Justice Mwita invoked the Supreme Court's landmark decision in *Attorney-General & 2 others v Ndii & 79 others*;

Dixon & 7 others (Amicus Curiae) [2022],⁵⁹ popularly known as the Ndii or Building Bridges Initiative (BBI) case. In Ndii, the Supreme Court examined whether President Uhuru Kenyatta could face personal liability in civil proceedings for spearheading constitutional amendments later deemed unlawful. The High Court and Court of Appeal had initially held that immunity under Article 143(2) does not extend to unconstitutional acts, imposing personal costs on Kenyatta to deter impunity and uphold the rule of law.⁶⁰ However, the Supreme Court overturned this, and stated that Article 143(2) provides absolute immunity from civil proceedings during tenure for official acts, including those subsequently invalidated as unconstitutional.⁶¹ The Court articulated that the intention of Article 143(2) is to immunize and protect the President from civil proceedings during their tenure in respect of anything done or not done under the Constitution⁶², emphasizing protection against litigation's distractions while allowing judicial declarations of invalidity through institutional suits.

Applying Ndii's principles in the Aukot case, Mwita differentiated direct personal suits against the President from broader challenges to executive policies.⁶³ He determined that Ruto's Haiti deployment commitments, as official exercises of power, were shielded by immunity, warranting his removal as a respondent. Yet, this did not immunize the actions themselves; the court proceeded to invalidate the deployment on substantive grounds, illustrating immunity's nuanced scope it safeguards the individual but not the act's legality. This echoes *Omtatah v*

⁵⁹Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (r).

⁶⁰Constitution of Kenya (2010), article 143(2).

⁶¹Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) para 565

⁶²Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) para 567

⁶³Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para74.

President of the Republic of Kenya (Petition E514 of 2023) [2025]⁶⁴, where the High Court reaffirmed that immunity does not bar scrutiny of presidential decisions via judicial review, nor does it extend to international crimes under Article 143(4), as in cases involving ICC obligations like the al-Bashir immunity ruling by the Kenyan Court of Appeal.

Scholarly analyses reinforce this tension. Dennis Abisai (2014),⁶⁵ critiques immunity's potential to foster executive overreach, advocating for strict judicial oversight to align with the 2010 Constitution's anti-impunity ethos. Similarly, the International Center for Transitional Justice's in Institutional Reform in the New Constitution of Kenya 2010 highlights Article 143(4)'s carve-out for treaty-based prosecutions,⁶⁶ limiting absolute impunity in international contexts. Recent scholarship, such as "Constitutional Amendments, Political Process, and the BBI Case in Kenya" (2025), examines Ndii's implications, arguing that while immunity enhances executive stability, it necessitates robust indirect accountability to prevent abuse.

The government's adaptive pivots: Navigating legal hurdles

In the wake of Justice Mwita's January 2024 judgment, which unequivocally declared the initial deployment plan unconstitutional due

to the lack of a reciprocal agreement and the misapplication of Article 240(8), the Kenyan government swiftly adapted its strategy. Undeterred by Justice Mwita Chacha's Judgement, President Ruto's administration pursued a bilateral agreement with Haiti's then-Prime Minister Ariel Henry. On March 1, 2024,⁶⁷ the two leaders signed a reciprocal policing agreement in Nairobi,⁶⁸ ostensibly fulfilling the requirements under sections 107 to 108 of the National Police Service Act. This move was criticized by opposition figures and civil society as a "cunning pivot" to circumvent the court's emphasis on reciprocity, with petitioners like Dr. Ekuru Aukot arguing it was a post-hoc rationalization rather than a genuine mutual arrangement.⁶⁹

Despite a subsequent legal challenge in May 2024 highlighting ongoing constitutional concerns, the government proceeded with deployment. The first contingent of 400 Kenyan police officers arrived in Port-au-Prince on June 25, 2024,⁷⁰ under the UN-authorized MSS mission per Resolution 2699 (2023). Additional deployments followed, with another 200 officers in August 2024 and 300 more by October 2025, bringing the total Kenyan presence to over 1,000 by early October.⁷¹ The government framed these actions as compliant with the law, leveraging the signed agreement and parliamentary approval obtained in November 2023 prior to the court's ruling but retroactively justified.

⁶⁴Omtatah v President of the Republic of Kenya (Petition E514 of 2023) [2025] KEHC 2613 (KLR) (Constitutional and Human Rights) (13 March 2025) (Ruling), para12.

⁶⁵Dennis Abisai, 'An Analysis of the Law on the Immunity of Heads of State with Specific Reference to Kenya' (2014) SSRN Electronic Journal <https://doi.org/10.2139/ssrn.3047663>.

⁶⁶International Center for Transitional Justice, Institutional Reform in the New Constitution of Kenya 2010 (ICTJ 2010) <https://www.ictj.org/publication/institutional-reform-new-constitution-kenya-2010>.

⁶⁷Reuters, Kenya, Haiti Sign Agreement Allowing Police Deployment (Mar. 1, 2024), <https://www.reuters.com/world/africa/kenya-haiti-sign-agreement-allowing-police-deployment-2024-03-01/>.

⁶⁸KBC Channel 1. "Kenya, Haiti Sign Agreement on Deployment of 1,000 Police Officers." YouTube, uploaded by KBC Channel 1, 1 Mar. 2024, [https://www.youtube.com/watch?v=\[insert-video-ID\]](https://www.youtube.com/watch?v=[insert-video-ID]).

⁶⁹Genga, A., & Ogada, G. (2023, November 29). Kenya dispatch: Government deployment of Kenyan police to gang-plagued Haiti provokes debate, division. JURIST. <https://www.jurist.org/news/2023/11/kenya-dispatch-government-deployment-of-kenyan-police-to-gang-plagued-haiti-provokes-debate-division/>.

⁷⁰Citizen TV Kenya. (2024, June 25). First group of 400 police officers leaves for Haiti [Video]. YouTube. [https://www.youtube.com/watch?v=\[insert_video_id\]](https://www.youtube.com/watch?v=[insert_video_id]).

⁷¹United Nations Security Council. (2023, October 2). Security Council authorizes Multinational Security Support Mission for Haiti for initial period of one year, by vote of 13 in favor with 2 abstentions (SC/15432). United Nations. <https://press.un.org/en/2023/sc15432.doc.htm>.



The Late Corporal Kennedy Mutuku Nzuve

Public discourse on X reflected deep divisions. Many Kenyans lambasted the deployment as a "colonial project," highlighting the irony of Kenyan police suppressing protests at home while enforcing order abroad.⁷² Conversely, a few Kenyans hailed it as enhancing Kenya's global standing, echoing sentiments of national pride amid international acclaim.⁷³ Yash Pal Ghai and Jill Cottrell, in *Kenya's Constitution: An Instrument for Change* (2011),⁷⁴ emphasize the Constitution's demilitarization of the police, arguing that extraterritorial roles must not undermine domestic functions, a principle seemingly stretched by these pivots.

The mission's bittersweet legacy as of October 2025

By October 21, 2025, the MSS mission, led by Kenya, had achieved modest successes but faced persistent challenges in curbing Haiti's entrenched gang violence. Kenyan forces secured key infrastructure, including Port-au-Prince's airport and major hospitals, enabling humanitarian aid delivery and reducing immediate threats in some areas.⁷⁵ However, gangs like G9 and G-Pep retained control over approximately 80-90% of the capital, with over 5,600 deaths reported in 2024 alone and projections of worsening conditions into 2026. Mass displacement affected hundreds of thousands, and acute hunger gripped nearly six million Haitians half the population exacerbated by blocked aid routes.⁷⁶

The mission's legacy is bittersweet, three confirmed Kenyan casualties as of October 2025 including Corporal Kennedy Mutuku Nzuve in a road accident and two others in clashes,⁷⁷ Limited impact on gang suppression led to its transition into the UN's 5,550-strong GSF under Resolution 2793 (2025), adopted on September 30, 2025. Over 800 Kenyan officers remain in Haiti, integrating into the GSF, with recent contingents bolstering the expanded force amid targeted operations as recent as October 17, 2025.⁷⁸ Vanda Felbab-Brown's 2024 Brookings report cautioned against superficial interventions, warning

⁷²Mariama Diallo, 'Kenyans Wonder Why Police Are Deployed to Haiti While Unrest Churns at Home' (Voice of America, 26 June 2024) <https://www.voanews.com/a/kenyans-wonder-why-police-are-deployed-to-haiti-while-unrest-churns-at-home-/7674952.html>.

⁷³Kenya secures global backing for expanded Haiti security mission." The Standard, 4 Apr 2025. <https://www.standardmedia.co.ke/article/2001531098/kenya-secures-global-backing-for-expanded-haiti-security-mission>.

⁷⁴Ghai, Yash Pal, and Jill Cottrell. *Kenya's Constitution: An Instrument for Change*. Nairobi: Strathmore University Press, 2011.

⁷⁵Arthur Frayer-Laleix, 'Kenya-led anti-gang mission in Haiti ends with mixed results' Le Monde (Paris, 2 October 2025) https://www.lemonde.fr/en/international/article/2025/10/02/kenya-led-anti-gang-mission-in-haiti-ends-with-mixed-results_6746015_4.html.

⁷⁶United Nations Human Rights Council. (2024, September 26). Situation of human rights in Haiti: Interim report of the United Nations High Commissioner for Human Rights (A/HRC/57/41). United Nations. <https://documents.un.org/doc/undoc/gen/g24/148/14/pdf/g2414814.pdf>.

⁷⁷Arthur Frayer-Laleix, "Kenya-led anti-gang mission in Haiti ends with mixed results," Le Monde (Paris, 2 October 2025) https://www.lemonde.fr/en/international/article/2025/10/02/kenya-led-anti-gang-mission-in-haiti-ends-with-mixed-results_6746015_4.html.

⁷⁸"Stay in Haiti or Come Home? Kenyan Officers Await Decision on Their Fate after UN Vote." Capital FM Kenya, October 3, 2025. Available at: <https://www.capitalfm.co.ke/news/2025/10/stay-in-haiti-or-come-home-kenyan-officers-await-decision-on-their-fate-after-un-vote/>.



Police are trained for domestic law enforcement, not military-style combat or international peace enforcement: Haiti's gang violence is heavily militarized and requires combat and paramilitary capability — the KDF is better suited.

that without addressing root causes like corruption, poverty, and political instability, such missions risk repeating failures like the UN's MINUSTAH, which was marred by cholera outbreaks and exploitation allegations.

Enduring Implications: Global ambitions vs. constitutional integrity

Justice Mwita's verdict, grounded in Articles 240(8), 243(3), and 143(2), not only halted the initial deployment but also reaffirmed the 2010 Constitution's transformative ethos of demilitarizing the police and limiting their role to domestic functions unless under strict reciprocal terms. As Ghai and Cottrell note in their 2011 commentary, the Constitution serves as an 'instrument for change,' promoting a national police service focused on community welfare rather than militarized international ventures.⁷⁹ Lumumba's call for purposive interpretation echoes here, urging

courts to view provisions in light of the Constitution's broader goals of sovereignty and accountability.⁸⁰

Yet, as Kenya integrates into the GSF amid ongoing Haitian chaos with over 800 officers still deployed as of October 21, 2025,⁸¹ Justice Mwita's stand raises a profound question, Can the pursuit of global goodwill justify bending domestic rules? The judiciary's role in upholding constitutional integrity remains crucial, ensuring that humanitarian aspirations do not erode the rule of law at home. In an era of increasing international engagements, Kenya's experience in Haiti serves as a cautionary tale for nations navigating the tightrope between global responsibility and national sovereignty, reminding us that true solidarity begins with fidelity to one's own legal foundations.

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⁷⁹Ghai, Yash Pal, and Jill Cottrell. *Kenya's Constitution: An Instrument for Change*. Nairobi: Katiba Institute, 2011.

⁸⁰Lumumba, P. L. O., and Franceschi, L. G. *The Constitution of Kenya, 2010: An Introductory Commentary*. Nairobi: Strathmore University Press, 2014.

⁸¹"Stay in Haiti or Come Home? Kenyan Officers Await Decision on Their Fate after UN Vote." Capital FM Kenya, October 3, 2025. Available at: <https://www.capitalfm.co.ke/news/2025/10/stay-in-haiti-or-come-home-kenyan-officers-await-decision-on-their-fate-after-un-vote/>.

The Advocates' Benevolent Association is the welfare arm of the Law Society of Kenya whose main objective is to assist distressed members.

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Justice Enock Chacha Mwita: The silent sentinel of justice and constitutional order



By Caren Nalwenge Mudeyi

Abstract

Hon. Justice Enock Chacha Mwita, elevated to Kenya's High Court in 2014, stands as a central figure in the nation's post-2010 constitutional era, embodying an unwavering commitment to constitutional supremacy, human rights, and transparent governance. From his humble roots in Migori County, Justice Enock Chacha Mwita's relentless pursuit of justice began with a stellar Bachelor of Laws at the University of Nairobi, igniting a passion for human rights. As a fearless advocate, he championed the marginalized, confronting systemic injustices with unwavering resolve.¹ Elevated to the High Court in 2014,² his bold rulings and judgements have reshaped Kenya's legal landscape, safeguarding constitutional rights and accountability. Mwita's inspiring journey from rural Kenya to judicial eminence captivates, embodying a legacy of courage and transformative justice.³ Justice Chacha Mwita's resilience,



Justice Enock Chacha Mwita

has driven reforms in privacy, taxation, and governance, while his principled reasoning continues to mentor jurists and shape Kenya's judicial landscape. Mwita's legacy as a champion of justice remains a beacon as Kenya approaches its 2027 elections.

¹Judiciary of Kenya, Annual Report 2014-2015 (Nairobi: Judiciary of Kenya, 2015), 32, http://kenyalaw.org/kenya_judiciary_annual_reports.

²Judiciary of Kenya, Annual Report 2014-2015 (Nairobi: Judiciary of Kenya, 2015), 32, http://kenyalaw.org/kenya_judiciary_annual_reports.

³The Judiciary. "BBI Bench, Winners of Judicial Integrity Award 2023." The Judiciary of Kenya, December 15, 2023. <https://judiciary.go.ke/bbi-bench-winners-of-judicial-integrity-award-2023/>.

Introduction

Picture a courtroom where the fate of a nation's privacy hangs in the balance or a bold judgement declared an international police mission unconstitutional.⁴ These are not fictional dramas but defining moments from the career of Hon. Justice Enock Chacha Mwita, a High Court judge whose decisions have consistently challenged entrenched power structures to protect ordinary Kenyans.⁵ In an era marked by rapid digital transformation and political volatility, Mwita has emerged as a resolute guardian of constitutional rights, often at great personal and professional cost. As Kenya navigates challenges from surveillance overreach to fiscal inequity, Mwita's jurisprudence rooted in the transformative 2010 Constitution offers a compelling narrative of justice in action. Drawing on Kenya's Constitution: *An Instrument for Change* by Yash Pal Ghai and Jill Cottrell's,⁶ which underscores the Constitution's shift from authoritarianism to accountability, this article explores Mwita's life, judicial philosophy, and landmark rulings, illuminating why he is both revered and contested.⁷

From Migori roots to the Bar: Forging a path in Law

In the vibrant, sun-drenched landscapes of Migori County, where cultural traditions weave through the fabric of daily life and socio-economic challenges cast long

shadows, Justice Chacha Mwita's story began. Born into a community rich in heritage yet grappling with inequality, Mwita's early years forged a fire in him a relentless drive for justice and equity that would define his remarkable career.⁸ Though his birth year remains a private detail, his journey from Migori's dusty paths to the hallowed halls of Kenya's High Court is a testament to grit, intellect, and an unwavering moral compass.

Mwita's legal journey kicked off at the prestigious University of Nairobi, where he earned his Bachelor of Laws (LL.B.) with a keen mind for unraveling complex legal puzzles.⁹ He sharpened his skills further at the Kenya School of Law, securing a Postgraduate Diploma in Law. By 1991, Mwita had earned his stripes and was admitted to the Bar, stepping into the rough-and-tumble world of private practice. Here, he cut his teeth on criminal, civil, and commercial litigation, quickly earning a reputation as a formidable advocate with a razor-sharp legal acumen.¹⁰

By 2006, Mwita's focus sharpened on a cause that would become his hallmark: human rights. In an era when Kenya wrestled with the twin demands of security and liberty, Mwita stood out as a beacon of balance. He took on pro bono cases, representing victims of torture, extrajudicial killings, and enforced disappearances cases that pitted him against powerful state machinery.¹¹ Fearlessly, he mediated

⁴Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law.

⁵Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR) (Constitutional and Human Rights) (26 January 2024) (Judgment).

⁶High Court declares directive requiring parents to pay school fees via eCitizen unconstitutional' AllAfrica (1 April 2025) <https://allafrica.com/stories/202504010226.html>.

⁷Ghai, Y. P., & Cottrell, J. (2011). *Kenya's Constitution: An Instrument for Change*. Nairobi: Katiba Institute.

⁸Katila, J. (2025) 'Chacha Mwita Profile: Age, Education, Career, Family', The Kenya Times, 23 January. Available at: <https://thekenyatimes.com/latest-kenya-times-news/chacha-mwita-profile-age-education-career-family-and-net-worth/>.

⁹Justice Chacha Mwita: What You Didn't Know About Him, GMCHACHA TV (15 January 2025) YouTube Video <https://www.youtube.com/watch>.

¹⁰Judiciary of Kenya, Hon. Justice Chacha Mwita (Judiciary of Kenya, May 2024) https://judiciary.go.ke/team_member/hon-justice-chacha-mwita/.

¹¹Janeffer Katila, "Chacha Mwita: Profile, Age, Education, Career, Family and Net Worth" (The Kenya Times, 23 January 2023) <https://thekenyatimes.com/latest-kenya-times-news/chacha-mwita-profile-age-education-career-family-and-net-worth/>.

between suspected terrorists and prison officials, advocating for fair treatment while ensuring accountability. His work extended to the margins, championing access to justice for those affected by HIV,¹² aligning his practice with the principles of dignity and accountability enshrined in Article 10 of Kenya's 2010 Constitution, as eloquently explored in *The Constitution of Kenya: A Commentary* by PLO Lumumba and Luis Franceschi.¹³

Mwita's versatility was staggering. From navigating the intricacies of bail and bond laws to mastering tax disputes and electoral battles, he built a formidable arsenal of expertise. Each case was a brick in the foundation of his judicial career, preparing him for the bench where his human rights ethos would blaze. His advocacy wasn't just about winning cases it was about reshaping a system to serve the ordinary Kenyan, ensuring the law wasn't a privilege for the elite but a shield for the vulnerable.¹⁴

A legacy in the making

Appointed to the High Court in 2014, Mwita carried his Migori-bred resilience and Nairobi-honed intellect into the judiciary. As Presiding Judge of the Milimani Constitutional and Human Rights Division, his rulings and judgements striking down unconstitutional laws,¹⁵ blocking elite-

driven constitutional amendments,¹⁶ and safeguarding public participation have cemented his legacy as a judicial titan.¹⁷ From Migori's roots to the pinnacle of Kenya's legal system, Justice Mwita's journey is a gripping saga of a man who turned personal resolve into a powerful force for justice, inspiring a nation to demand fairness in the face of power.

Ascending the bench

Elevated to the High Court in 2014 following rigorous vetting by the Judicial Service Commission, Mwita served in Kajiado, Kakamega, and Nairobi's Milimani divisions, including as Presiding Judge of the Constitutional and Human Rights Division. His tenure, encompassing constitutional petitions and commercial disputes, has faced intense scrutiny.¹⁸

In 2019, a baseless social media smear campaign falsely linked him to drug trafficking allegations swiftly debunked for lack of evidence.¹⁹ His resilience reflects themes in *Judiciary Chiefs in Hybrid Regimes: Kenya* by Victor Miyandazi and David M. Okubasu,²⁰ which commends judges upholding integrity amid political pressures. As a member of the National Council for the Administration of Justice's Civil Justice Reforms Committee, Mwita continues to drive systemic improvements.²¹

¹²Kenya National Commission on Human Rights, Chacha Mwita: An Advocate Who Believes Countering Terrorism Does Not Permit Violation of Human Rights <https://www.knchr.org>.

¹³Kenya Legal & Ethical Issues Network on HIV and AIDS. (2012). Advancing human rights and access to justice for persons living with HIV and AIDS in Kenya. KELIN. <https://www.kelinkenya.org/wp-content/uploads/2012/10/Advancing-Human-Rights-and-Access-to-Justice-for-PLHIV.pdf>.

¹⁴Franceschi, L. G., & Lumumba, P. L. O. (2014). *The Constitution of Kenya: A Commentary*. Nairobi: Strathmore University Press.

¹⁵Defenders Coalition, 'Chacha Mwita: An Advocate Who Believes Countering Terrorism Does Not Permit Violation of Human Rights' <https://defenderscoalition.org/hrd/governance/chacha-mwita-an-advocate-who-believes-countering-terrorism-does-not-permit-for-violation-of-human-rights>.

¹⁶Kenya Human Rights Commission v Attorney General & another [2018] KEHC 9656 (KLR).

¹⁷David Ndii & Others v Attorney General & Others, Petition No. E282 of 2020, High Court of Kenya (Constitutional & Human Rights Division) [2021] (BBI Consolidated Judgment, 13 May 2021).

¹⁸Universities Academic Staff Union v Ministry of Education & Others, Petition No. E543 of 2024, High Court of Kenya (Constitutional & Human Rights Division) [2024] (Judgment of Justice Chacha Mwita, 20 December 2024).

¹⁹Judicial Service Commission of Kenya (2014). Report on the Recruitment and Vetting of Judges for the High Court of Kenya.

²⁰Kenya Law Reports (2019). Judicial Service Commission Statement on False Allegations Against Hon. Justice Enock Chacha Mwita [2019] eKLR.

²¹Miyandazi, Victor, and David M. Okubasu. "Judiciary Chiefs in Hybrid Regimes: Kenya." *International Journal of Constitutional Law*, vol. 23, no. 1, 2025, pp. 240–268, <https://doi.org/10.1093/icon/zoab016>.



Prof Luis G. Franceschi

Judicial Philosophy: Purposive interpretation meets strategic activism

Justice Mwita's judicial philosophy is rooted in purposive interpretation, ensuring laws promote equity and justice, as emphasized in scholarly analyses of constitutional interpretation by Franceschi and Lumumba.²² Grounded in Article 2(1)'s doctrine of constitutional supremacy,²³ he employs the least restrictive means test under Article 24 to balance rights with state interests and champions robust public participation as mandated by Article 10, drawing on precedents such as *British American Tobacco Kenya Plc v Ministry of Health* [2019] eKLR.²⁴ His approach integrates rigorous legal reasoning with a commitment to societal fairness, ensuring that judicial decisions reflect the transformative spirit of the 2010 Constitution.

Mwita skillfully balances judicial restraint with strategic activism, prioritizing the protection of vulnerable populations while maintaining fidelity to legal principles. His openness to amicus curiae briefs, as explored in *Friend of the Court & the 2010 Constitution: The Kenyan Experience* (2018),²⁵ amplifies marginalized voices in the judicial process. His rulings resonate with *Constitutional Interpretation of Rights and Court Powers in Kenya*,²⁶ which advocates for vigilant judicial oversight to curb state overreach, reinforcing the judiciary's role as a guardian of constitutional values.

Landmark rulings and judgements: Where law meets life

What happens when a judge stands as the last line of defense against government overreach in a rapidly evolving world? Justice Enock Chacha Mwita's judgements and rulings offer riveting answers, weaving constitutional principles into real-world protections that shield Kenyans from unchecked power. His jurisprudence breathes life into the law, transforming abstract rights into tangible safeguards for citizens. This article explores his most impactful decisions, grounded in judicial precedents, statutes, and scholarly analyses, showcasing a pattern of principled activism that has reshaped Kenya's legal landscape.

(i) Reaffirming equality through education: Justice Mwita's stand against discriminatory policy

In December 2024, Justice Enock Chacha Mwita reaffirmed his place among

²²"Hon Justice Chacha Mwita." The Judiciary of Kenya, judiciary.go.ke/team_member/hon-justice-chacha-mwita/. (Accessed 18 Oct. 2025).

²³Franceschi, Luis G., and P.L.O. Lumumba. *The Constitution of Kenya: A Commentary*. 2nd ed. Nairobi: Strathmore University Press, 2019.

²⁴Constitution of Kenya (2010), Article 2(1).

²⁵*British American Tobacco Kenya Plc v. Ministry of Health*. [2019], eKLR, High Court of Kenya, www.kenyalaw.org/caselaw/cases/view/174683/.

²⁶Kerkerling, Chris, editor. *Friend of the Court & the 2010 Constitution: The Kenyan Experience and Comparative State Practice on Amicus Curiae*. Kenyans for Peace with Truth and Justice, 2017. IDLO, www.idlo.int/sites/default/files/pdfs/Friend-of-the-Court-the-2010-Constitution-the-Kenyan-Experience-and-Comparative-State-Practice-on-Amicus-Curiae-FINAL.pdf. (Accessed 18 Oct. 2025).

Kenya's most courageous defenders of constitutionalism through his ruling in *Kenya Human Rights Commission & others v Attorney General & others*,²⁷ where he struck down the government's Variable Scholarship and Loan Funding Model as unconstitutional, discriminatory, and enacted without public participation. He held that education is a public good, not a privilege, and that the State cannot abdicate its duty to fund higher education or classify students by income, school background, or age, as this offends the equality guarantee under Article 27 of the Constitution. The judgment reflected Mwita's enduring judicial philosophy of purposive interpretation guided by empathy and fidelity to the transformative spirit of the 2010 Constitution. It mirrored the same courage and clarity seen in his previous decisions protecting privacy, reproductive health, and fiscal accountability, underscoring that legality must always align with justice and that executive expediency cannot replace constitutional process. Through this decision, Mwita strengthened the judiciary's role as the guardian of human dignity and reminded the nation that the Constitution's promise of equality and fairness must remain more than words on paper.

(ii) Defending judicial independence: Justice Mwita's landmark nullification of the contempt of court act

In *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR, Justice Enock Chacha Mwita delivered one of the most significant rulings of Kenya's constitutional era by declaring the entire Contempt of Court Act, 2016 unconstitutional for violating Articles 10 and 118 on public participation and for undermining judicial independence. He held

that the Act's central aim, which was to limit the courts' power to punish for contempt, conflicted with the supremacy of the Constitution and the doctrine of separation of powers. In a detailed and principled analysis, Mwita affirmed that the authority to punish for contempt is inherent in the courts and not granted by statute, stating that without such power, courts would become "paper tigers with a mighty roar but no teeth to bite." His reasoning safeguarded the judiciary's capacity to uphold the rule of law, warning that a court stripped of its enforcement power would lose its moral and constitutional authority. Through this judgment, Justice Mwita fortified the independence of the judiciary, strengthened public confidence in the courts, and reaffirmed that the Constitution's promise of justice depends on the ability of judges to act freely, fearlessly, and without interference from any arm of government.

(iii) Privacy triumph: Striking down IMEI registration

In a decision that reverberated across Kenya's tech-savvy populace, Justice Mwita, in July 2025, struck down the IMEI registration directive mandating mobile device tracking. He declared it an unconstitutional enabler of mass surveillance, violating the fundamental right to privacy enshrined in Articles 24 and 31 of the Constitution of Kenya, 2010.²⁸ These provisions protect privacy and permit rights limitations only through proportionate, lawful measures. Mwita excoriated the Communications Authority of Kenya and Kenya Revenue Authority for failing to conduct a data protection impact assessment as mandated by the Data Protection Act, 2019. The notices are not grounded in any law and are therefore

²⁷Ghai, Yash Pal. "Constitutional Interpretation and the Role of Courts in Kenya's 2010 Constitution." *Kenya Law Review*, vol. 7, no. 1, 2019, pp. 1–20.

²⁸*Kenya Human Rights Commission & 3 others v Attorney General & 4 others* (Constitutional Petition E412 of 2023) [2024] KEHC 16369 (KLR) (Constitutional and Human Rights) (20 December 2024) (Judgment)

unconstitutional, he asserted in *Okiya Omtatah v Communications Authority of Kenya & 3 others*.²⁹ His judgment echoed Lawrence Mute's warnings of "Orwellian" surveillance risks in *Data Protection and Privacy Law in Kenya* (2022),³⁰ reinforced by the African Union Convention on Cyber Security and Personal Data Protection (2014). Building on *Nairobi Law Monthly v Kenya Electricity Generating Co.* [2013] eKLR,³¹ Mwita underscored the judiciary's critical role in checking state actions that erode fundamental rights, cementing Kenya's commitment to digital privacy in an era of growing government surveillance.³²

(iv) Fiscal Integrity: Tax waivers and deductions

Picture a banking giant sidestepping millions in taxes until a judge restores fairness. In April 2025, Mwita quashed a KSh 384.5 million stamp duty waiver granted to NCBA Bank under the Stamp Duty Act, Cap 480, citing procedural irregularities and lack of public interest justification.³³ Tied to the 2019 merger of NIC Bank and CBA Bank, the waiver was deemed to prioritize private gains over public welfare in *Okoiti v Cabinet Secretary, National Treasury &*

5 others (Petition E444 of 2024).³⁴ Two months later, in June 2025, Mwita declared the Social Health Insurance Fund (SHIF) 2.75% deductions unconstitutional,³⁵ labeling them double taxation in violation of Section 3 of the Income Tax Act. "Imposing additional deductions on gross income is unlawful," he ruled, emphasizing equity.³⁶ Both decisions leaned on *Republic v Kenya Revenue Authority ex parte Yaya Centre Ltd* [2002] eKLR,³⁷ which mandates tax exemptions align with constitutional fairness under Article 201. Mwita's decisions bolster fiscal accountability, curbing elite capture of public resources and fostering trust in transparent governance.

(v) Heritage defense: KICC privatization blocked

In a judgment that safeguarded a national icon, Mwita nullified key provisions of the Privatization Act, 2023 in September 2024,³⁸ for failing to meet the constitutional mandate of public participation under Article 10.³⁹ This decision protected the Kenyatta International Convention Centre (KICC) as a cultural heritage site under Article 11 and the National Museums and Heritage Act. "KICC is a national monument

²⁹*Katiba Institute v Communications Authority of Kenya & 2 others; Data Privacy and Governance Society of Kenya & 3 others* (Interested Parties); Ideate Policy Africa Limited (ITPA) (Amicus Curiae) (Petition E647 of 2024) [2025] KEHC 10568 (KLR) (Constitutional and Human Rights) (18 July 2025) (Judgment).

³⁰*Communications Authority of Kenya v Okiya Omtatah Okoiti & 8 others* [2020] KECA 754 (KLR).

³¹Kenya National Commission on Human Rights. (2023). The status of human rights in Kenya: 2022. KNCHR. <https://www.knchr.org/Handling/Annual%20State%20of%20Human%20Rights%20Reports/Annual%20State%20of%20Human%20Rights%20Report%202022.pdf> (Original work published 2022).

³²*Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others* [2013] eKLR, Petition No 278 of 2011 (High Court of Kenya, 13 May 2013).

³³*Katiba Institute v Communications Authority of Kenya & 2 others; Data Privacy and Governance Society of Kenya & 3 others* (Interested Parties); Ideate Policy Africa Limited (ITPA) (Amicus Curiae) (Petition E647 of 2024) [2025] KEHC 10568 (KLR) (Constitutional and Human Rights) (18 July 2025) (Judgment).

³⁴*Okiya Omtatah Okoiti v Cabinet Secretary, National Treasury and Economic Planning & 3 others* [2025] eKLR (High Court of Kenya at Nairobi, Petition No. [TBD] of 2023, Chacha Mwita J, 4 April 2025).

³⁵*Okiya Omtatah Okoiti v Cabinet Secretary, National Treasury and Economic Planning & 3 others* [2025] eKLR (High Court of Kenya at Nairobi, Petition No. [TBD] of 2023, Chacha Mwita J, 4 April 2025).

³⁶*Mweresa & 3 others v Social Health Authority & another; Law Society of Kenya & 3 others* (Interested Parties) (Petition E524 of 2024) [2025] KEHC 8365 (KLR) (Constitutional and Human Rights) (13 June 2025) (Judgment).

³⁷*Clarence Eboso & 3 others v Ministry of Health & Social Health Authority* (Petition E524 of 2024) [2025] KEHC [TBD] (KLR) (High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Chacha Mwita J, 23 June 2025).

³⁸*Republic v Kenya Revenue Authority ex parte Yaya Centre Limited* [2002] eKLR (High Court of Kenya at Nairobi, Judicial Review Application No. 839 of 2001, Visram J, 19 July 2002).

³⁹*Orange Democratic Movement Party & 4 others v. Speaker of National Assembly & 5 others* (Constitutional Petition E491 of 2023 & E010 & E025 of 2024 (Consolidated)) [2024] KEHC 11494 (KLR), delivered on September 24, 2024, by Justice Chacha Mwita.

that must be preserved,” Mwita declared, halting the sale of 10 other parastatals in *Law Society of Kenya v Privatisation Commission* (Petition E789 of 2023).⁴⁰ Aligned with *Making and Remaking Kenya’s Constitution* (2022) by Christina Murray’s, which emphasizes participatory governance,⁴¹ Mwita’s decision reinforced the judiciary’s role in shielding national heritage from precipitous executive actions, galvanizing public engagement in policy decisions.

(vi) Human rights vigilance: Enforced disappearances and media Freedom

How far will a judge go to defend free expression in turbulent times? Between July and September 2025,⁴² Mwita issued a habeas corpus order in the case of blogger Ndiang’ui Kinyagia, who resurfaced after a 13-day disappearance, restraining arbitrary arrests under Article 49.⁴³ Directing the DCI to justify the detention, he underscored protections against enforced disappearances in *Kinyagia v Directorate of Criminal Investigations* (Petition E456 of 2025).⁴⁴ In June 2025, Mwita suspended restrictive broadcast regulations by the Communications Authority, invoking Article 34’s guarantee of media freedom and lifting a ban on live protest coverage. “The directive is suspended with immediate effect,” he ruled in *Media Council of Kenya v Communications Authority* (Petition E321

of 2025), restoring signals amid national unrest. These rulings highlight Mwita’s resolute defense of civil liberties, ensuring state actions align with constitutional safeguards.

(vii) Halting the Haiti Mission: Executive Checks in Action

In January 2024, Justice E.C. Mwita of the Kenyan High Court delivered a fundamental judgment in *Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party)* [2024],⁴⁵ declaring the proposed deployment of Kenyan police officers to Haiti unconstitutional and invalid due to lack of a reciprocal agreement between Haiti and Kenya. The petitioners, including Ekuru Aukot, Miruru Waweru, and Thirdway Alliance Kenya, challenged the National Security Council’s authority to deploy the National Police Service abroad,⁴⁶ arguing it violated core constitutional provisions such as Articles 240(8) and 243.⁴⁷ Drawing on the doctrine of ripeness and exhaustion from precedents like *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013],⁴⁸ and *Attorney- General & 2 others v Ndii & 79 others* [2022],⁴⁹ Justice Mwita rejected claims of prematurity, affirming the High Court’s exclusive jurisdiction under Article 165(3)(d) to adjudicate constitutional violations or threats thereof. He struck out President William Samoei Ruto’s name

⁴⁰Constitution of Kenya (2010), Article 10.

⁴¹*Law Society of Kenya v Privatisation Commission & 5 others* (Constitutional Petition E789 of 2023) [2024] KEHC 13256 (KLR) (High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Chacha Mwita J, 31 October 2024).

⁴²Murray, C. (2022). Making and remaking Kenya’s Constitution. SAIFAC Occasional Papers Series, University of Johannesburg. <https://saifac.org.za/wp-content/uploads/2022/07/Murray-Making-and-Remaking-Kenyas-Constitution-2022.pdf>.

⁴³Kenya National Commission on Human Rights, Safeguarding Democratic Space Amid 2025 Protests (Nairobi: KNCHR, 2025), <https://www.knchr.org/Reports/Special-Reports/Safeguarding-Democratic-Space-2025-Protests.pdf>.

⁴⁴*Law Society of Kenya v Inspector General of Police & 4 others* (Habeas Corpus Application E567 of 2025) [2025] KEHC 7890 (KLR) (High Court of Kenya at Nairobi (Milimani Law Courts), Constitutional and Human Rights Division, Chacha Mwita J, 30 June 2025).

⁴⁵*Kinyagia v Directorate of Criminal Investigations & 4 others* (Constitutional Petition E456 of 2025) [2025] KEHC 8012 (KLR) (High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Chacha Mwita J, 2 July 2025).

⁴⁶*Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party)* (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law.

⁴⁷*Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party)* (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 55.

⁴⁸Constitution of Kenya (2010), Article 243.

⁴⁹*Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] KECA 445 (KLR).

due to presidential immunity under Article 143(2),⁵⁰ as echoed in cases like *Matindi & 3 others v President of the Republic of Kenya & 4 others* [2023], but proceeded to scrutinize the deployment's legality, underscoring the judiciary's role in upholding Article 3(1)'s obligation to defend the Constitution.

The unconstitutionality stemmed from a purposive interpretation of Article 240(8),⁵¹ which Justice Mwita held empowers the NSC to deploy only “national forces” construed strictly as the Kenya Defence Forces (KDF), including the Army, Air Force, and Navy for regional or international peace support, subject to parliamentary approval, aligning with the Kenya Defence Forces Act, 2012. In contrast, the NPS, established under Article 243 as a “service” functioning throughout Kenya, lacks express constitutional authorization for NSC-led foreign deployment, distinguishing it from “forces” as per scholarly analyses in Kenya’s Constitution: An Instrument for Change by Yash Pal Ghai and Jill Cottrell’s, which critiques executive overreach and emphasizes textual precision in security provisions. While upholding sections 107, 108, and 109 of the National Police Service Act as constitutional enabling reciprocal deployments to “reciprocating countries” under bilateral arrangements,⁵² consistent with principles in *Anarita Karimi Njeru v Republic* [1979] presuming statutory validity Justice Mwita ruled no such agreement existed with Haiti, rendering the executive's expansive view of “national forces” an invalid overreach under Article 2(4).⁵³

The judgment fortified judicial oversight in national security, prohibiting NPS

deployment to Haiti or elsewhere absent compliance with Part XIV of the National Police Service Act, and invalidated any related state actions as null and void, drawing on *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015],⁵⁴ for accountability in executive decisions. Justice Mwita acknowledged Kenya's noble intent to lead the UN Security Council Resolution 2699-backed Multinational Security Support mission but insisted international obligations must conform to domestic law, invoking the ICJ's advisory opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (1971) on supremacy of constitutional frameworks. Partly allowing the petition validating sections 107-109 without costs the ruling ignited debates on Kenya's global security role, reinforcing the Constitution's supremacy in curbing arbitrary power and leaving avenues for future reciprocal pacts, as analyzed in works like Ghai and Cottrell's critique of post-2010 governance.

(viii) Upholding reproductive health rights: Judicial limits on policy overreach

In October 2025, Justice E.C. Mwita issued a landmark judgment in *Mwikali & 3 others v Cabinet Secretary Ministry of Health & another; Kenya Obstetrical Gynecology Society & 2 others (Interested Parties)* [2025])⁵⁵, partially upholding a challenge to the National Reproductive Health Policy 2022-2032 by declaring one clause unconstitutional for introducing extraneous considerations in abortion decisions, while affirming the policy's overall validity and the adequacy of public

⁵⁰David Ndii & Others v Attorney General & Others, Petition No. E282 of 2020, High Court of Kenya (Constitutional & Human Rights Division) [2021] (BBI Consolidated Judgment, 13 May 2021).

⁵¹Constitution of Kenya (2010), Article 143(2).

⁵²Constitution of Kenya (2010), Article 240 (8).

⁵³*Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party)* (Petition E389 of 2023) [2024] KEHC 336 (KLR). High Court of Kenya, 26 Jan. 2024. Kenya Law, para 11.

⁵⁴Constitution of Kenya (2010), Article 2(4).

⁵⁵*Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] KEHC 6984 (KLR).

participation in its formulation. The petitioners, including Rachael Mwikali, Esther Aoko, the Ambassador for Youth & Adolescent Reproductive Health Programme (AYARHEP), and the Kenya Legal and Ethical Issues Network on HIV & AIDS, argued that the policy's development violated Articles 10,⁵⁶ Article 35,⁵⁷ and 232 on public participation and access to information, and infringed rights to life under Article 26,⁵⁸ health under Article 43, non-discrimination under Article 27, and children's rights under Article 53, alongside statutory provisions in the Health Act, 2017, Children Act, 2022, and Science, Technology and Innovation Act, 2013. Relying on precedents like *Robert N. Gakuru & others v Kiambu County Government & 3 others* [2014] eKLR and *Doctors for Life International v Speaker of the National Assembly & Others* [2006]⁵⁹, Justice Mwita emphasized that public participation must be “real and not illusory,” rejecting claims of inadequacy based on evidence of extensive stakeholder engagements from 2016 onward, including meetings with civil society, county governments, and parliamentary committees. He dismissed broader allegations of rights violations, underscoring the judiciary's role under Article 165(3)(d) in interpreting the Constitution purposively to balance individual rights with societal interests, as articulated in *Federation of Women Lawyers (FIDA-Kenya) & 3 others v Attorney General & 2 others* [2019] (KLR),⁶⁰ but struck down Clause 3.4.1 paragraph 12 for conflicting with Article 26(4)'s explicit focus on the mother's life and health in permitting abortions.⁶¹

The court's analysis centered on two core issues: public participation and substantive constitutional compliance. On participation, Justice Mwita applied a qualitative and quantitative lens from *Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR⁶², finding the Ministry's process spanning consultations from 2017, including Naivasha retreats in 2020-2021, Mombasa workshops in April 2022, and Nairobi validations sufficiently inclusive, despite petitioners' complaints of short notices and unshared drafts. He noted petitioners' own admissions of attending sessions and submitting views, aligning with *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006],⁶³ 12's emphasis on “reasonable opportunity” for input, and rejected access-to-information violations under Article 35 of the constitution and the Access to Information Act, 2016, as documents were demonstrably circulated. Substantively, the judgment dissected challenged clauses through a purposive interpretation per Article 259, affirming parental consent for minors' reproductive services under Clause 3.4.8 paragraph 8 as consistent with section 16(1) of the Children Act, protecting children's best interests (Article 53(2)) against risks like HIV, STIs, and abuse, without barring emergency access via children's officers. Dismissing discrimination claims in family planning (Clauses 2.3.3, 3.4.2) and assisted reproductive technology (Clause 3.4.11 paragraphs 5-6), Mwita held that references to “couples” or “families” were evidence-based and non-exclusionary, harmonizing with Article 45's family protections and section 6 of the Health Act's

⁵⁶*Mwikali & 3 others v Cabinet Secretary Ministry of Health & another; Kenya Obstetrical Gynecology Society & 2 others* (Interested Parties) (Petition 27 of 2022) [2025] KEHC 13908 (KLR) (Constitutional and Human Rights) (2 October 2025) (Judgment).

⁵⁷Constitution of Kenya (2010), Article 10.

⁵⁸Constitution of Kenya (2010), Article 35.

⁵⁹Constitution of Kenya (2010), Article 26.

⁶⁰*Doctors for Life International v Speaker of National Assembly and Others* [2006] ZACC 11 (17 August 2006).

⁶¹*Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others* (Interested Party) & *Women's Link Worldwide & 2 others* (Amicus Curiae) [2019] KEHC 6928 (KLR).

⁶²*Mwikali & 3 others v Cabinet Secretary Ministry of Health & another; Kenya Obstetrical Gynecology Society & 2 others* (Interested Parties) (Petition 27 of 2022) [2025] KEHC 13908 (KLR) (Constitutional and Human Rights) (2 October 2025) (Judgment), para 84

⁶³*Kiambu County Government & 3 others v Robert N. Gakuru & others* [2014] KECA 157 (KLR).

equity mandate, echoing non-discrimination principles in *Prinsloo v Van der Linde and Another* [1997]⁶⁴. He upheld HIV testing for pregnant women (Clause 3.4.4) as preventive, not coercive, under the HIV and AIDS Prevention and Control Act, 2006, and found no research interference in Clauses 3.4.13 and 4.2.3.8 paragraph 5, which align with the Director General of Health's duties under sections 16-17 of the Health Act without usurping the National Commission for Science, Technology and Innovation per the Science, Technology and Innovation Act, 2013.

The unconstitutionality arose from Clause 3.4.1 paragraph 12's mandate to ensure "both the mother and her unborn child receive the highest attainable standard of healthcare" in terminations, which Mwita ruled extraneous to Article 26(4)'s strict grounds emergency treatment or maternal life/health endangerment potentially creating ambiguity and barriers, as critiqued in *PAK and another v Attorney General & 3 others* [2022] (KLR).⁶⁵ This echoed international standards like CESCR General Comment No. 22 on reproductive health, prioritizing maternal autonomy, and scholarly analyses in *The Constitution of Kenya: An Instrument for Change* (2011) by Yash Pal Ghai and Jill Cottrell's,⁶⁶ which warns against policy dilutions of constitutional rights through vague expansions. Denying broader reliefs like policy suspension or mandatory review, the judgment reinforced constitutional supremacy under Article 2(4), nullifying only the offending phrase without costs in this public interest suit, per *Mitu Bell Welfare*

Society v Kenya Airports Authority & 2 others [2021] eKLR.⁶⁷ The judgements bolsters judicial checks on executive policy-making, affirming devolved health roles (Fourth Schedule) while urging alignment with laws like the East African Community HIV and AIDS Prevention and Management Act, 2012,⁶⁸ and may influence future reforms amid debates on adolescent access to reproductive health and intersex rights.

Recent Stands: Governance and education

Mwita's recent judgements and rulings continue to captivate, addressing governance with profound implications. In August 2025, he invalidated hospital music royalty tariffs under the Kenya Copyright Board, ruling collections from health facilities unconstitutional due to procedural flaws in *Mundia v Kenya Copyright Board & 5 others* (Petition E654 of 2025).⁶⁹ These spared hospitals millions while balancing artists' rights. In July 24 2025, Justice Mwita issued granted a conservatory order extending protections against Governor Kimani Wamatangi's arrest by the EACC,⁷⁰ pending the hearing and determination of the constitutional petition, dismissing objections from Deputy Inspector General Lagat in *Wamatangi v Ethics and Anti-Corruption Commission* (Petition E987 of 2025).

Legacy: A beacon amid controversy

In an era where judicial independence faces relentless pressure, Mwita's jurisprudence stands as a bulwark against executive overreach. Informed by Koigi

⁶⁴*Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006).

⁶⁵*Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

⁶⁶*PAK & another v Attorney General & 3 others* (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (24 March 2022) (Judgment).

⁶⁷Yash Pal Ghai and Jill Cottrell, *The Constitution of Kenya: An Instrument for Change* (Katiba Institute 2011).

⁶⁸*Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* [2021] eKLR (Supreme Court of Kenya), para143.

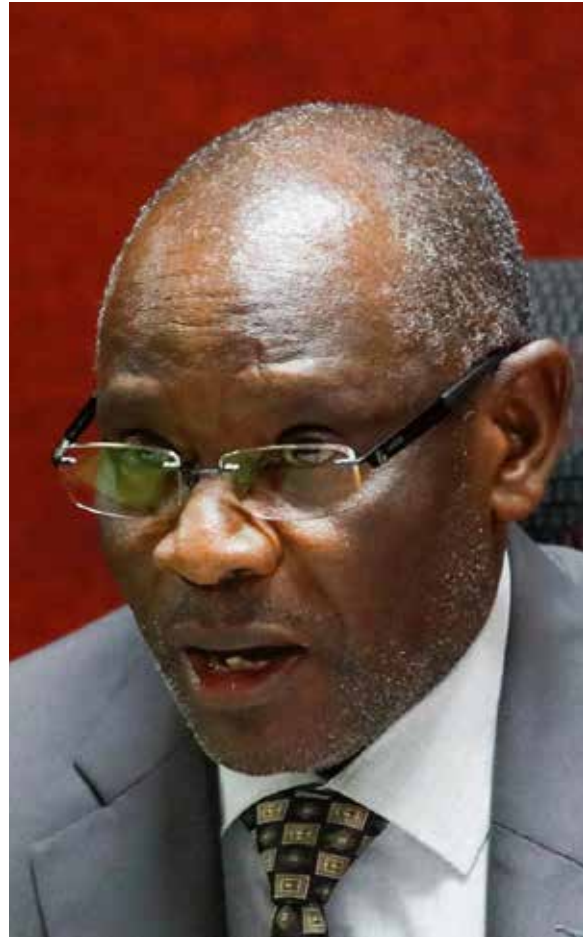
⁶⁹East African Community HIV and AIDS Prevention and Management Act 2012 (EAC Act No. 2 of 2012).

⁷⁰*Mundia v Kenya Copyright Board & 5 others; Kenya Dental Association & 6 others* (Interested Parties) (Petition E076 of 2024) [2025] KEHC 11144 (KLR) (High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Chacha Mwita J, 29 July 2025).

wa Wamwere's *Towards Genocide in Kenya: The Curse of Negative Ethnicity* (2008),⁷² additionally Walter Khobe's *The Judicial-Executive Relations in Post-2010 Kenya* (2016),⁷³ his work counters authoritarian tendencies. Despite baseless smear campaigns in 2019, his reforms in privacy, taxation, and governance have sparked widespread acclaim, as evidenced by vibrant discussions on X. As Kenya heads towards the 2027 elections, Mwita's principled constitutionalism, highlighted in the *Judiciary Watch Report (ICJ Kenya, 2024)*,⁷⁴ galvanizes jurists and citizens to champion accountability and good governance.

Conclusion: Justice pursued with humanity

From human rights advocate to High Court judge, Justice Mwita embodies the judiciary's transformative role. Harmonizing the 2010 Constitution with statutes like the Data Protection Act and reflecting the principles and ideals articulated in *The Cambridge Handbook of the Right to Freedom of Thought* (Kenya chapter, 2024),⁷⁵ he embodies a judicial philosophy grounded in reason, compassion, and respect for human dignity. In Mwita's courtroom, the law is a dynamic force shielding the vulnerable, challenging the powerful, and forging a more just Kenya in its democratic journey. His courtroom is a sanctuary where intellectual brilliance converges with deep compassion, wielding the law as a vibrant force to uplift the voiceless and hold the



Justice Mwita is known for upholding the Constitution as the supreme law, even when it challenges executive or political actions.

powerful to account. In Mwita's vision, justice transcends rulings and judgements, it becomes a transformative tide, forging a fairer, more humane Kenya in its bold democratic ascent.

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⁷¹Kenya.co.ke, High Court Extends Orders Shielding Governor Wamatangi in EACC Graft Case, by Mercy Sowek, 18 September 2025, <https://www.kenya.co.ke/news/116344-high-court-extends-orders-shielding-governor-wamatangi-eacc-graft-case>.

⁷²Wamatangi v Ethics and Anti-Corruption Commission & Another (Petition No. E987 of 2025) [2025] eKLR (High Court at Nairobi, 24 July 2025, Chacha Mwita J).

⁷³Koigi wa Wamwere, *Towards Genocide in Kenya: The Curse of Negative Ethnicity* (Nairobi: Longhorn Publishers, 2008).

⁷⁴Khobe Ochieng, Walter. "Judicial-Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?" In *Separation of Powers in African Constitutionalism*, edited by Charles M. Fombad, 286-299. Stellenbosch Handbooks in African Constitutional Law 1. Oxford: Oxford University Press, 2016.

⁷⁵International Commission of Jurists (Kenya Section), *Judiciary Watch Report 2024: Safeguarding Constitutionalism and Judicial Independence in Kenya* (ICJ Kenya 2024).

⁷⁶Miyandazi, Victoria, Miracle Mudeyi, and Harrison Okoth Otieno. 2025. "The Right to Freedom of Thought in Kenya." In *The Cambridge Handbook of the Right to Freedom of Thought*, edited by Patrick O'Callaghan and Bethany Shiner, 167-178. Cambridge: Cambridge University Press.

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The courage to break the mould: Integrity, leadership and law; an address to USIU university during its 2025 legal elevate



By Emeritus Chief Justice
David Maraga

Protocols

**Dr Victor Boiyo, Deputy Vice Chancellor,
United States International University;**

Dr Joyce Muchemi, Chairperson, SHSS;

**The USIU community; lecturers present;
USIU students;**

Invited guests, ladies and gentlemen,

**I'm deeply honored and delighted to be
with this morning on...**

**Thank you ... for the invitation to speak
at the USIU 2025 Legal Elevate Summit.**

1. Justice Dikgang Moseneke, the former Deputy Chief Justice of the Constitutional Court of South Africa popularised a simple but very fundamental phrase: "Clarity of purpose".
2. Today, I want to speak to you about why this phrase matters so much to me

and why it should matter also to you in everything you set out to do or whoever you wish to become. It ties well with the subject of my address today: "Courage to break the mould: integrity, leadership and the law".

3. And so, I start by asking, how often do you pose to think what is my purpose in this life; what is the purpose of the professional career I plan to have; what is my purpose in my family, in my community, at my place of work, and in my leadership role. Fundamentally, what is my purpose to the nation.
4. Clarity of purpose at any stage and at every stage, is what determines whether we are successful as students, as professionals and as leaders. It is what grounds us and makes us to be consistent regardless of the difficulties, barriers, hurdles, or risks we face along the way.
5. But today, I want to speak to you more specifically about clarity of purpose and leadership. I want to explain why, having clarity of purpose was so consequential to my tenure as Chief Justice. I want to explain why clarity of purpose was important in making the decision to run for president in 2027.

6. But let me begin by reflecting on the two fundamental words that are intended to orient my speech: integrity and law.

Integrity

7. Integrity is a word that has now been popularised by Chapter 6 of our Constitution. Instructively, Chapter 6 speaks of integrity in leadership. To begin, at its core, integrity is a very simple concept – that is – “the quality of being honest and having strong moral principles.” In law, integrity connotes “moral soundness, rectitude and steady adherence to ethical standards.” It is “soundness of moral principle and character, as shown by one person dealing with others” or in execution of ones’ duties.
8. Integrity is about fidelity and honesty – though, it is broader than honesty. Broader, because it is also about accountability to one’s conscience – which means that one will do the right thing regardless of whether they are being watched or expect that their actions will be reviewed. It is therefore about “probity”, “honesty” and “uprightness”. In other words, integrity is absolute honesty.
9. Our Constitution recognises the complexity of what integrity means – but appreciates that at core, it is about uprightness. That is why Article 73(2) insists on “personal integrity” not just professional integrity with Article 75 emphasising that integrity must be demonstrated in “public and official life, in private life, or in association with other persons”. It can’t be better expressed.
10. Let me now go to law, before I triangulate law, integrity and leadership.

Law

11. For most lawyers, law is about its mechanics – that is, understanding the black letter of the law, meaning of statutes, case law and even legal procedure. What we often miss is the transformative power of the law. When confronted by a case or a legal question, most lawyers and judges spend too much time trying to research and find out “what the law says” in respect of the issue at hand and not the potential of the law to resolve, in both fundamental and transformative ways, the problem the affected community or society faces. This type of approach to law is what I refer to as the mechanics or the mechanical approach to the law.
12. But in Kenya, we are exceptionally lucky. Our supreme law – the Constitution – looks at the law differently. It views the law and itself (the Constitution) as a tool for social transformation; as a tool for securing substantive justice; more importantly, as a tool that has the greatest potential to secure human dignity for all. This is why the Constitution frowns upon judges who obsess on technicalities at the expense of substantive justice; that is why the Constitution is obsessed with values and principles – values and principles of governance; values and principles of executive power; values and principles of devolved government; values and principles of public finance, among others. This over insistence on values and principles – shows the potency of the law as a tool not primarily for regulation, but one for transforming governance and more importantly, as a tool for providing people with a pathway to dignified existence.
13. I want to offer one other critical characteristic of our Constitution and the law. Our Constitution insists that

law is not an end by itself, it is a means to a purpose. Hence, Article 259 insists that the Constitution [and I would add any law made under it] must be understood in a manner that promotes its purposes, values and principles.

Let me now turn to clarity of purpose in leadership.

Leadership, courage and clarity of purpose

14. How then do we find the courage to break the mould? I return to where I started: how do we get the courage to break from the mould and offer leadership with integrity through law?
15. In 2016 I was honoured with the Office of the Chief Justice of Kenya and President of the Supreme Court and I retired in 2021. During my tenure, I faced many challenges and critical moments that called for an unwavering leadership. Three – relatively well-known examples – will illustrate some of those instances.
16. The first was in 2017, when Supreme Court that I presided over was called to determine the propriety of the presidential election. Adjudicating on a presidential election is an enormous and anxiety-inducing task. The country literally looks at the Court and specifically its seven judges (in the case of 2017, six Judges) to offer an existential direction for the Nation. In a closely contested election, the country is literally divided into two and whatever the Court does, there will be as many Kenyans disappointed with the Court's decision as those elated by it.
17. But, deciding against a sitting President – as happened in 2017 – means that the Court not only contends with half of a country that is discontent, but an entire and very powerful machinery of State around the President. Making the decision, to nullify the Presidential election demanded for the highest level of intellectual, moral and personal courage. It was a consequential moment of leadership.
18. The second concerns the advisory I gave to the President in 2020 to dissolve Parliament. Again, context is important here. Parliament is a consequential institution. Parliament – because it holds the power of budgetary purse – can bring the judiciary to its knees by starving it of operational funds. Relevantly, under Article 168(5)(a) the Speaker of the National Assembly is one of the members of the Tribunal that has powers to recommend the removal of the Chief Justice from office. Hence, going against Parliament puts the judiciary at financial risk and for me at that time under the risk of removal through possible vendetta. When, I wrote the Advisory Opinion I knew this too well and knew the risks I was taking but I had a constitutional mandate to discharge.
19. The third relates to numerous incidents when I had to confront Parliament and the Executive – including the Presidency – because of targeting individual judges or the entire judiciary for exercising its independence. Some moments meant that I stood alone – at times not even counting on the solidarity from the Judicial Service Commission.
20. But why and how did I do this – especially when there were always easier and convenient options of acquiescence? Because of my “clarity of purpose”.
21. Coming into the Office of the Chief Justice in 2016, I knew that I owed a duty of fidelity to the Constitution and the People of Kenya. My instructions in Articles 1 and 159(1) were clear: the power I wielded

was delegated to me by the people of Kenya to further the objects of the Constitution, to defend it and specifically to defend the rule of law. As a Christian, I had the additional duty to ensure that whatever I did was in accordance with God's will. With this clarity of purpose, it mattered less whether those I offended – by following the Constitution had more powers than me.

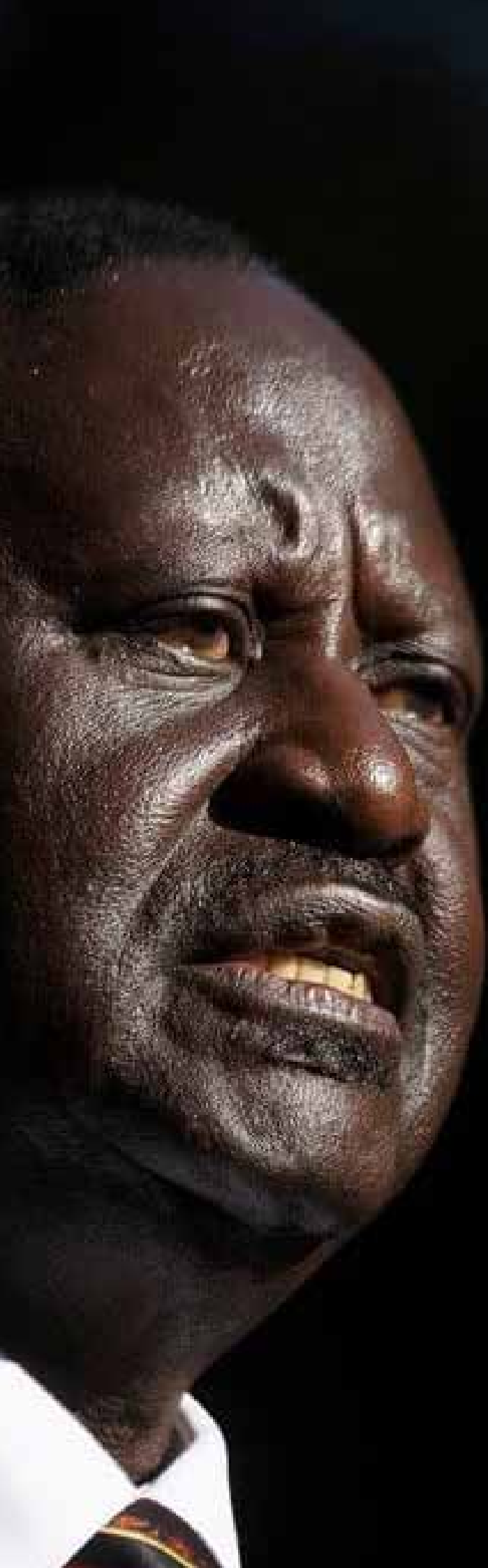
And now to the moment we are in.

22. Late last year – following the Gen Z protest and the extra-judicial killings, torture and abduction that happened to many, young Kenyans and friends constantly reached out to ask what I could do to help put our country back into the path of constitutionalism. I agonised over their invitation that I consider running for the office of President. After consultation and earnest prayer, I finally took the decision to run for President in 2027.
23. Again, while I have no doubts the journey to the presidency will be a tough and challenging one – because I seek to upset our deep-seated culture of transactional and extractive politics, I found the decision to run and the energy and resolve to stay the course an easy one – again, because I have clarity of purpose on why I want to be President: to restore to the Kenyans their country which has been stolen from them.
24. That purpose is rooted in the Constitution – and this is the reason I have indicated that my philosophy is Ukatiba, constitutionalism. Because, in many ways, the Constitution has the clarity of what courageous, value-driven leadership ought to do in all aspects of governance; whether on education, health, land reforms, public finance, devolution, or social welfare – to set this country back to the path of transformation and sustainable

progress. That clarity of purpose calls for leaders of integrity and courage who believe the Constitution is our true and constant North.

25. I have no doubt we can and will do this. And I take so much encouragement from the young people – from your generation – that has proven that we can end our petty politics and reset the country back into a path of nationalism and constitutionalism. I am encouraged by your generation's resolve not to give up on Kenya, but to fight to better it. I am happy and honoured that I can join and offer some contribution in that regard.
26. So, again, fellow Kenyans – we are lucky that our courage to offer leadership of integrity, rooted in the rule of law, is all scripted legibly in Kenya's 2010 Constitution. We just need to step up, in our small ways – whether it be registering and encouraging others to register to vote; volunteering to support value-based leaders; offering ourselves for office; having conversations with families why Constitution matters – why the unity and dignity of all Kenyans matters regardless of their stations of life; and why challenging the runaway Corruption and endless illegal acts of this regime is one of the greatest acts of patriotism and courage.
27. Let's go out - and with courage and clarity – do our part.
28. With those few remarks, I wish to appeal to the youth and all Kenyans who have not registered to vote to do without any further delay. Young people, the only way you can be heard is by registering and voting for the leaders who will champion your rights. So, please go and register to vote.

God bless you all and God bless Kenya.
15/10/25



FREEDOM WORK CONTINUES

**The last
liberation:
Raila
Odinga's
legacy
and the
unfinished
struggle for
a just Kenya**



By Ochieng Robert Obura

Introduction

Few political figures in contemporary African history have embodied both the promise and frustration of democratic struggle as fully as Raila Amolo Odinga. For more than four decades, Raila has occupied a paradoxical position in Kenyan politics: never the head of state, yet repeatedly the gravitational centre around which political discourse rotates. He has been detained without trial, accused of treason, declared unelectable, and yet relied upon to rescue Kenya from its recurring constitutional crises. His impact on Kenya's political evolution is undeniable, yet his ascent to ultimate leadership has been systematically thwarted. Raila's legacy therefore raises a key question: *Can a democracy truly call itself just when its most persistent champion of reform is consistently denied state power?*¹

This article examines Raila Odinga's political legacy from a critical perspective. It argues that Raila represents both the most consequential democratising force in post-independence Kenya, and simultaneously a case study in how entrenched political systems neutralise transformative threats without eliminating them. While his legacy includes undeniable achievements such as the 2010 Constitution and the institutionalization of devolution, it also reflects a broader structural failure: the inability of Kenya's political order to translate opposition energy into institutional change at the executive level. His life



Raila Odinga's detention in 1982 was a major event in Kenya's political history — one that shaped both his personal life and the country's pro-democracy struggle.

therefore marks not the conclusion of Kenya's democratic journey, but a stark reminder that the struggle for a truly accountable state remains unfinished.

From detention to defiance: The making of an opposition figure

Raila Odinga did not enter politics through privilege or ambition, but through persecution.² Detained in 1982 under President Daniel Arap Moi's authoritarian regime following allegations of involvement in a coup attempt, he spent nearly a decade in prison and solitary confinement.³ Unlike many African opposition leaders who transitioned into dissent for political convenience, Raila's identity as an opponent of state excess did not emerge from strategic calculation. It was forged through punishment, rather than through campaign speeches.⁴

¹Fukuyama, Francis. "Why is democracy performing so poorly?." *Journal of democracy* 26.1 (2015): 11-20.

²Jonyo, Silas O. *Politics of identity and ideology, political oratory of Raila Odinga and the manifesto of the Orange Democratic Movement (ODM)*. Diss. University of Nairobi, Kenya, 2012.

³De Baets, Antoon. "Extracts for Africa." (2005).

⁴Jonyo, Silas O. *Politics of identity and ideology, political oratory of Raila Odinga and the manifesto of the Orange Democratic Movement (ODM)*. Diss. University of Nairobi, Kenya, 2012.

When he re-emerged in the 1990s as part of the pro-democracy movement pushing for multi-party reforms, Raila's credentials were not merely political they were moral.⁵ This distinguished him from many of his contemporaries, including those who later opposed him. He entered electoral politics not as a populist outsider nor as a technocratic insider, but as a survivor of state repression with deep ideological conviction. This origin positioned him uniquely as both a symbol of resistance and as a complicated political actor determined to work within the system he once fought against.

Elections and betrayal: A recurring narrative

Raila's legacy is inextricably tied to a sequence of disputed elections.⁶ Four times 2007, 2013, 2017, and 2022 he stood at the brink of state power. Four times, the state's electoral mechanisms intervened to prevent his ascent.

The 2007 election, widely believed to have been manipulated against him, led to Kenya's deadliest period of post-election unrest.⁷ The subsequent power-sharing agreement, which installed Raila as Prime Minister, was both a validation of his political strength and a dilution of his victory.⁸ The 2013 election, declared in favour of Uhuru Kenyatta, introduced technological obfuscation ("server failure") as a method of electoral control. The 2017 election saw the Supreme Court, for the first time in African history, nullify a presidential election only for Raila to boycott the re-

run, recognising it as a procedural façade rather than a genuine competitive process.⁹ And finally, 2022, in which he ran with the backing of the very establishment he once resisted, resulted in an even more bitter denial: this time, defeat came not through insurgency against the system but through the system pretending to embrace him.

Taken together, these episodes illustrate not merely individual loss, but structural exclusion. Raila did not lose elections simply because opponents out-campaigned him; he lost because the state apparatus repeatedly recalibrated itself to ensure he would never govern. Whether through tallying disruptions, judicial expediency, technological opacity, or strategic alliances, the system preserved itself against him.

Democratic ideology and vision

Unlike many African leaders whose political platforms evolve according to convenience, Raila has consistently articulated a vision rooted in social democracy, constitutionalism, and state accountability.¹⁰ His advocacy for devolution, implemented through the 2010 Constitution, fundamentally altered Kenya's governance framework decentralising power away from the historically dominant executive and distributing both resources and decision-making to county governments.¹¹

He articulated a model of governance that rejected both ethnic chauvinism and neoliberal detachment. While often cast as a "Luo leader" by detractors, Raila's agenda engaged labour rights, land justice, and

⁵Murunga, Godwin R., and Shadrack W. Nasong'o. "Bent on self-destruction: The Kibaki regime in Kenya." *Journal of Contemporary African Studies* 24.1 (2006): 1-28.

⁶Stanley, Jason. *Erasing history: How fascists rewrite the past to control the future*. Simon and Schuster, 2024.

⁷Njeru, Jacqueline K. "A critical analysis of crisis decision making: the case of Kenya's post-election violence." (2012).

⁸Sihanya, Ben, Duncan Okello, and Karuti Kanyinga. "Mediating Kenya's Post-Election Crises: The politics and limits of power sharing agreement." *Tensions and reversals in democratic transitions: The Kenya* (2007): 653-709.

⁹<https://www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html>

¹⁰Framo, Mavis. "Explaining Variation in Democracy in West Africa: A Case Study of Ghana and Nigeria." (2024).

¹¹Khaunya, Mukabi Frederick, and Barasa Peter Wawire. "Devolved governance in Kenya; is it a false start in democratic decentralization for development?." (2015).

equitable resource distribution, elevating him beyond the confines of identity politics even when his critics attempted to reduce him to it. His public rhetoric consistently drew from Pan-African anti-colonial discourse, linking his personal struggle to broader continental questions about legitimacy, governance, and freedom.

Yet, this ideological clarity was also his political liability. In a system where coalition-building is typically transactional, Raila's insistence on policy over patronage deprived him of the elite complacency that smooths the path to power. He was too radical for the conservatives, too reformist for the power-hungry, and too honest for those who saw politics as a marketplace rather than a moral responsibility.¹²

Critiques and limitations

To present Raila as only victim is to miss part of the picture. He was also a flawed strategist at crucial moments. His handshake with Uhuru Kenyatta in 2018, though justified as a peace-building measure, alienated core support bases who perceived it as capitulation. His ambiguity regarding succession planning within his political movement weakened institutional continuity. Additionally, the perception of him as part of a dynastic elite given his lineage complicated his ability to fully capture populist legitimacy in an era where "anti-dynasty" rhetoric gained public traction.

Moreover, Raila often underestimated the psychological power of political fatigue.

Many in the electorate came to associate him not only with resistance but with perpetual unrest a perception his opponents weaponised by framing themselves as "stability candidates," even when their own records contradicted such claims.

Institutional legacy

Despite electoral setbacks, Raila's influence on Kenyan democracy is institutional and enduring. The 2010 Constitution, arguably his most consequential achievement, emerged from decades of agitation for change that he helped sustain. The implementation of devolution remains a structural safeguard against centralised authoritarianism.¹³ Additionally, the normalisation of street protest as legitimate political engagement once criminalised under Moi has become an accepted democratic instrument largely due to his persistence.¹⁴

In many ways, Raila Odinga did not just participate in Kenyan democracy he expanded its boundaries.¹⁵ He forced courts to evolve, compelled electoral bodies to modernise, and made accountability an unavoidable national discourse.¹⁶

Raila and the system: Why he was never allowed to rule

Ultimately, Raila Odinga's repeated setbacks in his quest for power cannot be attributed solely to electoral arithmetic.¹⁷ They are better understood within the broader context of Kenya's political sociology particularly the dynamics of trust, fear,

¹²Amulega, Shamilla. *Presidential Public Address as Power Maintenance: A Critical Discourse Analysis of Selected Speeches by President Uhuru Kenyatta*. Diss. Howard University, 2021.

¹³Olowu, Dele, and Dele Olowu. *Decentralization policies and practices under structural adjustment and democratization in Africa*. Geneva: United Nations Research Institute for Social Development, 2001.

¹⁴Ajwang, Fredrick. "Politization of National Security Institutions: Kenya's Historical Experience With Protests." *Available at SSRN 4943697* (2024).

¹⁵MUNENE, MACHARIA. "Contestation of democracy in Kenya." *The crisis of democratization in the Greater Horn of Africa: Towards building institutional foundations* 48 (2020): 180.

¹⁶Yadav, Vaishali. "From Chaos to Control: The Riveting Evolution of Political Party Regulations." *Jus Corpus LJ* 4 (2023): 756.

¹⁷Jonyo, Silas O. *Politics of identity and ideology, political oratory of Raila Odinga and the manifesto of the Orange Democratic Movement (ODM)*. Diss. University of Nairobi, Kenya, 2012.

and self-preservation among the elite. Raila came to embody ideals of inclusion, accountability, and institutional reform. Yet, for sections of the political class whose influence was rooted in long-standing systems of centralized control and limited transparency, his ascendancy posed deep uncertainties about the balance of power and access to privilege.

Rather than excluding him through overt repression or violence a course that could have risked national instability or even turned him into a unifying martyr the state appeared to adopt a subtler, more calculated approach. By allowing him to come tantalizingly close to power but never fully within reach, the system managed to retain his symbolic and mobilizing value while ensuring that the core structures of power remained intact. In this way, Raila's enduring presence in politics both challenged and sustained the equilibrium of Kenya's postcolonial statecraft.

Conclusion legacy of achievement, legacy of denial

Raila Odinga's legacy is neither that of failure nor triumph. It is one of unfinished justice.¹⁸ He succeeded in transforming the architecture of Kenyan democracy, but failed to personally ascend to its highest office. His life demonstrates both the power of resistance and the resilience of entrenched elite immunity.

To future generations, Raila's story offers both inspiration and warning. It proves that reform is possible but also that reformers must build systems, not icons. Kenya cannot continue to depend on singular figures to carry the burden of national conscience; institutions must now inherit



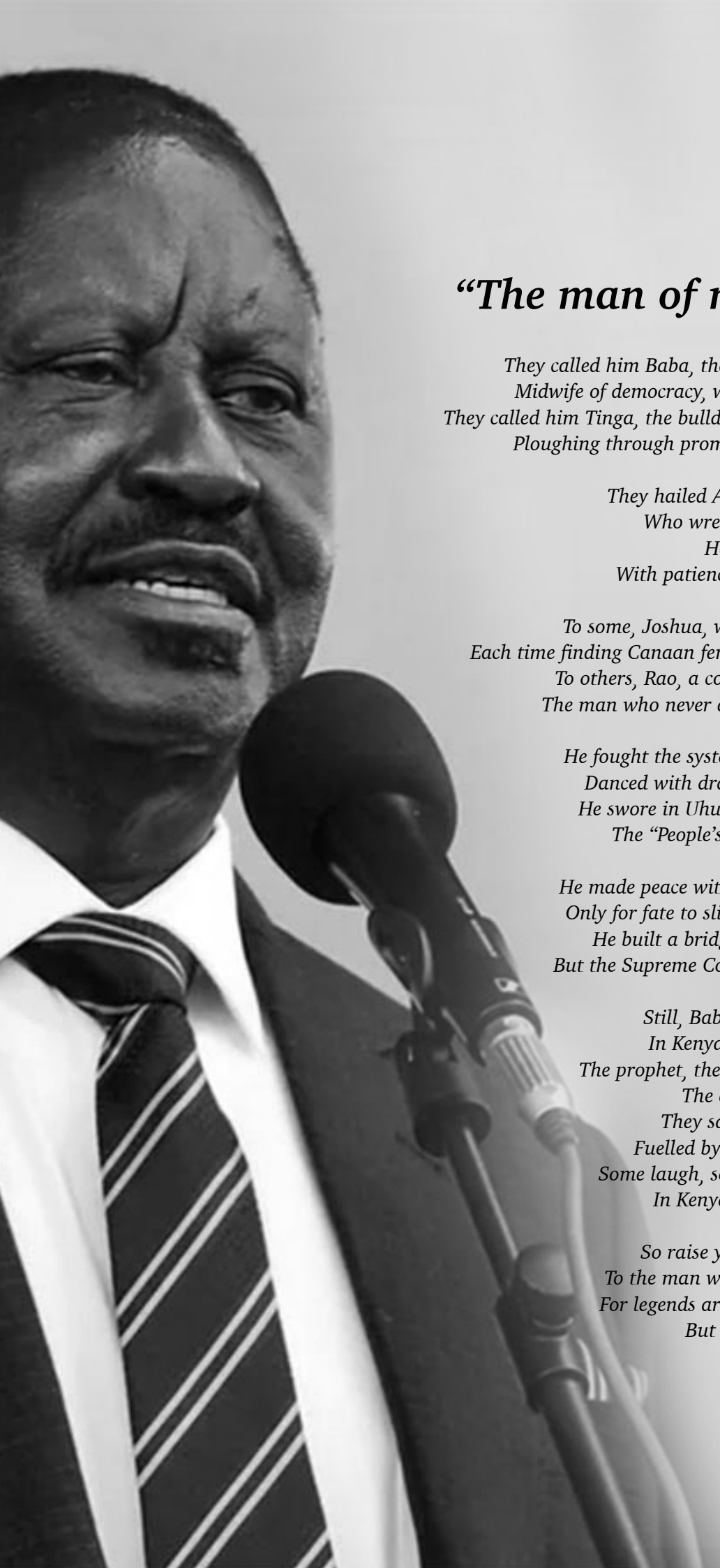
the work that Raila embodied.¹⁹ History will remember Raila Odinga not simply as a perennial candidate, but as the most influential unelected leader in Kenya's post-independence era. His impact is undeniable but his exclusion is equally unforgivable.²⁰ The last liberation therefore, is not on Raila's to finish. It is Kenya's to confront.

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¹⁸Mutie, Stephen Muthoka. "Ethics of Memory, Contested Pasts and the Poetics of Recall: the Kenyan Political Autobiography." *Postcolonial Text* 17.4 (2022).

¹⁹Breidlid, Anders. "Resistance and consciousness in Kenya and South Africa." *Frankfurt am* (2002).

²⁰Nasong'o, Wanjala S. *Kenya and the Politics of a Postcolony*. Vol. 1. Anthem Press, 2024.



“The man of many names”

*They called him Baba, the father of the nation unborn,
Midwife of democracy, whose child still cries at dawn.
They called him Tinga, the bulldozer, unbowed and unbroken,
Ploughing through promises, some kept, most spoken.*

*They hailed Agwambo, the mysterious one,
Who wrestled destiny and almost won.
He's Jakom, the chair of chairs,
With patience enough to outlast his hairs.*

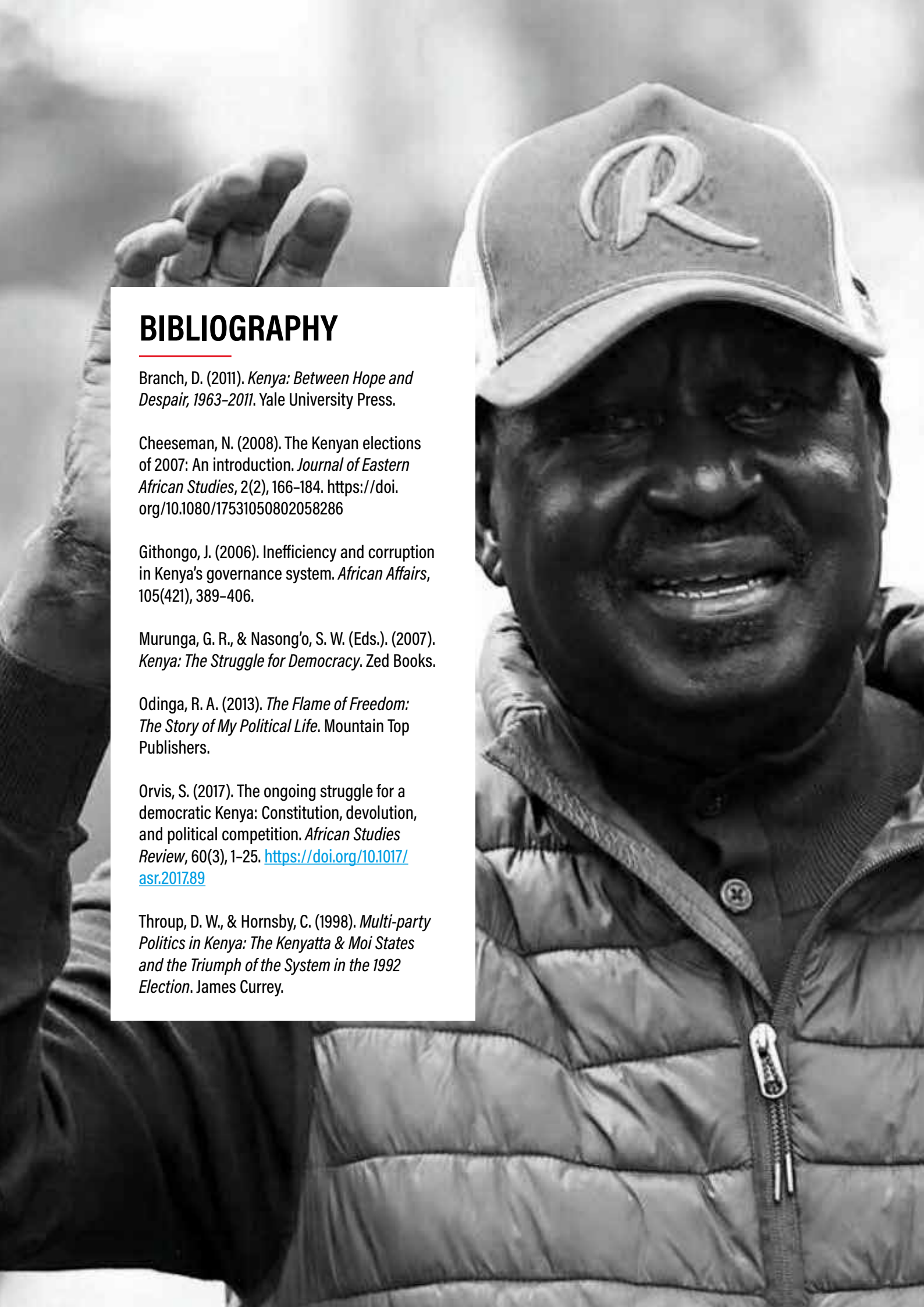
*To some, Joshua, who crossed the Jordan thrice,
Each time finding Canaan fenced, and the gate not so nice.
To others, Rao, a code name whispered in smoke,
The man who never quits just calls another stroke.*

*He fought the system, then befriended the same,
Danced with dragons, yet dodged their flame.
He swore in Uhuru Park what a day that was!
The “People’s President,” minus the clause.*

*He made peace with foes, hugged history’s hand,
Only for fate to slip through like dry river sand.
He built a bridge called BBI, grand in vision,
But the Supreme Court saw through the revision.*

*Still, Baba stands, a veteran of storms,
In Kenyan folklore, he takes all forms.
The prophet, the rebel, the reformer, the saint,
The artist of politics bold in paint.
They say he’s aged, yet never retired,
Fuelled by dreams the years never tired.
Some laugh, some curse, but all must admit
In Kenya’s story, his name won’t quit.*

*So raise your glass, whether foe or fan,
To the man who almost always almost ran.
For legends are written not just by winning,
But by refusing to stop beginning.*



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STATEMENT ON RESPECT FOR COURT ORDERS AND THE RULE OF LAW

My attention has been drawn to the deeply regrettable events that transpired today during the ongoing Kenya National Drama Festival in Nakuru, involving students from Butere Girls High School.

It is particularly disturbing that these events occurred against the backdrop of clear and binding court orders issued by the High Court sitting in Kisii, in *Anifa Mango v Principal, Butere Girls High School & 3 Others, Petition No. E006 of 2025*. In that decision, delivered on 3rd April 2025, the High Court directed the school administration and the organisers of the Kenya National Drama Festivals to facilitate and ensure that 50 students of Butere Girls High School participate in and perform their play titled *'Echoes of War'* at the national drama festival.

What transpired today raises grave concerns about the extent to which those orders of the High Court were respected and complied with. It is a foundational principle of our constitutional democracy that all persons and institutions — including State organs, State officers, and public officials — are bound by and must obey court orders. Defiance of court orders not only undermines the authority of the courts but also poses a serious threat to the rule of law, which is the bedrock of our society.

Even more troubling are reports of the use of force and violence against school-going children in the course of these events. Such actions raise serious constitutional questions about respect for the dignity, rights, and welfare of children, who enjoy special protection under the Constitution, the Children Act, and international human rights instruments.

I wish to make it clear to all state organs, state officers and public officers that respect for court orders is not optional. It is a constitutional imperative that safeguards our collective commitment to the rule of law, and constitutionalism. Any deviation from this path erodes public confidence in our institutions and poses a danger to our democracy.

I therefore condemn today's events as they deviate from path of the rule of law and constitutional duty to protect the rights of all — especially our children — in every sphere of public and private life.

Hon. Justice Martha K. Koome, EGH
Chief Justice and President of the Supreme Court of Kenya



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5th Volume of the EALS Human Rights and Rule of Law Journal

Introduction

The East Africa Law Society (EALS) is inviting members to submit manuscripts for consideration for publication in the 5th volume of the EALS Human Rights and Rule of Law Journal.

This journal was created to deliver the Society's mandate of monitoring the state and progress of respect and promotion of human rights and Rule of Law in the East African region. In fulfilling this mandate, EALS also oversees the implementation of decisions of regional courts, conduct of public interest litigation initiatives, publishing Rule of Law reports, issuing public statements against abuses of human rights and Rule of Law, making policy and legal reform recommendations to the EAC and state governments and undertaking general advocacy on human rights and rule of law.

The Journal among others aims at providing critical contemporary analyses of the state and progress of respect for and promotion of human rights and Rule of Law in East Africa. It will thus be instrumental in improving understanding of region's state of human rights as well as Rule of Law concerns and developments which will in turn inform better and more effective Policy discourse and other actions for change.

Special Edition to Celebrate 25 Years of the East African Community

On 30th November 1999, the Treaty for the Establishment of the East African Community (EAC) was signed, and on 7th July 2000, it entered into force, officially launching the modern EAC. The year 2024 marked 25 years since the re-establishment of the EAC, making it a crucial moment to reflect on its progress, challenges, and future prospects.

The EAC was revived with the ambition of fostering regional integration, economic cooperation, and legal harmonization to support peace, stability, and development in East Africa. Since then, the bloc has expanded to include eight member states, launched key economic frameworks such as the Customs Union, Common Market, Monetary Union Protocol, and played a pivotal role in regional trade, governance, and dispute resolution.

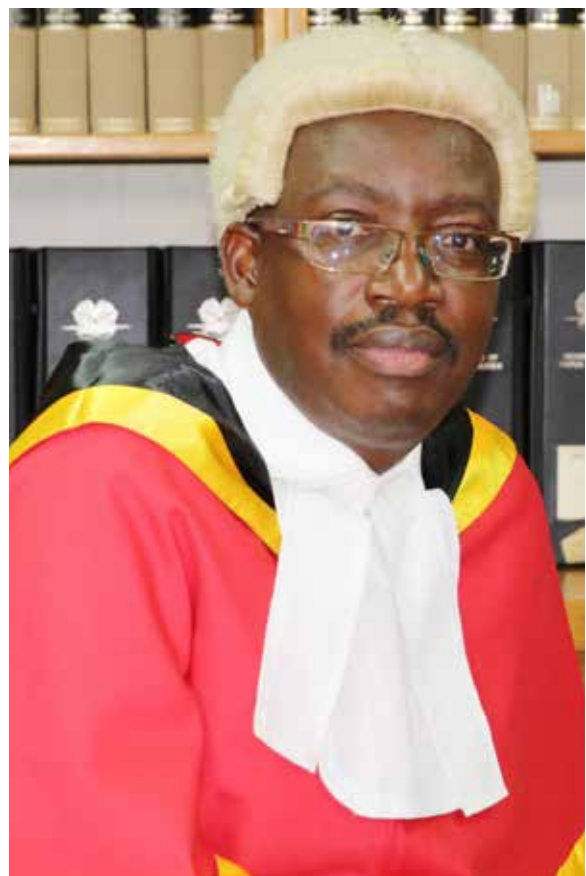
The Sacred Calling of Judging: Reflections on Justice Oagile Bethuel Key Dingake's Jurisprudential Philosophy



By Evans Ogada

“Being a judge is not a job; it is a calling. Being appointed a judge is akin to priesthood. Today, the idea that judgeship is akin to priesthood subsists because of the belief that judges epitomize righteousness, fairness, and justice. Acceptance of the calling is like entering a monastery, a place of worship occupied by monks living under religious vows.” — Justice Oagile Bethuel Key Dingake

Justice Oagile Bethuel Key Dingake's evocative words situate the office of the judge within a moral and almost spiritual framework. His analogy of judgeship as “priesthood” and the judiciary as a “monastery” extends beyond rhetorical flourish—it articulates a profound philosophy of judicial ethics and the moral consciousness that ought to animate the administration of justice. In this vision, judging is not a career but a vocation—an enduring commitment to fairness, truth, and righteousness. In contemporary judicial discourse, where debates about independence, accountability, and legitimacy abound, Justice Dingake's reflection reminds us that the authority of the judiciary derives not solely from constitutional mandate but from the moral integrity of those who interpret it. The notion that judges



Justice Oagile Bethuel Key Dingake

“epitomize righteousness” restores the ethical dimension of justice—an element too often eclipsed by proceduralism and institutional formalism.

Justice Dingake's intellectual legacy, spanning Botswana, Papua New Guinea, and several international tribunals, reflects a jurisprudential compass oriented toward a universal ethical vision of law. Justice Oagile

Bethuel Key Dingake is a distinguished jurist of global repute, currently serving on the Supreme and National Courts of Papua New Guinea—the first African to hold such a position. He also sits on the Residual Special Court for Sierra Leone, appointed by the UN Secretary-General in 2013, and has served on the Seychelles Court of Appeal since 2020. A former judge of Botswana’s High Court and Industrial Court, Justice Dingake has combined judicial service with an academic career, having taught law at the University of Botswana and held visiting and honorary positions at several universities, including Cape Town, Pretoria, and James Cook University in Australia. He holds a PhD in Law from the University of Cape Town, an LLM from the University of London, and an LLB from the University of Botswana, alongside postgraduate qualifications in international development from the University of Oslo and the London School of Economics. In 2019, he became the first African to serve as the William L. Beatty Jurist in Residence at Southern Illinois University. His scholarship and leadership in law and human rights have earned him international recognition. He currently presides over the Africa Regional Judges Forum on HIV/TB, Human Rights and the Law, and co-chairs the African Think Tank on HIV, Health, and Social Justice.

An accomplished author, Justice Dingake has written extensively on law and justice, with notable works including *Judges, Lawyers, and In Pursuit of Justice*.

His conceptualization of the judge as a moral custodian aligns with the tradition of transformative constitutionalism, which views law as a living instrument of social justice rather than a static set of rules. In likening judicial appointment to priestly vocation, Dingake underscores the self-discipline, humility, and devotion to truth required of the judicial role. Just as a priest renounces worldly temptations to serve a higher spiritual calling, a judge must renounce partisan loyalties, personal



Mutunga is remembered as the architect of Kenya’s modern judiciary — one that is people-centered, independent, and grounded in constitutional values. He nurtured a new generation of judges committed to social transformation through law.

ambition, and political seduction to serve justice impartially. This ethical self-restraint is the cornerstone of judicial independence and the ultimate source of public trust in the courts.

For Justice Dingake, the law’s legitimacy lies in its moral content and human relevance. He envisions the judiciary as a guardian of human dignity and social harmony. In doing so, he echoes jurists such as Justice Albie Sachs, who described the judge’s role as “a continuous dialogue between the heart and the law,” and Chief Justice Willy Mutunga, who advanced the ideal of a transformative judiciary in Kenya—one grounded in values of human rights, equity, and public

accountability. The “monastery” metaphor further captures the solitude of judging—the introspective discipline that accompanies judicial vocation. The judge, like the monk, must dwell in contemplation, insulated from public passions yet not indifferent to social realities. This delicate balance between detachment and empathy represents the moral burden of judicial office. It demands not merely intellectual rigour but also moral imagination—the ability to perceive the human consequences of legal decisions.

Within the African context, Justice Dingake stands among a new generation of jurists committed to redefining the role of the judiciary in postcolonial governance. His writings, judgments, and lectures consistently emphasize that the judiciary must serve as a moral bulwark against corruption, authoritarianism, and injustice. He urges judges to interpret constitutions and statutes in ways that promote social justice and uphold the dignity of the marginalized—a philosophy resonant with Justice Yvonne Mokgoro’s assertion that “the Constitution lives in the hearts and minds of the people.” By grounding his reflections in the moral language of vocation, Justice Dingake invites the African judiciary to reclaim its legitimacy through ethical leadership. In an era when courts are frequently accused of political bias or elitism, his metaphor of “priesthood” reaffirms the judiciary’s transcendent purpose: to heal divisions, restore faith in justice, and guide the moral conscience of the nation.

Justice Dingake is expected to be among the prospective candidates for election to the International Court of Justice in the near future. Justice Dingake’s jurisprudential philosophy and moral outlook make him eminently suited to serve as a judge of the International Court of Justice (ICJ). His intellectual orientation, ethical depth, and transformative approach to law reflect the essential attributes demanded of jurists who sit at the pinnacle of global adjudication.

First, his profound ethical and moral grounding conceives of judging as a calling rather than a career—a vocation rooted in fairness, truth, and righteousness. This conception aligns perfectly with the ICJ’s mandate to uphold justice “in accordance with international law” while embodying impartiality, dignity, and independence. At the ICJ, where judges navigate the moral complexities of disputes between states, such ethical conviction ensures that decisions are informed by conscience as well as legal reasoning. His “priesthood” metaphor reflects a moral temperament ideally suited to the weighty responsibility of global judicial service.

Second, Justice Dingake’s unwavering commitment to judicial independence and integrity mirrors the ICJ’s foundational values of impartiality and autonomy. His understanding that a judge must renounce “worldly temptations” to serve a higher ideal of justice resonates with Article 2 of the ICJ Statute, which demands that judges be of “high moral character.” In an international setting where geopolitical pressures often loom large, Dingake’s moral courage and principled detachment would safeguard the Court’s legitimacy and moral authority.

Third, his transformative and human-centred jurisprudence marks him as a jurist deeply attuned to law’s emancipatory potential. Throughout his career, Dingake has championed a vision of law as a living instrument of social justice, capable of transforming societies rather than merely regulating them. This philosophy of transformative constitutionalism translates naturally into international law’s humanistic purpose—to promote peace, equality, and human dignity among nations. At the ICJ, where questions of sovereignty, human rights, and international responsibility converge, such a perspective enriches the interpretative depth of the Court’s reasoning and ensures that legal outcomes advance the broader goals of justice and humanity.

Moreover, Dingake's cross-jurisdictional and multicultural experience—spanning common law and mixed legal systems—equips him with comparative insight and cultural sensitivity indispensable in a collegial, multinational judicial body. His work in diverse jurisdictions underscores adaptability, respect for legal pluralism, and the capacity to deliberate constructively across differing legal traditions, all of which are vital qualities for an ICJ judge.

Finally, as a leading voice in judicial ethics and independence, Justice Dingake has helped shape Africa's evolving legal thought, positioning himself among reform-minded jurists such as Albie Sachs, Willy Mutunga, and Yvonne Mokgoro. His insistence that judges must act as moral custodians of justice reflects the ICJ's ethos of moral leadership on the world stage. In a court that serves as the conscience of the international community, Dingake's voice would represent not only Africa's intellectual maturity but also a universal commitment to justice grounded in integrity and humanity.

Justice Dingake's metaphor of the judiciary as a "monastery" captures the reflective solitude and disciplined restraint that define great judges, yet he couples this moral introspection with intellectual rigour and deep respect for the rule of law. His ability to harmonize empathy with analytical precision exemplifies the equilibrium the ICJ demands—where complex disputes require both legal expertise and humane discernment.

In conclusion, Justice Dingake's conception of judging as a sacred calling is both poetic and prescriptive. It challenges jurists, scholars, and societies alike to view the judiciary not merely as a constitutional organ, but as a moral institution whose credibility depends as much on virtue as on authority. The comparison to priesthood evokes a higher order of duty—one grounded in truth, humility, and service to humanity. Ultimately, his philosophy

reminds us that great judges are not merely interpreters of law but guardians of faith in justice itself. In the spirit of Justice Dingake's vision, the judicial robe becomes not an emblem of privilege but a vestment of service, worn by those who enter the "monastery" of justice with devotion to truth and fidelity to the people. Justice Oagile Bethuel Key Dingake thus exemplifies the rare fusion of moral conviction, intellectual sophistication, and judicial independence that the International Court of Justice requires of its judges. His lifelong commitment to ethical jurisprudence, transformative understanding of law's social function, and global experience render him not only a capable jurist but also a moral beacon for international justice. In an age where the authority of international law depends on the credibility and conscience of those who interpret it, Dingake's vision of judgeship as a sacred calling situates him as a fitting custodian of justice on the world's highest judicial bench.

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Evans Ogada is an advocate and researcher, serving as Chairperson of the East Africa Law Society Rule of Law Committee and a lecturer at the University of Nairobi. He is also a member of the Law Society of Kenya's Public Interest Litigation Committee, the African Judiciaries Research Network (AJRN), and the International Commission of Jurists (Kenya).



Raila Amolo Odinga: The father of legal reform in Kenya



By Ouma Kizito Ajuong'

The 15th day of October, 2025 will remain cast in the history of the Republic of Kenya as very cold and cloudy day. This is because it not only marked the end Raila Amolo Odinga's mortal journey but also an end of an era to more than two decades of a political career punctuated by the five times race to the high Office of President of the Republic of Kenya. While massively adored by his constituency from the different pockets and regions in the country, Raila Odinga never got a chance to serve as President of the Republic of Kenya. He was however the enigma and perhaps the most consequential figure in the politics of Kenya. "**Baba**" as popularly known always found a way to mutate and evolve as he stayed relevant to the politics of the day in spite of the different political shades and formations that he fronted. This article however examines the role of Raila Odinga in legal reform. In retrospect, just as the man evolved in politics, so did Raila seek for the laws and the legal systems in Kenya to evolve hence the father of legal reform.

Raila's mark in the Constitution amendment journey

Kenya's Constitution amendment journey

may be traced as early as 1963. This journey displays both the good and the bad of Kenya historical landscape. Raila's figure prints are always discussed in the light of the fight to repeal section 2A and make Kenya a multi-party State in 1992. This of course has always been christened as the second-generation liberation struggle meant to open up the political space and human rights in the country. Raila's foot prints influence and leadership were also very evident in the push for a new Constitution 2010 but this came with the rejection of the *Kilifi draft* and the endorsement of the *Bomas Draft* Constitution. Raila Odinga was therefore known as a big champion of the Constitution of Kenya 2010. Raila has however evolved with time and has championed amendments even to the Constitution of Kenya through the BBI and the NADCO report all be it unsuccessfully. As much there may be a lot to say about the BBI and the NADCO reports, there is a sense in which Raila sought to reform the law so that the law reflects the needs of our society. Now that Raila is gone is it time to examine, reflect on and amend the Constitution of Kenya? The question remains, If the Constitution was to be amended what would this look like? A question Raila Amolo Odinga would gladly grapple with.

Raila and devolved system of government

Raila Odinga is often referred to as the father of Devolved system of government



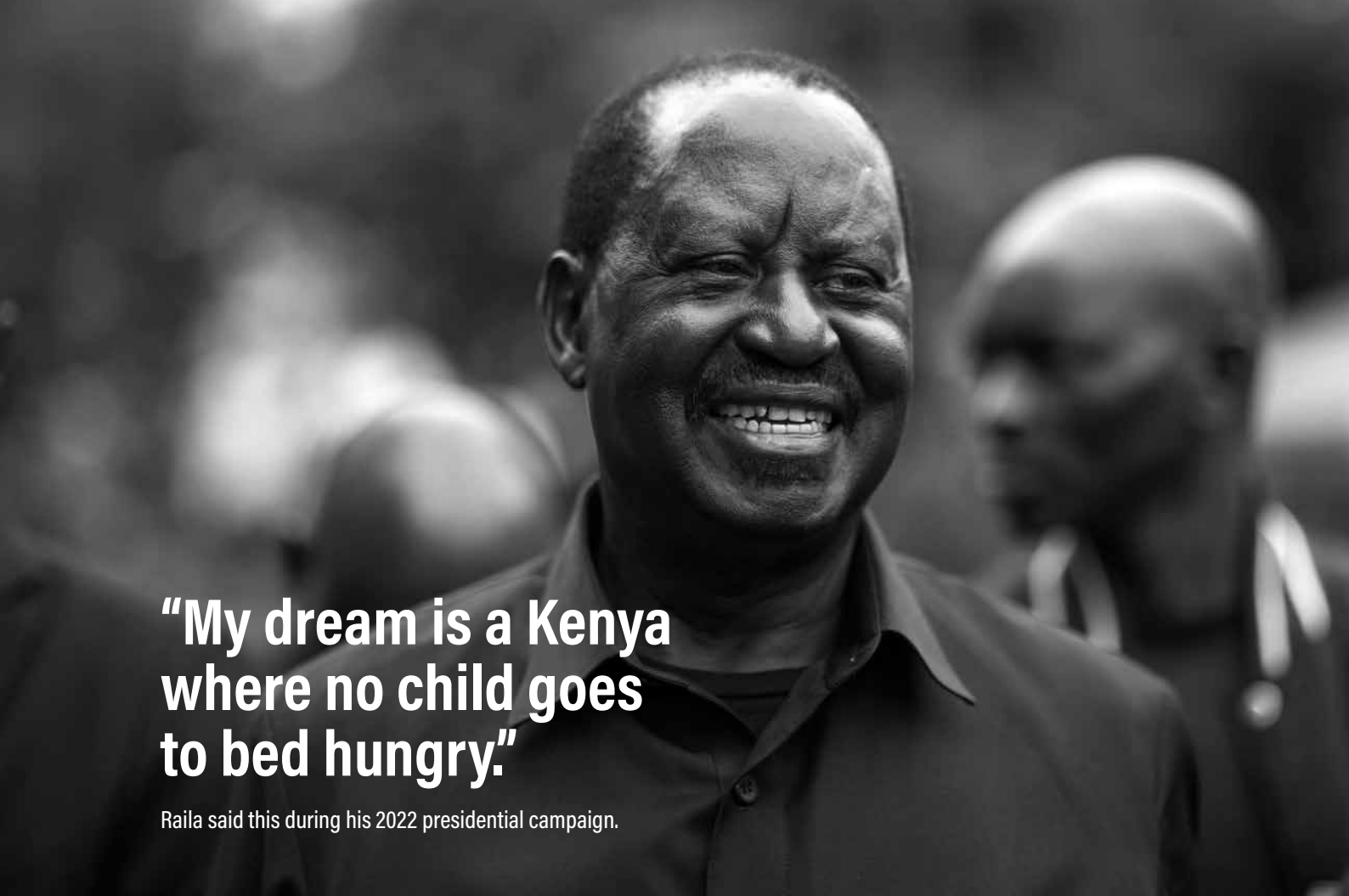
Raila Odinga was at the center of Kenya's democratic and electoral reform journey for more than four decades. His political activism—rooted in his experiences under one-party rule and detention—made him one of the key figures pushing for free, fair, and credible elections.

entrenched in the Constitution, 2010. This is because Raila was of the strong view that the Constitution ought to decentralize the power of the President and bring services closer to the people. Devolution also helped to bring resources to the people and equity to communities that were historically marginalized. In fact, the difference between the *Kilifi draft*, rejected by Raila and *Bomas draft* was the structure of government. The latter proposing the devolved system of government. Raila through his reform mind however kept on agitating for a change in the devolved system. He was of the view that the county government as they exist are not economically viable. Kenya in Raila's view needed less counties that would allow the governors to collect more revenue and have more autonomy. Raila further controversially sought reform with regards to the subject of *NG-CDF fund*. As much a lot of people (more so MPs) did

not agree with Raila, he was that the fund ought to be given to governors and not members of parliament to manage as that is executive function. [*Gikonyo & Another Vs National Assembly & 4 Others*]. Raila always advocated for more money and functions to the devolved system of government.

Raila and electoral reforms

It is impossible to discuss reforms and elections in Kenya without Raila Odinga. As highlighted Raila has been knee deep in election matter four more than two decades. A lot of reforms, amendments and jurisprudence have come out of the Supreme Court as a result of Petition presented to Court by Raila Odinga challenging presidential results in Kenya. This includes the 2017 Presidential petition that nullified the presidential election results. This was because the Electoral Management



"My dream is a Kenya where no child goes to bed hungry."

Raila said this during his 2022 presidential campaign.

Body [EMB] had allowed for irregularity and illegality. In life, Raila was seen as a perennial election loser but the reforms in elections championed by Raila [taken for granted] has built the house Kenya is so proud of today. It is important to remember that there was a time in Kenya where it was impossible to challenge presidential elections. Today, there is the Supreme Court of the Republic of Kenya with original jurisdiction to try settle Presidential Election disputes.

The Constitutionalization and institutionalization of the IEBC is another win and reform that was fought for by *inter alia* Raila Odinga. Again, in the nature of building jurisprudence, the Supreme Court in the 2022 Presidential Election petition discussed the function powers and composition of the IEBC at length. There is a myriad of election reforms that came after the 2007. These include; the incorporation of technology in protecting the election integrity, the validity of counted votes

within the constituencies amongst others. As Kenyans we ought to champion free and fair elections that are clear and just.

Raila and the values of human rights

Raila Odinga protected promoted and defended human rights. He believed in a free and democratic society. He was a champion of police reform to entrance service as opposed to police brutality and harassment of people. Raila was also a champion of judicial reforms and he respected the rule of law in words and in deeds. This has led to a robust human right charter and a country that is relatively free. As part of human rights, Raila also furthered for good governance. He was particularly interested in cleaning up the civil service and enshrining the conflict-of-interest law as an effort to fight corruption.

Ouma Kizito Ajuong' is an Advocate of the High Court of Kenya.

My take on the 8 Bills President Ruto Assented to on 15.10.2025



By Senator Okiya Omtatah
Okoiti

On 15th October, 2025, President William Samoei Ruto signed eight Bills passed by the National Assembly into the following laws (Acts of Parliament):

1. The Air Passenger Service Charge (Amendment) Act, 2025;
2. The National Police Service Commission (Amendment) Act, 2024;
3. The Virtual Asset Service Providers Act, 2025;
4. The Wildlife Conservation and Management (Amendment) Act, 2025;
5. The Computer Misuse and Cybercrime (Amendment) Act, 2025;
6. The Land (Amendment) Act, 2025;
7. The National Land Commission Amendment Act, 2025; and
8. The Privatisation Act, 2025.

At the very onset, I wish to clarify that the eight Acts of Parliament are not the same as their source Bills, which were published and tabled in the National Assembly. So, those commenting on them should be awake to the fact that some underwent major changes as they were processed in the House. It would help a lot if those commenting on the issue focused on the new Acts of Parliament and not on the original Bills which were worked on by the National Assembly before they were sent to the President to sign into

law. Some people are even discussing on totally irrelevant Bills that were rejected by Parliament, such as the one that had proposed levies to be imposed on freehold private land.

Of the eight Acts of Parliament, I don't have any issues with the following five laws:

- a) **The Air Passenger Service Charge (Amendment) Act, 2025** revises the Air Passenger Service Charge Act to redirect proceeds from the Tourism Promotion Fund to the Tourism Fund, aligning the law with current tourism financing structures. It also amends the Tourism Act to include these proceeds as part of the Tourism Fund's revenue and ensure that funds collected from air passenger service charges contribute directly to tourism development and promotion.
- b) **The National Police Service Commission (Amendment) Act, 2025** strengthens support for the mental health and wellbeing of police officers. It introduces definitions for counselling, psychosocial support, and wellness, and mandates the establishment of a Counselling and Psychosocial Support Unit within the National Police Service Commission to develop and oversee mental health programmes. The Act requires that this unit be devolved to every county police headquarters and that the commission, in consultation with the

Inspector-General of Police, provide mental health and wellness resources and establish well-equipped centres in police stations, camps, training colleges, and communities to offer counselling and psychosocial support to officers across the country.

- c) **The Wildlife Conservation and Management (Amendment) Act, 2025** updates the Wildlife Conservation and Management Act to strengthen the handling of claims related to marine wildlife. It introduces a new provision requiring that when a claim involves injury, death, or loss caused by marine wildlife species, the relevant Community Wildlife Conservation and Compensation Committee must include additional members representing the Kenya Coast Guard Service, the Kenya Fisheries Service, and the Kenya Marine and Fisheries Research Institute, appointed by the respective Cabinet Secretaries. The Act also expands Part A of the Third Schedule by adding shark, stonefish, whale, and stingray to the list of protected wildlife species for which compensation may be claimed.
- d) **The Virtual Asset Service Providers Act, 2025** establishes Kenya's first comprehensive legal framework for virtual assets and virtual asset service providers (VASPs). It defines a "virtual asset" as a digital representation of value that can be traded or transferred and used for payments or investment — excluding fiat currency, securities, e-money and other specified financial assets.
- e) **The Land (Amendment) Act, 2025** updates the Land Act, 2012 to streamline the registration of public land allocated for public purposes. It introduces a new definition of "Registrar" consistent with the Land Registration Act, 2012, and adds new

subsections to Section 12 requiring that any public body or institution allocated public land by the National Land Commission must apply to the registrar for registration. The registrar is mandated to register such land, including that set aside by individuals or land-buying companies for public use during developments, and in line with the Physical and Land Use Planning Act, 2019. Upon registration, the registrar must publish a gazette notice detailing the registration and issue a certificate of title—to the entity itself if incorporated, to the Cabinet Secretary for the National Treasury as a trustee if unincorporated, or to the county government, where applicable. The amendment enhances transparency, accountability, and proper documentation in the management of public land.

But I have serious issues with the following three laws:

- a) **The Computer Misuse and Cybercrimes (Amendment) Act, 2025** was supposed to but dismally fails to strengthen the cybercrime law. It is bad law to the extent that it uses vague definitions that introduce ambiguous and overly broad offences which rogue officials can invoke to limit the freedom of expression, media freedom, and access to information by criminalising speech, opinion, or commentary which is critical of influential individuals or institutions.

It broadens the definition of "access" to include entry through any device or program and it casually, nay, recklessly, introduces new terms such as asset, computer misuse, cybercrime, identity theft, terrorist acts, and virtual accounts, reflecting the evolving digital landscape.

The Act empowers authorities to block websites or applications (which could

include TikTok, X, Facebook, and WhatsApp) where they are perceived to promote what the Act vaguely refers to as unlawful activities, terrorism, religious extremism, cultism, or inappropriate sexual content involving minors. It also criminalises online behaviour that could cause a person to commit suicide and extends harassment provisions to include emails and calls, and not just messages. And whereas all sexual content involving minors is taboo, the Act, by criminalising what it calls “*inappropriate sexual content involving minors*”, implies that some sexual content involving minors is appropriate. That is unacceptable!

The new Section 6(1)(ja) of the Act is vague and, therefore, void for not determining who, before the National Computer and Cybercrimes Co-ordination Committee (the committee) issues a directive to render the website or application inaccessible, proves that a website or application promotes unlawful activities, inappropriate sexual content of a minor, terrorism or religious extremism and cultism.

To make matters worse, the section also contradicts the new Section 46A, which allows courts to order offenders—or, on application by authorised persons—to remove harmful content, deactivate websites or digital devices, or take any other necessary actions.

By not naming who the authorised persons are, the Act leaves it open for the committee to usurp the mandate of the Communications Commission of Kenya to take the actions in issue.

Overall, the amendments will undermine the country’s capacity to constitutionally combat online crimes, protect minors, and enhance digital safety and accountability.

For that reason, I am heading to the High Court to have the offending law declared to be unconstitutional and, therefore, invalid, null and void ab initio.

b) **The National Land Commission (Amendment) Act, 2025**, which repeals and replaces Sections 14 and 15 of the National Land Commission Act, is a desperate attempt by the National Assembly to defeat the High Court Constitution and Human Rights Petition No. E349 of 2021, which is cited as *Okiya Omtatah Oloit i vs. the Hon. Attorney General, the Ministry of Lands and Physical Planning, and the Parliament of Kenya, and the National Land Commission (interested party)*. Judgment in the petition is set to be delivered on 28th November 2025 by Mr. Justice E. C. Mwita.

Because the Constitution imposes no timelines on the mandate of the National Land Commission (NLC) to address land governance disputes and historical injustices by reviewing all public land grants or dispositions made before 27th August 2010 to determine their legality, the petition challenges the constitutional validity of Parliament’s decision to impose a 10-year timeline from the commencement of the Act.

The amended Act still violates the Constitution by imposing on the commission a five-year time limit from the commencement of the Act, within which to execute its mandate to review all public land grants or dispositions made between 1895 and 2010, and to investigate and recommend remedies for historical land injustices, including restitution, compensation, resettlement, or revocation of irregular titles, with determinations to be completed within one year and implemented within three years.

My position is that the new timelines are also unconstitutional. For that reason, I am heading to the High Court to arrest the judgment in Petition No. E349 of 2021, so that I can amend the pleadings to have the offending new law quashed for being unconstitutional and, therefore, invalid, null and void ab initio.

- c) **The Privatisation Act, 2025** creates a legal framework to govern the disposal of state-owned enterprises. It repeals the old Privatisation Act (CAP 485B), which was assented to on 13th October 2005 and commenced on 1st January 2008, and establishes a new structure with an empowered Privatisation Authority, defined oversight by the Cabinet Secretary, and requires the identification of public entities for privatisation through a published programme that must be ratified by the National Assembly.

However, the Act is voided by its definition of “privatisation” to mean a transaction that results in a transfer of the assets and or liabilities of a public entity to a private one, without excluding public land. By doing so the Act is unconstitutional and, therefore, invalid, null and void *ab initio*

because under the Constitution of Kenya, 2010, public land cannot be privatised. For clarity, completeness and the avoidance of doubt, Article 68(c)(iv) of the Constitution expressly prohibits the privatisation of public land by requiring Parliament to enact legislation “to protect, conserve and provide access to all public land”.

I posit that the National Assembly has no capacity to contravene that express provision of the Constitution by enacting legislation that allows public land to be privatised.

It is also instructive that Article 68 of the Constitution expressly requires Parliament (both the Senate and the National Assembly) to enact legislation on land. Hence, the Act is void *ab initio* to the extent that the Senate was excluded and the law was enacted by the National Assembly only.

The Act also introduces a new entity called “government-linked corporation,” which it defines as “a corporation in which the National Government or a national

government entity is a shareholder with less than fifty per centum of the share capital of the corporation”.

The mischief in this is that Section 4(c) provides that the Act shall not apply to— the “sale of government shares in a government-linked corporation”. That means that the sale of shares held by the public in companies such as Kenya Airways and Safaricom, where the government is not the majority shareholder, is not subject to the Act, and will be done without reference to the law.

Section 4(e) provides that the Act does not to apply to “any balance sheet reorganisation, which may lead to dilution of the percentage of shares held by a public entity”. That also allows for mischief in the sense that the percentage of shares held in a public entity like KENGEN, where the government shareholding is 70%, can be manipulated so that they fall below 50%, to allow the entity to fit the definition of a “government-linked corporation,” so that it is not subject to the Act.

Further, Section 4(f) provides that the Act does not to apply to “the sale or transfer of shares by a county government”, yet county governments hold shares in some companies earmarked for privatisation under Section 71 of the Act vide Gazette Notice No. 8739 of 12th August, 2009, which was published in Nairobi on 14th August 2009 in the Special Issue of the Kenya Gazette, Vol. CXI—No. 70.

These include:

- a) Mt Elgon Lodge Limited – KTDC 72.92%; Kitale Municipal Council 13.54%; and Trans Nzoia County Council 13.54%;
- b) Golf Hotel Limited – KTDC 80%; and Kakamega Municipal Council 20%; and,
- c) Sunset Hotel Limited – KTDC 95.4 and Kisumu Municipal Council 4.6%.



Senator Okiya Omtatah Okioti

The Act is also void *ab initio* because it was not presented to the Senate for consideration and approval and yet it concerns the privatisation of public land and the disposal of shares held in public entities by county governments.

All the grounds listed under Section 6 of the Act as the purpose for privatisation violate the following provisions of the Constitution:

- (i) The principles of public finance under Articles 201(c) of the Constitution, which stipulate that *the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations*.
- (ii) The values and principles of public service under Articles 232(1)(b) of the Constitution, which include the *“efficient, effective and economic use of resources”*.

The provision in Section 7(d) that the functions of the Cabinet Secretary include “(d) overseeing the administration of this Act” contradicts with the mandate of the Privatisation Authority under the Act.

Section 45 (2) of the Act eliminates the Government Valuer from valuing public assets earmarked for privatisation.

Section 55 of the Act is unconstitutional to the extent that contrary to Article 50(1) of the Constitution on fair hearing, it vests the mandate in the authority itself to hear appeals filed against its decisions.

Section 65(1) of the Act, which imposes restrictions on access to information held by the authority, is unconstitutional to the as it violates the right to access information under Article 35 (1) & (3) of the Constitution.

To the extent that the Section 66 of the Act imposes offences that require involvement of the National Police Service, Article 239(6) of the Constitution comes into play, requiring Parliament (both the Senate and the National Assembly) enact the legislation. Hence, the Act is void *ab initio* to the extent that the Senate was excluded and the law was enacted by the National Assembly only.

Section 71 of the Act is unconstitutional for purporting to act retrospectively and revive Gazette Notice No. 8739 of 14th August 2009, which expired by an act of the law on 13th August 2014.

Signed: Okiya Omtatah Okioti

Date: 22.10.2025

Interpreting the right to self-determination in Lamu's coal power judgment



By Munira Ali Omar

"Courts cannot wring their hands and restrain themselves from acting in favour of the environment where the impact of a proposed project is uncertain, for the precautionary principle is ingrained into our environmental law."¹

Hon. Justice Mwangi Njoroge

Reading the judgment on a quiet weekend, one cannot miss the weight of its reasoning. We were reminded that law, at its best, listens to both people and the environment. With these words, Justice Mwangi captured the spirit of his own judgment in the Amu Power Company Limited-vs-National Environment Tribunal & Others. After multiple adjournments, the Court finally delivered its ruling on 16th October 2025, marking a defining moment in Kenya's environmental jurisprudence and the practical realization of public participation as a constitutional value. Beyond determining whether a coal power plant could proceed in Lamu, the case tested the depth of government's obligation to ensure

communities can exercise their right to self-determination.

Lamu, a UNESCO World Heritage Site and home to rich cultural traditions, mangrove forests and marine ecosystems became the stage for a contest between corporate interests and environmental justice. Home to more than 60 percent of Kenya's mangroves, Lamu's ecosystem faced an unprecedented threat from the proposed 1,050 MW coal-fired power plant; one that risked eroding both its natural heritage, cultural and livelihood systems that have sustained its people for generations.

Central to the Amu Power case is a fundamental question of who decides to shape the future of Lamu and its people? Although the judgment did not explicitly frame this as a self-determination issue, its reasoning embodies that principle. Self-determination is about the capacity of a people to freely shape their political, economic, social and cultural development. For the people of Lamu, it is expressed through their relationship with the ocean, mangrove forests and coastal lands spaces that define their identity and economy.

When the national government predetermined Lamu as the coal plant site without adequately consulting the people of Lamu, it undermined their ability to influence decisions affecting their environment and livelihoods. The High

¹Amu Power Company Ltd -vs- Save Lamu & Others [2019] ELCA/6/2019, Environment and Land Court of Kenya at Malindi.



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Action by activists from Greenpeace Africa carrying a model of a coal plant, symbolizing toxic air pollution,.

Court recognized this imbalance, holding that the location was selected by the government of Kenya through the Ministry of Energy before any Environmental and Social Impact Assessment (ESIA) or proper public consultation was conducted. This, it ruled, violated the constitutional rights to public participation and access to information. This finding speaks to a violation of community agency, showing how the state's unilateral decision-making disregarded the community's right to shape their own development path. It can also be understood through the lens of Free, Prior and Informed Consent (FPIC), a principle recognized under international law that ensures communities have the right to make

informed decisions about how their lands, resources and environment thereby linking participation right to the right to self-determination.

The Court devoted significant attention to the process of public participation and found it wanting. In its assessment, it noted that Amu Power and NEMA had relied primarily on newspaper advertisements, with several procedural flaws in the conduct of the public hearings. NEMA, in particular, failed to observe the full 30-day period required under the Environmental (Impact Assessment and Audit) Regulations for receiving public comments. The Court agreed with the National Environment

Tribunal's finding that these shortcomings rendered the consultation process superficial and contrary to the constitutional standards of openness and inclusivity. It agreed with the National Environment Tribunal and observed as follows:

"It is an inescapable fact that the public hearing was held on 26th August 2016 yet the last date of publication of the gazette notice relating to the project was on 29th July 2016. An elementary mathematical computation shows that the convening of that public hearing earlier than expected ate into the 30 days provided by Regulation 22 by three days, such that anyone who would have desired to submit comments on 27th, 28th and 29th August 2016 was unable to do so before the public hearing. This court is unable to comprehend why the public hearing was held 3 days earlier, on 26th August 2016 instead of at the earliest, on 29th August 2016."

Beyond the technicalities of notice periods and hearings, the court also emphasized that genuine public participation is inseparable from access to information noting that the community's support for the project might have been very different had they been fully informed of the data held by Amu Power company. In this case, key details from the EIA study were not shared with the public, nor was there an effort to re-engage the community after the study was completed. This lack of disclosure meant that concerns about serious environmental risks could not be properly addressed.

It noted that if the findings of the ESIA such as risks to biodiversity, air quality, human health and the possibility of acid rain affecting forests, soil and marine life had been properly communicated to the people of Lamu, they might have reacted differently to the project. While mitigation measures were proposed, the

Court held that these should have been explained to the community so they could make an informed decision. It noted that the proposed safeguards could not be considered effective until the community had the opportunity to engage with them, observing that they remained "largely mere academic presentations" in the absence of participation.³ Put simply, citizens cannot participate meaningfully without knowing what is at stake.

Equally significant is the fact that feedback submitted by community representatives during the consultation process was largely ignored, with no indication that their views were seriously considered or incorporated. This procedural neglect has however, become normalized in many development decision-making processes in Kenya where public participation is often reduced to a formality rather than a genuine avenue for community influence. Across the country, we have seen many communities go through similar experiences participating in consultations, submitting memoranda and voicing opposition only to see projects proceed as originally designed with little to no reflection of their input. By sidelining community's input, this pattern leave communities feeling further marginalized and unheard as development in Kenya often proceeds without respecting the right to self-determination, stripping people of their power to decide how their land, resources and environment are used and managed.

Expanding on these concerns, the Court went on to note:

"This court also finds that the Tribunal did not err in holding that the meetings held were introductory in nature and not structured to share information on effects or impact of the Amu Power project... there was lack of access to information that was a prerequisite to a

²Ibid

³Ibid



People protesting the coal-project in Lamu. The protests reflect a broader shift in Kenya (and globally) towards energy justice, environmental rights, and community participation in major development projects.

meaningful exercise of public consultation and participation.”⁴

By insisting on genuine participation, the Court signaled a necessary shift in Kenya’s development model from “decide-announce-defend” to “consult-co-create-consent.” This is what the drafters of the right to self-determination envisioned under Article 1 of the International Covenant on Civil and Political Rights.

The UN Declaration on the Right to Development under Article 1(2) similarly emphasizes that development must be grounded in the full realization of self-determination including “sovereignty over natural wealth and resources.” Likewise, pursuant to Article 22 (1) of the African

Charter, no development project should proceed without the free, prior and informed consent of the affected community. In this spirit, the Court, by upholding the principles of participation and access to information gave concrete expression to the cornerstone of the right to self-determination over land and natural resources.

Amid these failures, the judgement revealed a chronic accountability deficit in Kenya’s environmental governance framework where project developers are often cleared to implement their projects even after presenting incomplete or inaccurate information during approval processes leaving communities exposed to environmental risks and powerless to influence decisions affecting their future.

It also reinterpreted the right to self-determination in a climate-conscious era and served as a wake-up call to the country that development must begin and end with people. For the mangrove champions, fishermen and families of Lamu, it was as a moral affirmation that their voices, environment and culture are not expendable in the pursuit of profit driven projects. The significance of the Amu Power landmark ruling is inseparable from the decade-long struggle behind it. It was the culmination of a ten-year campaign spearheaded by deCOALonize, Save Lamu Katiba Institute and Natural Justice whose relentless advocacy ensured that the voices of the community were amplified and justice was ultimately achieved. Against the odds, the people of Lamu reclaimed the essence of self-determination proving that development without their consent is no development at all. Truly, Vox populi, vox dei!

Munira Ali Omar serves as an advocate at the High Court of Kenya and holds the position of Land Program Officer at Haki Yetu Organization.

⁴Ibid

Ten years of the Strathmore Law Review: A decade built to last

On behalf of the Strathmore Law Review



By Mark Lenny Gitau



By Zayn Aslam



By Peter Muindi

When the Strathmore Law Review (SLR) published its first issue ten years ago, it set out a bold proposition: that a student-led, peer-reviewed law journal rooted in Africa could be consistent, serious, and influential. A decade later – with Volume X on record and a symposium to mark the milestone – we celebrate a community that has proven that proposition true and, in doing so, widened the space for African legal scholarship in a way that this region has never seen.

From the beginning, the Review's identity has been clear. It is managed and edited by students of Strathmore Law School and published annually through a rigorous peer-review process. This process is an



institutional design that trains editors, and authors alike, while ensuring the standards expected of an academic journal. That design has remained unabated: SLR continues to be a student-edited, peer-reviewed journal with a deliberate focus on bringing thoughtful African legal work to the center of the conversation.

The evidence of that continuity is visible in the archive. Year after year, the Review has curated scholarship across doctrinal and interdisciplinary themes, building a living record rather than a one-off burst of energy. Volume X, officially published in October 2025, exemplifies this breadth, featuring articles ranging from cultural property and alternative methods of dispute resolution, to intellectual property and property law. This is an editorial ledger that mirrors the

changing questions in law and policy while keeping quality as the constant.

We marked the tenth volume with our flagship event labelled “**SLR@10: Celebrating a Decade of Excellence**” on 8 October 2025. The occasion was a full-day symposium hosted at Strathmore University, and brought together authors, editors, alumni, and leading scholars across the country. The day’s agenda saw the authors featured in this historic volume present their papers, offering concise expositions of their research, before engaging directly with attendees in Q&A sessions. Interwoven with these presentations were panel discussions that revisited the Review’s formative years, examined the implications of technology and artificial intelligence for legal research, and reflected on the responsibilities and opportunities inherent in stewarding an African law review in an ever-evolving academic landscape. These conversations were guided by distinguished scholars, practitioners, and experts whose insights delivered broadened perspectives on legal scholarship and its impact.

SLR@10 was a mirror and a map: a mirror to reflect who we have been, a map to guide who we should become. The panels, keynote addresses, and reflections stitched together the lessons of editorial craft, integrity in a fast-evolving digital research ecosystem, and the discipline required to sustain a student organization across generations.

From the vantage point of an onlooker wondering how a student-run journal has endured – and grown – over ten years, three things stand out.

First, the SLR is an institution made of persons proud to be associated with the Review and motivated to drive it forward. Each new team is aware that they are stepping into a story – those who started it began the tradition of writing a chapter, and those who have carried it since are cognizant of the weighty pen then hold.

Whenever time comes to pass the baton to the next team, they are driven by a shared awareness that the Review has meant something and must continue to mean something. We are, if anything, afraid to fall short of that heritage. It is that quiet sense of responsibility – to do right by the Review, to live up to its name – that has steadied us through to this ten-year mark.

Second, the Review has been stubbornly, deliberately African. That posture is not rhetorical. It shows up in thematic selection, author outreach, and the insistence that jurisdictional diversity is engineered rather than left to chance. In practice, that has meant building mentorship pipelines, insisting on courageous standards, and cultivating partnerships that widen the circle – so that when we claim to be an African law review, the table of contents bears that out. This Africanness has kept the Review grounded, giving it purpose, authenticity, and an audience that sees itself in its pages. It has anchored us in something larger than the institution itself, and that rootedness is part of why we have lasted ten years strong.

Third, SLR is an institutional project, not a personality project. While students lead, they do not lead alone. The Strathmore University fraternity, and the larger legal community have been the spine to which the Review leans. This is why the processes have survived the ultimate test of time. The result is a journal that readers and authors take seriously – precisely because it takes itself seriously.

The tenth-anniversary program reinforced these convictions. Keynotes and panelists – including leaders from across Kenyan legal academia – challenged us to guard integrity while welcoming innovation. Announcements and reflections around SLR@10, shared across our official channels and partner platforms, captured the same message: celebrate the decade; then get back to work.

For our community, SLR's decade has also been a proof-of-concept for legal education in this region: that students can run a peer-reviewed journal that contributes to the profession's knowledge base. Our institutional sites, archives, and calls for submissions over the years repeat the same essentials – student-edited, peer-reviewed, annual, rigorous – because those essentials are the point. They are why authors choose to publish here and why readers return.

What, then, did SLR@10 reveal about what it means to enter a responsible second decade?

The Review must continue to enforce standards that make publication in Africa mean something. That includes clarity around author responsibilities in an AI-enabled research environment, transparent editorial policies, and disclosure practices that protect integrity without pretending the technology will slow down. These are not hypothetical concerns; they are present-tense editorial questions that require principled answers.

The closing address emphasised that the SLR should widen the welcome without lowering the lintel. Volume X shows that topical range and rigor can coexist. The task now is to deepen jurisdictional diversity, invite voices from under-represented fields and regions, and mentor first-time authors so that promise can become publication. The need for “Deliberate pipelines” cannot be treated as a slogan; it is an editorial calendar, a mentorship structure, and a set of partnerships across law schools and journals on the continent – that is how you create these pipelines.

The most fragile moment for any student-run journal is the handover. SLR's past teams turned that fragility into a practice: inherit, improve, hand over. We intend to keep institutional memory alive so that the next Volume does not start from zero. This is how a tradition stays a tradition.

Ten years on, the question is no longer whether a student-run law review can survive in the African continent. It has. The question is whether we can steward the next ten with the same seriousness that built the first. Our answer is a disciplined yes. Volume X is on the record; the SLR@10 symposium has closed with gratitude and resolve; the editorial room lights are, as ever, on.

But all the above said, we would be remiss not to be thankful to those who played a critical role in our making ten years. To our authors: thank you for trusting a student-edited African journal with work that matters. To our readers who are the second half of this enterprise, we are most grateful. To our alumni editors whose fingerprints are on every page of every Issue in our archive, we are filled with gratitude that your example tells today's students that this is possible.

And to the incoming teams – Volume XI and beyond – guard what has been built, refine it with courage, and remember that what you hold is a story still being written. To students in other institutions, let this be an invitation. Be the one who decides to take that first step in building a student-run, peer-reviewed journal of your own. It is possible; it is demanding, but it is deeply worthwhile.

Onward, the SLR remains committed to publishing into eternity. The Review will stay student-led and determinedly African; our job is to ensure the scaffolding remains firm while the ideas grow bolder. In quoting the closing address, “when we gather for the next milestone, may the archive be deeper, the footprint wider, and the community even stronger”.

And so, this is the SLR, a decade old. Ten years on, we know – what we begin in faith and sustain in discipline, endures.

From Nairobi 1986 to Mombasa 2025: The long road to land and housing justice



The Affordable Housing Programme (AHP) is part of the government's housing & urban-development agenda, targeting to deliver ~250,000 housing units per year across Kenya.



By Munira Ali Omar

This year's World Habitat Day offered a sobering reminder of how far Mombasa still has to go in realizing equitable, inclusive and sustainable urban development. Planned by Haki Yetu Organization under the global theme "Urban Crisis Response" the event brought together community leaders, civil society actors, the National Land Commission, County officials and

the media to reflect on the land and housing governance challenges affecting thousands of residents across the county. At the national level, Kenya reaffirmed its commitment to sustainable urban development as the CS for Lands, Public Works, Housing and Urban Development of Kenya emphasized commitment to the New Urban Agenda and the Sustainable Development Goals. She pointed to priorities such as affordable housing, inclusive urban planning and community empowerment. Despite these declarations, the situation on the ground remains far removed from the stated vision.

World Habitat Day was first celebrated in 1986 with the powerful and timeless theme, “Shelter is My Right,” in Nairobi, a city that continues to embody the challenges of urban development in Kenya. Since that inaugural observance, the world has witnessed decades of rapid urbanization, growing inequalities and ongoing struggles for secure housing. Yet, almost four decades later, the fundamental issues remain clearly familiar i.e access to land, protection from eviction and the right to dignified shelter. The commemoration in Mombasa revived the challenge first posed in 1986 of bridging the gap between vision and implementation in the quest for housing justice. Thirty-nine years on the cry of “Shelter is My Right” still resonates challenging Mombasa to move beyond celebration and confront the realities of exclusion and displacement.

The 2025 World Habitat Day began with a peaceful procession through the streets of Mombasa where residents from informal settlements, members of Beach Management Units, persons with disabilities and people affected by the government’s affordable housing program walked side by side carrying placards to call for secure land tenure, dignified housing and justice for the displaced. The civic procession concluded at Tudor Pastoral Centre where anticipation was built for an engaging and consequential discussion with the government. For three consecutive years, the Mombasa County Executive Committee Member (CECM) for Lands, Physical Planning and Urban Development has been invited to dialogue with citizens on matters of land and housing. Each year, the seat reserved for the county official remained conspicuously empty. This year, to everyone’s surprise, he finally honoured the invitation. Communities turned up in large numbers to engage him directly, share their experiences and seek accountability for unfulfilled promises around land regularization, historical land injustices, affordable housing and the Ardhi Fund.

When he took the microphone, many hoped that at last, the government would respond in sincerity to their long-standing questions. Instead, what followed was a disappointing performance marked by deflection, misinformation and political games which are typical of public accountability engagements. Among the most glaring deceptions during the session was the declaration that the Ardhi Fund is fully operational. He noted that to address long-standing land injustices, the Mombasa County Government rolled out the Ardhi Fund allocating Ksh.50 million in the 2025/2026 budget to protect land rights and prevent recurring evictions. The claim not only contradicted community realities but also raised questions among other government officials present. Equally telling was the reaction from elected leaders like Hon. Katana, the MCA for Shanzu Ward who spoke firmly demanding greater transparency and accountability in the management of the Ardhi Fund. He questioned how funds could be mentioned publicly as functional when even members of the County Assembly, the institution tasked with oversight had not received a clear implementation framework or financial reports.

The Ardhi Fund was envisioned as a tool for promoting equitable land governance in Mombasa County by streamlining land administration, resolving land disputes and enhancing access to justice. Yet, one year since the regulations were passed, communities have seen no implementation, no budgetary allocation and no public reporting on how the Fund will operate. The forum exposed the growing gap between official pronouncements and actual implementation while also laying bare an endemic malaise within the Government of defending its image over authentic engagement with citizens’ struggles.

Rights groups and community networks in Mombasa have consistently challenged the Lands Department over its failure to protect

residents from eviction and land grabbing. Haki Yetu, in particular, has documented numerous cases of forced evictions and engaged communities to seek accountability. Yet, the CECM insisted in his own words that “the county has been at the forefront in defending and protecting those facing eviction threats.” There is, however, no verifiable evidence of such intervention. On the contrary, Mombasa has witnessed an increase in forced and threatened evictions. For instance, families continue to lose their homes and livelihoods often without adequate compensation or relocation plans. For instance, earlier this year, residents of Mwembe Kuku, fearing illegal eviction approached Haki Yetu for legal assistance. The situation escalated on 4th October when two comrades reached out to me directly requesting immediate intervention as one of the buildings within the settlement had already been demolished and another building was at risk of demolition despite clear court orders and a determination from the National Land Commission affirming the community’s ancestral ownership. The pressing question remains is why has both the national and county government failed to safeguard the homes and livelihoods of its people despite having the legal and institutional frameworks to do so?

Thomas Jefferson once said, “It is more honourable to repair a wrong than to persist in it.” Sadly, this tenet seems absent in the current handling of Mombasa’s land and housing challenges. Nowhere is this reluctance to correct past injustices more evident than in the recent remarks concerning the Ardhi Fund. It was very troubling and concerning when the minister stated that the Ardhi Fund will be used only to buy land that has no disputes, on a “willing buyer, willing seller” basis. Sadly, this approach fundamentally contradicts the purpose of the Fund because Mombasa’s land problems are rooted in history, not

market failure. Across the ten-mile coastal strip to settlement schemes, the majority of land occupied by the urban poor and marginalized communities is under dispute. By excluding “disputed” lands, the County effectively disqualifies the intended communities the Fund was meant to serve. Also, the “willing buyer, willing seller” model has a long record of failure in Kenya. It was used in the post-independence resettlement programmes, where inflated land prices combined with control of resources by African elites and power holders undermined redistribution goals. In all these cases, the approach rewarded those in position of power consequently excluding the landless poor. Therefore, applying the same model in Mombasa is to repeat a historical mistake and turning a potential instrument of justice into a marketplace for the powerful.

These modern-day failures cannot be separated from the historical inequities in land distribution and governance in Kenya. Following independence, the Settlement Trust Fund intended to provide land to the landless and marginalized was mismanaged. Large tracts of land were awarded to political allies, wealthy elites and government cronies rather than the intended beneficiaries, undermining the Fund’s redistributive purpose and entrenched inequality, concentrated land in the hands of a few and left entire communities without secure tenure. Informal settlement residents, project-affected persons and other vulnerable groups remain particularly exposed, indicating a continuity of exclusion and marginalization that persists to this day.

One must also question why Mombasa County established the Ardhi Fund when section 135 of the Land Act¹ already establishes the Land Settlement Fund mandated to settle landless and marginalized communities. The law clearly

¹No. 6 of 2012.

states that “there is established a Fund to be known as the Land Settlement Fund which shall be administered by a Board of Trustees known as the Land Settlement Fund Board of Trustees.” It was created precisely to facilitate the resettlement of landless persons and marginalized groups objectives identical to those now cited under the County’s Ardhi Fund. The creation of parallel funds suggests a shift from a justice-driven approach to a politically expedient one where control over land related finances and decisions becomes localized and potentially opaque. True reform lies not in multiplying funds but in ensuring that existing ones serve their intended redistributive purpose.

In the same vein, the talk around affordable housing continues to ring hollow in a city where “affordable” has become synonymous with eviction and displacement. Families evicted from municipal estates dating back to the 1970s have watched in disbelief as the so-called “affordable units” turn into high-end rentals and Airbnbs. The government’s promises of accessible housing have proven empty as what was touted in Mombasa in 2016 as a solution for the urban poor has largely become a vehicle for profit and displacement leaving communities without recourse and exposing the government failure of to protect the most vulnerable. This failure is compounded by the claim in the Regulations that ‘proceeds from affordable housing projects’ will fund the Ardhi Fund. Yet, once the ‘affordable’ houses are sold, they belong to private owners. In this context, claiming that “proceeds from affordable housing” will support the Ardhi Fund is not only legally untenable but also morally deceptive.

Moreover, the contradictions between national and county actions have magnified the governance vacuum. When the Governor of Mombasa appeared before the Senate



Mombasa Governor Abdulswamad Nassir

in May 2025, he blamed the national government for failing to deliver on its housing promises and demanded disclosure of the original plans and budgets supporting redevelopment. Yet, when pressed on why the County itself had not resettled affected tenants despite the existence of the national Housing Fund under the Affordable Housing Program, no coherent answer was given. In fact, the Governor defended the initiative, stating that the Mombasa Urban Renewal and Regeneration Program was not to be financed through the housing levy kitty and further argued that the Program had been initiated by his predecessor CS Hassan Joho and therefore he was not responsible for its failure. However, the County Governments Act is unambiguous on this point because under section 6 (4)², “All contracts lawfully entered into under this section shall be valid

²No. 17 of 2012.

and binding on the county government, its successors and assigns.” This means the current Mombasa Government cannot abdicate responsibility by blaming the national government or predecessors. Once it enters into leadership, it is legally and morally bound to advance public good.

This lack of accountability is further reflected in the County’s own planning and budgetary priorities. Page 179 of the Mombasa Annual Development Plan 2024/2025³ outlines the baseline departmental ceilings for the financial years 2023/24 to 2025/26. The Department of Land, Planning, Housing and Urban Renewal is projected to receive Ksh. 276,750,000 in 2024/25 and Ksh. 281,454,750 in 2025/26. While these figures indicate a gradual increase in resources, the persistent challenges in Mombasa unresolved land disputes, inadequate protection against evictions and stalled projects indicate that simply increasing resources cannot tackle the underlying structural challenges.

The debate over accountability is not limited to Mombasa. At the national level, recent media interviews⁴ have also exposed the growing disconnect between government targets and the actual progress of the affordable housing agenda. When asked how many housing units had been started and completed under President Ruto’s tenure, the Acting CEO of the Affordable Housing Board, Sheila Waweru admitted that only about 1,400 units had been delivered. This figure stands in clear mismatch to president Ruto’s ambitious target of 200,000 units per year translating to a million homes over five years. Despite this dismal performance, Waweru revealed that the government has already collected nearly Ksh. 100 billion through the Housing Fund, generating roughly Ksh. 6 billion per month. This

illustrate that the housing crisis in Kenya is not a problem of inadequate funding but rather one of governance, planning and accountability.

The following day, the Mombasa CECM for Lands took to his Instagram and Facebook pages with a very different message. He wrote that the World Habitat Day commemoration “provided a platform for residents to discuss issues on land tenure, squatter settlements and affordable housing,” and that he had “reaffirmed the County’s commitment, under Governor Abdulswamad Shariff Nassir’s leadership to promote secure land ownership, inclusive planning and sustainable housing for all.” Dialoguing in good faith requires acknowledging the realities on the ground, listening to the concerns of residents and committing to tangible action. To those who were in the forum know that the statements offered none of this, instead they presented a polished narrative that distorted the frustrations, grievances and unanswered questions voiced by the community.

World Habitat Day was meant to be a moment of introspection. A chance for government and citizens to engage constructively in how to build resilient and inclusive cities. Instead, it became a mirror reflecting our governance deficit, policies that exist on paper but not in practice, communities whose struggles are consistently dismissed and leaders who talk at citizens rather than with them. Simply put, the day saw the County Government of Mombasa through its CECM for Lands speak but said nothing.

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³Available at: <https://www.mombasaassembly.go.ke/wp-content/uploads/2023/11/Final-Msa-ADP-2024-25.pdf>. <Accessed on 12th October 2025>.

⁴Available at: <https://youtu.be/orim2rqWoOI?si=Pndc-ZQ88cnuZiPK>. <Accessed on 12th October 2025>.

The subordinates tests: delimiting the boundaries of the incidental inclusion defense in Kenyan copyright jurisprudence



By Pienziah Kuloba



By Antony Makau

Abstract

*In an era defined by high-volume digital content, establishing the precise threshold where secondary use transitions from a permissible de minimis occurrence result in a clear violation is crucial for creators and rights holders. Consequently, the interconnection between this gap and the existing laws, the Kenya Copyright Act, Cap 130, governing the defense for incidental inclusion of copyrighted works and actionable copyright infringement claims, lies in limbo. The premise of this paper is the recent High Court decision by Hon. Lady Justice (Dr). Freda Mugambi, in *Wanjiku v Christ is the Answer Ministries (CITAM)* & another [2025], that, in the authors' opinion, has stirred up a hornet's nest with respect to copyright claims under the ambit of incidental inclusion. This paper seeks to examine the statutory delimitations of incidental inclusion as a defense to actionable copyright, whilst distinguishing it from broader exceptions like fair use. This distinction is rigorously tested in courts, which examine the intent*



In Kenya, copyright protection is automatically granted the moment an original work is fixed in a tangible form, but you can voluntarily register your work for significant legal benefits.

and commercial nature of the alleged infringement. An examination of common law jurisprudence reveals that this defense fails if the underlying activity is commercially driven, as courts apply the propositum test to discern the true intention of the creators. The paper argues for the consistent application of a clear, objective legal standard for incidental inclusion in Kenya. This entails protecting the financial interests of copyright holders from unauthorized exploitation whilst shielding legitimate content creators from undue liability arising from the unavoidable realities of modern media production in Kenya.

Keywords: Incidental Inclusion, Copyright Infringement, Kenya Copyright Act, Cap 130, Fair Use, De Minimis Use

1. Introduction: The protection of intellectual property in Kenya

The legal framework governing intellectual property in Kenya is governed by the Copyright Act, Cap 130, the Intellectual Property Act (2001), and its accompanying Regulations, which collectively articulate the scope and enforcement of protections afforded to creative works in the modern economy. The framework recognizes distinct types of IP aimed at securing exclusive rights over creations of the mind.¹ Patents confer an exclusive monopoly for a statutory term of up to twenty (20) years from the application filing date, subject to the timely payment of prescribed annual maintenance fees.² The grant is contingent upon the invention demonstrating the requisite novelty, an inventive step (non-obviousness), and susceptibility to industrial application.³ The administration and enforcement pertaining to patents, alongside Industrial Designs, falls under the purview of the Kenya Industrial Property Institute (KIPI).⁴ Industrial Designs protect the purely ornamental or aesthetic features of a product; protection is granted for an initial five-year term, renewable twice for a maximum tenure of fifteen (15) years, predicated on a unique and new visual appearance.⁵ Trademarks serve as key

indicia of source, protecting names, logos, and slogans utilized to distinguish an entity's goods or services. Registration with KIPI mandates that the mark possess sufficient distinctive character and subsists for an initial period of ten (10) years, with the right to perpetual renewal contingent upon continued commercial use.⁶ Conversely, Copyrights vest automatically in the creator upon the fixation of an original creative work in a tangible medium, safeguarding literary, artistic, and musical expressions. This right persists for the lifetime of the creator plus fifty (50) years post-mortem auctoris.⁷ Finally, Trade Secrets comprise confidential proprietary business information that confers a demonstrable competitive edge.⁸ Protection in this domain is not conferred by public registration; rather, the safeguard against misappropriation is strictly contingent upon the proprietor's sustained efforts to maintain the requisite confidentiality of the information, enabling protection to subsist indefinitely.⁹

Copyright is fundamentally a proprietary right vested in the originator or author of original works, serving to regulate the exploitation, reproduction, and dissemination of cultural, informational, and entertainment goods.¹⁰ This body of

¹Abigael Mokua, 'Copyright: Creation, Enforcement and Transfer in Kenya' (Mokua Legal Counsel Blog, 18 September 2025) <https://mokualegalcounsel.blogspot.com/2025/09/copyright-creation-enforcement-and.html> accessed 15 October 2025.

²Mary Kiveu, Patenting in Kenya: Status and Challenges (KIPPRA Discussion Paper No 141, Kenya Institute for Public Policy Research and Analysis 2012) <http://repository.kippira.or.ke/handle/123456789/2504> accessed 15 October 2025. See also; Abigael Mokua, 'Copyright: Creation, Enforcement and Transfer in Kenya' (Mokua Legal Counsel Blog, 18 September 2025) <https://mokualegalcounsel.blogspot.com/2025/09/copyright-creation-enforcement-and.html> accessed 15 October 2025.

³Ibid.

⁴Ibid.

⁵World Intellectual Property Organization, 'Frequently Asked Questions: Industrial Designs' (WIPO) <https://www.wipo.int/en/web/designs/faq-industrial-designs> accessed 15 October 2025.

⁶Kenya Industrial Property Institute, 'Trade Marks' (KIPI) <https://www.kipi.go.ke/trade-marks> accessed 15 October 2025. See also; Abigael Mokua, 'Copyright: Creation, Enforcement and Transfer in Kenya' (Mokua Legal Counsel Blog, 18 September 2025) <https://mokualegalcounsel.blogspot.com/2025/09/copyright-creation-enforcement-and.html> accessed 15 October 2025.

⁷Copyright Act (Cap 130), s 22(5). See also; Mercy Chore, 'A Guide to the Protection of Copyrights in Kenya' (CM Advocates Blog, 6 February 2025) <https://cmadvocates.com/blog/a-guide-to-the-protection-of-copyrights-in-kenya/> accessed 15 October 2025. See also; Abigael Mokua, 'Copyright: Creation, Enforcement and Transfer in Kenya' (Mokua Legal Counsel Blog, 18 September 2025) <https://mokualegalcounsel.blogspot.com/2025/09/copyright-creation-enforcement-and.html> accessed 15 October 2025.

⁸Abigael Mokua, 'Copyright: Creation, Enforcement and Transfer in Kenya' (Mokua Legal Counsel Blog, 18 September 2025) <https://mokualegalcounsel.blogspot.com/2025/09/copyright-creation-enforcement-and.html> accessed 15 October 2025.

⁹Ibid.

¹⁰Ibid.

law delineates two principal categories of protected subject matter: authorial works, encompassing creations such as literature, music, and art, and entrepreneurial works, which include derivative productions like sound recordings, broadcasts, and audio-visual works.¹¹ The core mandate of the legislative structure is to achieve a critical equilibrium, rewarding creators for their inventive expenditure of skill and labor whilst ensuring reasonable public access to knowledge and cultural enrichment.

Protection from copyright infringement under the Act is premised on the long-standing principle of *automaticity*.¹² A copyright vests immediately upon the creation and fixation of a work in a tangible medium, provided the work satisfies the threshold requirement of originality.¹³ This criterion necessitates that the author must have demonstrated sufficient intellectual effort or skill to produce a non-derivative outcome. Central to this protection is the vital limitation known as the idea-expression dichotomy, a doctrine which stipulates that protection is extended solely to the particular manner in which an idea is articulated, and not to the abstract idea, discovery, or factual basis underlying the expression itself.¹⁴ This philosophical constraint is crucial, as it prevents the grant of exclusive monopoly over fundamental concepts, thereby safeguarding the free flow and advancement of general knowledge. While the subsistence of copyright is automatic, creators possess the option to voluntarily register their works with the



The most effective protection combines proactive registration with a clear enforcement strategy. Registering your work with KECOBO provides a solid legal foundation, making all subsequent enforcement actions—from a cease-and-desist letter to a court case—much stronger and more likely to succeed.

Kenya Copyright Board (KECOBO), the state agency mandated with the administration and enforcement of the Act.¹⁵ The establishment of the National Rights Registry facilitates this process, which, while not a prerequisite for protection, yields significant practical and evidentiary advantages to the right holder. Judicial precedent, notably in the case of *Nonny Gathoni Njenga & Another v. Catherine Masitsa & 2 Others*, has cemented the principle that a certificate of registration serves as *prima facie* evidence of ownership.¹⁶ This legal presumption significantly buttresses a creator's position in enforcement proceedings and offers a streamlined method of establishing title during litigation concerning unauthorized use or exploitation.

¹⁰Ibid.

¹¹Copyright Act, Cap 130, s 1. See also the rationale in; PM Legal KE, 'Copyright Law in Kenya' (19 February 2018) <https://pmlegalke.wordpress.com/2018/02/19/copyright-law-in-kenya/> accessed 9 October 2025.

¹²Copyright Act (Cap 130), s 22(5); *According to the Copyright Act, an author's copyright rights are granted automatically the moment a work eligible for protection is put into a material form (written down, recorded, etc.); therefore, the author's ability to make a claim is not prevented by the lack of registration or any other official procedure.*

¹³Copyright Act (Cap 130), s 22

¹⁴Supra, n 3. See also; A. B. Chebet, 'The Kenyan Regulatory Environment' in J. W. Mbuni and E. O. Kinyanjui (eds), *African Intellectual Property Law* (Oxford University Press 2024) 45, <https://academic.oup.com/book/3274/chapter/144264549> accessed 9 October 2025.

¹⁵Kenya Copyright Board (KECOBO), 'Copyright Registration' <https://copyright.go.ke/our-services/copyright-registration> accessed 9 October 2025.

¹⁶*Nonny Gathoni Njenga & Jane Wambui Odewale v Catherine Masitsa & Standard Group Kenya* [2014] KEHC 6468 (KLR).



In Kenya, the proprietary interest of a copyright owner is defined and protected under the Copyright Act, 2001. It is distinct from moral rights, which are personal to the author and protect their non-economic connection to the work.

The proprietary interest of the copyright owner manifests through a bundle of exclusive rights, including the unfettered authority to reproduce the work, control its public performance, translate or adapt it, and regulate its distribution.¹⁷ Any act that encroaches upon these exclusive prerogatives without the explicit authorization or license of the right holder constitutes copyright infringement.¹⁸ Infringement is broadly defined by the Act as the unauthorized¹⁹ use or reproduction of the work, or, critically, a substantial part thereof. Kenyan jurisprudence has consistently affirmed that infringement is not contingent upon the wholesale reproduction of the entire work. The

Court of Appeal, in the seminal case of *Mount Kenya Sundries Ltd v Macmillan Kenya (Publishers) Ltd*,²⁰ clarified that the reproduction of a substantial part of the work is sufficient to establish a violation of the exclusive rights. The determination of substantiality in this context relies predominantly on a qualitative assessment,²¹ wherein the importance of the part utilized is weighted more heavily than its mere quantitative proportion to the whole. Beyond civil remedies, the Act also criminalizes various activities, including the trafficking, possessing for trade, or importing of articles known to be infringing copies.²²

1.1 Judicial Conservatism: *Wanjiku v CITAM*

Beyond protection, the proprietary rights of the copyright owner are circumscribed by several necessary limitations and statutory defences designed to mediate the tension between private monopoly and the public interest. Among the most pertinent defences, as well as the crux of this paper, is the doctrine of incidental inclusion. This statutory exception permits the lawful inclusion of copyrighted work when it is incidentally, casually, or non-substantially featured in the background of another independent work, such as a piece of music inadvertently captured during a televised interview or a visual work displayed on a wall during a film shoot.²³

The defense of incidental inclusion must be rigorously distinguished from the broader,

¹⁷These exclusive rights were greatly elucidated in; University of South Alabama Libraries, 'Statutory Interpretation' (*Legal Research*) <https://libguides.southalabama.edu/c.php?g=602400&p=4172320> accessed 9 October 2025.

¹⁸Copyright Act, Cap 130, s 35.

¹⁹*Ibid*.

²⁰*Mount Kenya Sundries Ltd v Macmillan Kenya (Publishers) Ltd* [2016] KECA 377 (KLR)

²¹*Ibid* [31]

²²CopyX, *Kenya's Copyright Law: Selected Statutory Provisions and Cases* (2014) <https://copyx.org/wp-content/uploads/sites/9/2014/04/Kenyas-Copyright-Law-Selected-Statutory-Provisions-and-Cases.docx> accessed 9 October 2025.

²³See; Design and Artists Copyright Society (DACS), 'Other exceptions' <https://www.dacs.org.uk/advice/articles/copyright-infringement/other-exceptions> accessed 9 October 2025. See also the Government of UK in; GOV.UK, 'Exceptions to copyright' <https://www.gov.uk/guidance/exceptions-to-copyright> accessed 9 October 2025.

more expansive doctrine of fair dealing. Fair dealing permits the authorized use of copyrighted material for specified public-interest purposes, such as criticism, review, reporting current events, or private study, provided that such use does not unreasonably prejudice the legitimate interests of the right holder.²⁴ While fair dealing assesses the purpose and effect of the use itself, incidental inclusion is narrowly focused on the manner of inclusion, ensuring the copyrighted work is clearly secondary or merely a background element.²⁵

Incidental to this is the recent decision by Justice F.G. Mugambi on 20th June 2025, *Wanjiku v Christ is the Answer Ministries (CITAM) & another* [2025].²⁶ The Honorable Court made a finding consistent and critical to its locus classicus, *Nairobi Map Services Ltd*,²⁷ however, it stirred up the hornet's nest with respect to the need for elaborate and defined demarcations of what it means to use copyrighted work incidentally. The plaintiff, Wanjiku, brought suit against the defendants. The first defendant was Christ Is the Answer Ministries (CITAM), and the second was the men's choir leader. Wanjiku alleged that their choir group unlawfully infringed her song titled “*Rungu Rwa Ihiga*” (the Plaintiff's song). The defendants' rendition was titled “*Athuri Mwihithe*” (the Defendants' song).

The plaintiff's case was that the defendants had made unauthorized reproduction, performance, and distribution of her copyrighted musical work. The defendants, conversely, maintained a denial of liability.²⁸ Their primary defense rested on two claims: first, that the plaintiff's song lacked the

requisite originality under Section 22(3) (a) of the *Copyright Act, 2001*, arguing that the key phrase “*Rungu Rwa Ihiga*” was a common Christian reference and thus in the public domain. Second, they asserted that any similarity or overlap with the Plaintiff's work was incidental and fell within statutory exceptions, emphasizing that their use was non-commercial and not intended for profit.

The judge, Justice Mugambi, first addressed the question of subsistence and originality. The court reviewed the evidence, including expert testimonies and the competing works, and ultimately found that the plaintiff's song possessed the necessary originality to attract copyright protection. Having established the protected nature of Wanjiku's work, the court moved to the question of infringement. The analysis focused on the substantial similarity between the melody, rhythm, and lyrical structure of the two songs. The judge found that the Defendants' work was not an independent creation, but rather a reproduction of a substantial part of the plaintiff's work, thereby dismissing the argument that the similarities were merely incidental or *de minimis*.

In determining the award, the judge took into consideration the fact that the Defendants' use, while not explicitly commercial, utilized their established platform to disseminate the infringing work, and the Defendants' failure to disclose relevant digital evidence during discovery, which was interpreted unfavorably. Based on these considerations, the court awarded the plaintiff Kenya Shillings One Million Five Hundred Thousand (KES. 1,500,000/=) in general damages for copyright infringement.

²⁴A defense that has been widely interpreted in the United States in; S. Flynn and others, 'Research Exceptions in Comparative Copyright' (2022) PIJIP/TLS Research Paper Series no 75 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1140&context=research> accessed 9 October 2025.

²⁵CIPIT, 'Can I Get Away With This? Fair Use and Fair Dealing of Copyrighted Work' (Strathmore University Centre for Intellectual Property and Information Technology Law Blog) (27 November 2019) <https://cipit.strathmore.edu/can-i-get-away-with-this-fair-use-and-fair-dealing-of-copyrighted-work/> accessed 9 October 2025.

²⁶High Court at Nairobi, Civil Suit 066 of 2020.

²⁷*Nairobi Map Services Limited v Airtel Networking Kenya Limited & 2 others* [2019].

²⁸*Ibid*, Paragraph [4] – [7].

The court's finding underscored that copyright protects the expression of ideas, not the ideas or themes themselves.²⁹ Consequently, Part I of this paper discusses how the exception of incidental inclusion is judicially interpreted across various common law jurisdictions, focusing on the strict purpose and necessity test in the United Kingdom, the flexible fair use and *de minimis* doctrine in the United States, and relevant provisions in South Africa and Australia. Part II examines Kenyan copyright jurisprudence concerning the statutory defense of incidental inclusion under Section 26(1)(c) of the Copyright Act. This is achieved by analyzing key High Court and Court of Appeal decisions, including *Nairobi Map Services Ltd*,³⁰ and *Mwangi Kirubi v Ink Productions Ltd*,³¹ that delineated a personalized legal standard and/or a three-part test Courts have used to determine that the use of copyrighted work does not constitute an infringement. Part III transitions from the analytical to the prescriptive, advancing the argument that, notwithstanding the robust interpretive framework established by Kenyan courts, the current statutory provision necessitates legislative refinement. It advocates for the immediate delimitations and precise definition of the incidental inclusion exception within the Copyright Act, Cap. 130.

The boundary of unintended use: Incidental inclusion

The law of copyright, as aforementioned, is predicated on balancing the proprietary rights of creators with the public interest

in access to and reuse of creative works. The subsequent discussion examines this exception through the lens of its legislative and judicial development in key jurisdictions, notably the United Kingdom, the United States, and South Africa.

I. Beyond intended use: The United Kingdom (U.K)

In the United Kingdom, the governing provision is Section 31 of the Copyright, Designs and Patents Act 1988 (CDPA). This section explicitly states that copyright is not infringed by the incidental inclusion of a work in an artistic work, sound recording, film, or broadcast.³² The judicial application of Section 31 has solidified the principle that “incidental” is not synonymous with “unintentional,” but rather refers to inclusion that is subordinate, inessential, or merely background to the primary subject matter.³³ The seminal Court of Appeal decision in *Football Association Premier League Ltd & Ors v Panini UK Ltd* established the primary test.³⁴ Panini’s (The Defendant) collectible football stickers featured photographs of players in their club shirts, which included copyrighted club and league logos. The Court rejected the incidental inclusion defense, reasoning that the inclusion of the logos was essential to the commercial object for which the images were created, namely, to ensure the authenticity and collectability of the stickers.³⁵ Lord Justice Chadwick stated that the determination must consider the artist’s mindset, commercial reasons, and aesthetic

²⁹This is more than the author’s assertion, but a prevalent claim across the globe. See Gichuki, L, ‘Copyright Protects Expression, Not Idea’ (GFR Law 24 March 2023) <https://www.gfrlaw.com/what-we-do/insights/copyright-protects-expression-not-idea> accessed 13 October 2025. See also, Lawshelf, ‘Unprotected Ideas vs. Copyrightable Tangible Expressions (Module 2 of 5)’ (Lawshelf) <https://www.lawshelf.com/videocourses/moduleview/unprotected-ideas-vs-copyrightable-tangible-expressions-module-2-of-5/> accessed 13 October 2025 as well as Paul, P, ‘What Does a Copyright Mean and What Are the Different Types?’ (Paul & Paul) <https://www.paulandpaul.com/what-does-a-copyright-mean-and-what-are-the-different-types/> accessed 13 October 2025.

³⁰*Nairobi Map Services Limited v Airtel Networking Kenya Limited & 2 others* [2019]

³¹*Mwangi Kirubi t/Aa Click Picture Works Africa v Ink Productions Limited* [2022]

³²Copyright, Designs and Patents Act 1988, s 31.

³³Kuits, ‘Don’t get caught short’ (Blog, 16 May 2017) <https://www.kuits.com/dont-get-caught-short/> accessed 9 October 2025.

³⁴See the decision in Oxbridge Notes, ‘Football Association Premier League Ltd v Panini UK Ltd’ (Law Cases Summary) https://www.oxbridgenotes.co.uk/law_cases/football-association-premier-league-ltd-v-panini-uk-ltd accessed 9 October 2025.

³⁵*Ibid.*

reasons for the inclusion, concluding that the deliberate use to enhance market value negated the claim of incidental use.³⁶

This focus on the purpose of inclusion was further refined in *Fraser-Woodward Ltd v British Broadcasting Corporation and another* (2005), which involved a television programme criticizing tabloid journalism that featured various newspaper pages.³⁷ The High Court drew a fine distinction between two types of photographic use: photographs displayed for the purpose of criticism or review (which qualified as fair dealing under Section 30), and a small, blurred photograph of a celebrity appearing within a newspaper headline shot primarily to exemplify a sensational headline.³⁸ The court held that the latter was “incidental” because the focus of the televised shot was on the text of the headline; the photograph was “only there because it happened to be there in the original.”³⁹ This case highlighted the importance of prominence and centrality if the copyrighted work is not the object of the viewer’s attention, its inclusion is more likely to be deemed incidental.⁴⁰

II. *Beyond intended use: The United States (USA)*

The United States Copyright Act of 1976 does not possess a specific statutory



The case of *Fraser-Woodward Ltd v British Broadcasting Corporation and another* is a 2005 UK copyright law decision that provides important guidance on the “fair dealing” defense for criticism or review and the “incidental inclusion” defense

exception titled “incidental inclusion.” Instead, such uses are primarily analyzed through the flexible and fact-intensive lens of fair use or *de minimis* use under Section 107.⁴¹ Fair use requires the evaluation of four statutory factors: (1) the purpose and character of the use (including whether it is commercial or transformative); (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market.⁴²

³⁶Ibid.

³⁷See the case summary in; 5RB, 'Fraser-Woodward Ltd v BBC & Brighter Pictures Ltd' (Case Summary) <https://www.5rb.com/case/fraser-woodward-ltd-v-bbc-brighter-pictures-ltd/> accessed 9 October 2025. See also; Practical Law, 'Copyright: incidental inclusion' (Practical Law, 25 July 2024) <[https://uk.practicallaw.thomsonreuters.com/D-007-6582?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/D-007-6582?transitionType=Default&contextData=(sc.Default))> accessed 9 October 2025.

³⁸Ibid.

³⁹See the accurate quote in; EWHC 472 (Ch) (CopyrightX UCT 2015 Casebook) <https://opencasebook.org/casebooks/464-copyrightxuct-2015/resources/7.3.3-fraser-woodward-ltd-v-british-broadcasting-corporation-another-2005-ewhc-472-ch-64-ipr-187-united-kingdom/> accessed 9 October 2025.

⁴⁰Ibid.

⁴¹The provision states that; Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

⁴²Ibid.

Incidental use in the US context often correlates with the third factor (amount and substantiality) and sometimes is considered under the common law defense of de minimis copying. The de minimis defense posits that, while technical infringement may have occurred, the amount copied is so minimal that it is legally insignificant. The case of *Ringgold v Black Entertainment Television, Inc.* illustrated the quantitative assessment of de minimis copying.⁴³ The U.S. Court of Appeals for the Second Circuit found that the repeated and prominent inclusion of a poster in a television set, visible for several seconds at a time, was not de minimis, contrasting it with background use that might be acceptable. Conversely, in *Gordon v Nextel Communications and Mullen Advertising, Inc.*, the court found the fleeting, out-of-focus appearance of illustrations in a television commercial to be *de minimis*.⁴⁴ The common thread here is observability: if the work is indistinct, out of focus, or merely background, the use is less likely to be actionable.

More critically, in the context of news reporting, the *Italian Book Corporation v American Broadcasting Companies*⁴⁵ The decision provides a functional equivalent to the UK's incidental inclusion. When a news crew filmed an outdoor religious festival, it captured a band playing a copyrighted song. The court accepted the fair use defense, stating that the recording of the song was “wholly fortuitous, entirely uncomplicated

by any prior intent” and “incidental to the overall, informative purpose of the newscast.”⁴⁶ This aligns closely with the UK's emphasis on the purpose and secondary nature of the inclusion relative to the primary subject of the work.

III. Other jurisprudential nuances

Analysis of other jurisdictions further clarifies the principles. In Australia, Section 67 of the Copyright Act 1968 is modelled closely on the UK's CDPA, applying the exception where inclusion is “only incidental to the principal matters represented.”⁴⁷ The case of *Thompson v Eagle Boys Dial-A-Pizza Australia Pty Limited* involved an advertisement that deliberately showed a competitor's copyrighted pizza boxes as background for a comparative marketing message. The court, in denying an interlocutory injunction, entertained the argument that, despite the deliberate nature of the use, the inclusion of the artistic work (the box “get-up”) was only incidental to the major point of the commercial, the contrast in ownership.⁴⁸ This suggests a potentially broader reading of “incidental” than the *Panini* decision, focusing less on the deliberation itself and more on whether the artistic work's actual copyrightable elements were the focus of the communication.

In South Africa, Section 15(1) of the Copyright Act 98 of 1978 provides a similar defense but is restrictively applied only

⁴³U.S. Copyright Office, 'Ringgold v. Black Entertainment Television, Inc.' (Case Summary, US Copyright Office, 19 August 1997) <https://www.copyright.gov/fair-use/summaries/ringgold-blackentm%E2%80%99t-2dcir1997.pdf> accessed 9 October 2025.

⁴⁴*Gordon v Nextel Communications and Mullen Advertising, Inc* 349 F Supp 2d 675 (SDNY 2004) (VLEX) <https://case-law.vlex.com/vid/gordon-v-nextel-communications-887030430> accessed 9 October 2025.

⁴⁵*Italian Book Corp v American Broadcasting Companies* 458 F Supp 65 (SDNY 1978) (VLEX) <https://case-law.vlex.com/vid/italian-book-corp-v-890032377> accessed 9 October 2025. See also; *Italian Book Corp v American Broadcasting Companies* 458 F Supp 65 (SDNY 1978) (*Leagle*) <https://www.leagle.com/decision/1978523458supp651507> accessed 9 October 2025.

⁴⁶*Ibid.*

⁴⁷The section provides that: *Without prejudice to the last two preceding sections, the copyright in an artistic work is not infringed by the inclusion of the work in a cinematograph film or in a television broadcast if its inclusion in the film or broadcast is only incidental to the principal matters represented in the film or broadcast.*

⁴⁸AJ Van der Walt, 'Incidental Use in South African Copyright Law' (*De Rebus*) <https://www.derebus.org.za/incidental-use-south-african-copyright-law/> accessed 9 October 2025. See also; Australian Securities and Investments Commission, 'EAGLE BOYS DIAL-A-PIZZA AUSTRALIA PTY LTD (ACN 003 169 391)' (ASIC Published Notices, 17 March 2017) <https://publishednotices.asic.gov.au/browsesearch-notices/notice-details/EAGLE-BOYS-DIAL-A-PIZZA-AUSTRALIA-PTY-LTD-003169391/a78a3972-7ba1-4d59-97f2-c6fa3935b964> accessed 9 October 2025.

to the inclusion of an artistic work in a cinematograph film, broadcast, or diffusion service, provided it is merely by way of background, or incidental.⁴⁹ This narrow statutory scope highlights a potential legislative shortcoming when dealing with incidental musical or literary works, which are covered by the broader provisions in the UK and the US.

Incidental Inclusion in Kenya

The use and claim of incidental inclusion in Kenya under the Act is provided by Section 26(1)(c), which exempts users from claims by the copyright owner over “the incidental inclusion of an artistic work in a film or broadcast.”⁵⁰

The application of Section 26(1)(c) requires a judicial inquiry into the qualitative and quantitative relationship between the protected artistic work and the allegedly infringing film or broadcast. The pivotal legal question that arises is not merely whether copyrighted work is visible, but whether its inclusion is genuinely incidental, whether it serves an inessential, subordinate, or merely background function relative to the primary subject matter and objective of the new work. Kenyan Jurisprudence, aside from the recent *Wanjiku* citation, has demonstrated a reliance on both established common law principles, notably those developed in the United Kingdom, while adapting them to the realities of Kenyan commercial and artistic production.

I. Secondary and subordinate: *Nairobi Map Services Precedent*

The foundational precedent in Kenyan jurisprudence concerning the interpretation of the incidental inclusion defense begins in

the Court of Appeal decision in *Nairobi Map Services Limited v Airtel Networking Kenya Limited & 2 others*.⁵¹

The matter proceeded to the Court of Appeal as an appeal against the High Court's decision to dismiss a suit for copyright infringement. The Appellant, Nairobi Map Services Limited, claimed that the Respondents Airtel Networking Kenya Limited (the mobile network provider), Z. K. Advertising Limited (the advertising agency), and The Sound and Picture Works Limited (the production house) had unlawfully reproduced and broadcast its copyrighted work, the “Kenya Administrative Map,” in a television advertisement. The critical facts revolved around the nature and prominence of the map's display in the advertisement. The Appellant's Chief Cartographer, James Mwaura Wamuhui, testified that the copyrighted map appeared conspicuously as a prop throughout the thirty-second commercial. The advertisement depicted an engineer communicating updates on network coverage, with the information being correlated visually by pins being affixed directly onto the map. Crucially, the map was filmed closely, allowing the viewer to clearly discern the symbols, colors, and unique artistic elements of the Appellant's cartographic work. The Appellant sought general and punitive damages, arguing that this use constituted a breach of its exclusive rights of reproduction and broadcasting.

The central legal issue before the High Court, and subsequently the Court of Appeal, was the proper interpretation and application of the statutory defense of incidental inclusion under Section 26(1)(c) of the Copyright Act. On appeal at the COA, Nairobi Map Services Limited contended that the High Court judge erred

⁴⁹Copyright Act 98 of 1978 (South Africa), s 15(1).

⁵⁰Copyright Act, Cap. 130, s 26(1)(c)

⁵¹*Civil Appeal 125 of 2016*

in law by misapplying the established test for incidental inclusion, asserting that the map's inclusion was deliberate, substantial, and fundamentally essential to the communication objective of the commercial, namely, conveying wide network coverage across Kenya. The Court of Appeal, constituted by Waki, Musinga, and Gatembu, JJA, with respect to the substantive issue of copyright infringement, the Appellate Court proceeded to affirm the finding of the trial judge.

The Court of Appeal explicitly adopted and applied the definitive legal test, drawn from established common law principles, requiring the inclusion to be characterized as casual, inessential, subordinate, or merely background.⁵² Applying this test to the visual evidence, the Court determined that the advertisement's core commercial message had been sufficiently established through independent visuals and narration that preceded and accompanied the map's display. The map, therefore, functioned solely as a visual backdrop, a non-essential staging prop.⁵³ The Court's definitive conclusion was that the removal of the copyrighted map would not have destroyed the core communication or message of the commercial. Consequently, the use was held to be incidental to the overall commercial objective,⁵⁴ thereby excluding it from the scope of actionable copyright infringement. The Appellate Court's dismissal of the appeal

cemented the decision as the leading Kenyan authority on the strict and subordinate nature of the incidental inclusion defense.

II. Audio-visual works: *The Mwangi Kirubi case*

Following the establishment of the definitive test in *Nairobi Map Services*, the High Court was subsequently called upon to apply these principles in *Mwangi Kirubi t/a Click Picture Works Africa v Ink Productions Limited*.⁵⁵

The litigation originated in the Chief Magistrate's Court, where the Appellant, Mwangi Kirubi t/a Click Picture Works Africa (Mr. Kirubi), a professional photographer, sued the Respondent, Ink Productions Limited, a film producer. Mr. Kirubi asserted *bona fide* copyright ownership over a specific artistic work, a distinctive, high-quality photograph of the City of Nairobi at night, captured using a long exposure technique. The gravamen of the claim was that Ink Productions had used this photograph without authorization to promote its popular program, "Nairobi Diaries,"⁵⁶ which was broadcast on K24 Television Channel and disseminated via the Respondent's YouTube channel. Mr. Kirubi sought, *inter alia*, declarations of infringement, an injunction, damages, and an account of profits. Ink Productions denied the claim, asserting it had produced its own audio-visual content and still photographs for the program since

⁵²*Ibid.*

⁵³Secondary and subordinate incidental inclusion" refers to the principle in copyright law that allows the inclusion of a copyrighted work in another work, provided it is not the main focus and is merely a background or casual element. The "secondary" aspect highlights its non-primary role, while "subordinate" emphasizes that it is of lesser importance to the overall work. "Incidental inclusion" is a specific exception to copyright infringement, where a work is unintentionally and peripherally captured. See Band, H and Gerafi, A, 'Fair Use and Transformative Works in the Digital Age: A Comparative Analysis' (2023) 48(2) JIP 123

⁵⁴The overall objective rule was sternly stressed by the Australian Government. See also; Australian Law Reform Commission, 'Incidental or Technical Use' in *Copyright and the Digital Economy (ALRC Report 122)* (ALRC 2014) <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/11-incidental-or-technical-use-and-data-and-text-mining/incidental-or-technical-use/> accessed 13 October 2025

⁵⁵*Civil Appeal E40 of 2019*

⁵⁶Nairobi Diaries is a Kenyan reality television series that premiered on 14 December 2015 on K24. The one-hour show stars Notiflow a musician fashion stylist Silvia Njoki, musician and actress Ella Ciru, NGO ambassador and student Gertrude Murunga, architect Kiki Diang'a, luwi singer and socialite and singer Pendo. See 'Nairobi Diaries' (*Wikipedia* 13 October 2025) https://en.wikipedia.org/wiki/Nairobi_Diaries

⁵⁷Civil Case 4 of 2023

2013. The Respondent's primary defense, aside from disputing ownership, was that the photograph's use, even if copyrighted, fell under the permissible exceptions of the Copyright Act.

At the High Court, having established the existence of the copyright, the court moved to the question of infringement and the applicability of the incidental inclusion defense. Ink Productions successfully argued that the use of photographs was permissible under Section 26(1)(c). The High Court agreed with this contention, finding that the photograph's inclusion in the Nairobi Diaries program was incidental.

Applying the established test, Justice Mwita determined that the photograph was utilized merely as a background image, serving a secondary or subordinate role to the main drama content of the show. The key factor in this reasoning was the absence of evidence demonstrating that the photograph played a significant role in attracting viewers or that the program could not continue without its presence.

III. Inclusion in the digital age: *Cherwon v Karua and the murals*

The legal concept of incidental inclusion continued to be tested by evolving media platforms, particularly in the digital realm involving social media, campaign videos, and music videos. The High Court decision in *Cherwon v Karua & 5 others*⁵⁷ provided a contemporary application of the doctrine. The claim was instituted by the Plaintiff, Nancy Chelagat Cherwon, the author and copyright owner of specific artistic murals painted on the premises of the Sixth Defendant, 209 State House Road. The Plaintiff sued six Respondents, including prominent political and artistic figures Hon. Martha Karua (First Defendant), Boniface Mwangi (Second Defendant), Highlands



Martha Karua

Drinks Limited (Third Defendant), Jamed Obunga alias "Otile Brown" (Fourth Defendant), and Ali Yussuf alias "Arrow Bwoy" (Fifth Defendant), for the unauthorized reproduction and broadcast of her artwork. The Plaintiff sought substantial compensation for lost royalties and licensing fees, asserting that the use of her murals as a backdrop in campaign videos, music videos, and social media content constituted infringement under both the Constitution and the Copyright Act.

Justice Ongerī reiterated the *Nairobi Map Services* principle that the determination of incidental inclusion is fundamentally a question of fact dependent on the specific circumstances of each case. The judge then proceeded to apply the established test: whether the inclusion was casual, inessential, subordinate, or merely background.

⁵⁷Civil Case 4 of 2023



Christ is the Answer Ministries church

It was determined that the main activities of the Respondents were their campaign videos, music videos, and Instagram reels and posts. The murals, while visibly present, served the sole function of providing a visually appealing backdrop.⁵⁸ The judge concluded that the murals were merely incidental inclusions. In the court's precise articulation:

*"What the Court ought to establish is, looking at the three screenshots presented, is the artwork by the Plaintiff an infringement, or is it simply a background?"*⁵⁹

Since the artwork was clearly not the main feature or the central subject matter of the Respondents' activities, the campaigns and music were the focus; its use did not constitute an actionable infringement. The *Cherwon* decision strongly reaffirmed the prerequisite that the protected work must be distinctly subordinate to the host work's primary communicative or aesthetic function for the defense to succeed.

IV. The subordinate tests

The controlling standard, affirmed in *Nairobi Map Services* and consistently applied thereafter, requires the court to assess whether the copyrighted work is casual, inessential, subordinate, or merely background to the principal work.

The first and arguably most critical factor is the assessment of Functional Centrality versus Aesthetic Backdrop. The courts must meticulously inquire whether the protected work is truly necessary for the host work to achieve its primary objective, message, or commercial goal. The key distinction lies in the role the artwork plays: whether it is an interchangeable, passive piece of scenery or an active component of the communication.⁶⁰ For instance, in *Nairobi Map Services Limited v Airtel Networking Kenya Limited*, the Court of Appeal determined that the copyrighted map served merely as an illustrative backdrop a non-essential visual aid because the core message of expansive network coverage was already conveyed effectively through independent narration and other visual sequences. Similarly, in *Mwangi Kirubi t/a Click Picture Works Africa v Ink Productions Limited*, the High Court found that the photograph of Nairobi was simply an interchangeable background for the drama series "Nairobi Diaries." The drama, which constituted the core content, was entirely independent of the photograph. Conversely, the High Court in *Wanjiku v Christ is the Answer Ministries (CITAM)* encountered a different scenario. In that instance, the copyrighted material was deliberately integrated into the structural rhythm and lyrics of the defendants' song. This integration made the material functionally essential to the artistic

⁵⁸*Ibid.*

⁵⁹*Ibid.*, [89]

⁶⁰See also; Hugenholtz, P B and Spoor, J H, *The Recasting of Copyright & Related Rights for the Knowledge Economy: Final Report* (Institute for Information Law (IViR) 2006) https://www.ivir.nl/publicaties/download/IViR_Recast_Final_Report_2006.pdf accessed 13 October 2025

⁶¹It can also be termed as the functionality test.

expression and the overall communication of the song, thereby defeating the claim that it was merely incidental. This comparison establishes that centrality is not just about visibility but about functional reliance.⁶¹

Following this, the courts consider the element of Quantitative and Qualitative Substantiality. This factor demands an analysis of both the duration and the inherent significance of the inclusion. The law must prevent a producer from claiming a copyrighted work is “background” if the use is pervasive and integral.⁶² The ruling in *Wanjiku v CITAM* provides the necessary benchmark, where the court noted that the segment of the plaintiff’s work spanned “nearly half the entire composition,” running for over three minutes. Such excessive duration moved the work decisively from the category of casual inclusion to a substantial part of the composition. When the duration, prominence, and intrinsic value of the new work are significant, the court will conclude that the background function has been overwhelmed by the work’s substantiality, thus removing the protection of the incidental inclusion defense.⁶³

A robust method consistently employed by the courts to test subordination is the Destruction of Message Test. This principle requires the court to hypothetically remove the copyrighted work from the host work and evaluate the impact. If the copyrighted work can be entirely removed or substituted with a non-infringing alternative without destroying or fundamentally altering the host work’s communicative message, artistic structure, or commercial purpose, the inclusion is definitively classified as incidental.⁶⁴ This test proved successful

for the defendants in both *Nairobi Map Services* and *Mwangi Kirubi*. In the former, the removal of the map would not have destroyed the advertisement’s fundamental assertion of network coverage; in the latter, the removal of the background photograph would not have stopped the drama program’s core content from being broadcast. The successful application of this test is the strongest indicator of a work’s subordinate status.

Finally, the courts also analyze the Intent of the Creator, though with limited relevance to the ultimate determination. This factor recognizes that in modern film and broadcasting, the act of filming itself is often deliberate, as creators intentionally choose sets, locations, and backdrops. However, the law distinguishes between the deliberate intent to film an area containing copyrighted material and the deliberate intent to use the copyrighted material as the main subject or a substantial focus of the host work.⁶⁵ If the intent is merely to capture a scene such as a city view, a public square, or a premise adorned with murals, and the copyrighted work (the photograph, the building, the mural) is merely present within that scene, the defense remains available. The inclusion, while deliberate in the sense of choosing the location, is still incidental to the host work’s primary narrative or commercial objective.

Consequently, provided the copyrighted artistic work maintains a clearly subordinate and inessential role relative to the main purpose and content of the film or broadcast, the exception provided by Section 26(1)(c) of the Copyright Act, will operate as a complete and effective bar to any claim of copyright infringement.

⁶²See Band, H and Gerafi, A, 'The Digital Economy and Copyright Law' (*Working Paper* 2020) <https://core.ac.uk/download/pdf/43095256.pdf> accessed 13 October 2025. See also; Gerafi, A, 'The Incidental Inclusion Defense in Copyright Law' (SSRN 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3883500> accessed 13 October 2025.

⁶³Ibid Gerafi Pg. 21.

⁶⁴World Intellectual Property Organization (WIPO), *Understanding Copyright and Related Rights* (WIPO 2018) https://www.wipo.int/edocs/pubdocs/en/wipo_pub_791_2018.pdf accessed 13 October 2025

⁶⁵Ibid.

Addressing the lacuna: Acute delimitations

The preceding analysis confirms that Kenyan copyright jurisprudence, primarily through the establishment of the Subordinate Test in *Nairobi Map Services* and its refinement in cases like *Mwangi Kirubi* and *Wanjiku v CITAM*, has positively developed a workable, fact-intensive framework for the incidental inclusion exception under Section 26(1)(c) of the Copyright Act. By critically applying factors such as functional centrality and the destruction of message test, the courts have successfully protected secondary, background uses while rightfully punishing instances of substantial or structural appropriation.⁶⁶

Nevertheless, reliance solely on judicial interpretation, however rigorous, leaves a significant legislative lacuna that hinders systemic predictability and regulatory efficiency. The absence of clear, formal, and systematic statutory boundaries for this exception poses tangible risks to both rights holders and legitimate creative users, particularly as media consumption accelerates and technologies evolve.⁶⁷

The necessity of defined statutory or judicially established requirements is paramount, especially when differentiating between the categories of protected works. While the current jurisprudence provides a strong framework for visual artistic works (e.g, maps, photographs, murals),

the application to other categories, such as literary or musical works, remains less clearly codified within the incidental inclusion context, often blurring the line with the broader, more complex fair use doctrines.⁶⁸ The ruling in *Wanjiku v CITAM*, which hinged on the structural integration of musical elements, serves as a crucial judicial delimiter but underscores the vulnerability of the exception when applied to temporal or non-visual works. A systematic framework is required to formalize the distinction between a permissible background visual and a substantial, integrated thematic element, preventing the erosion of copyright protection for the latter categories of work.⁷⁰

Moreover, the relentless pace of technological evolution necessitates immediate legislative attention. The existing statute was designed for traditional film and broadcast, not the instantaneous, high-volume, and often transformative content generation prevalent on platforms like TikTok, Instagram Reels, and YouTube Shorts.⁷¹ The nature of short-form digital media, which relies heavily on video sampling, rapid transitions, and the constant reuse of visual and audio elements, exponentially increases the potential for technical infringement claims.⁷² Without clear statutory guidance, courts will face escalating difficulty in determining whether the rapid, transient appearance of an artistic work in a five-second viral video constitutes an “incidental inclusion” or an actionable infringement. This ambiguity creates a

⁶⁶See Part II.

⁶⁷For example, in Canada, the provisions for incidental inclusion have been laid out pragmatically. Consider; Documentary Organization of Canada (DOC), *Fair Dealing and Documentary Filmmaking: A Guide* (DOC 2010) https://docorg.ca/wp-content/uploads/2010/05/DOC-FairDealing-EN-v2-web_4.pdf accessed 13 October 2025

⁶⁸Mutua, P M, 'Incidental Inclusion and the Limits of Copyright Protection' (2023) 5(2) *Strathmore Law Journal* 45

⁶⁹According to Grace, “Right now, courts are doing fairly well when dealing with visual or artistic works, such as photographs, maps, murals, or paintings. These are easier to judge because one can visually see whether the copyrighted element is just background or central to the new work. However, the situation becomes murkier with non-visual works like literary or musical pieces, because the laws and court decisions don't yet spell out how incidental inclusion applies to them. For example, in music, it's harder to tell whether a short melody or lyric used in another work is truly incidental or if it amounts to copying.” See also; Gerafi, A, 'Copyright and the Digital Economy' (SSRN 2005) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=346361> accessed 13 October 2025

⁷⁰Artists' Rights in the Works They Create' in P J O'Connor and S J P Smith (eds), *Law, Ethics, and the Visual Arts* (Cambridge University Press 2018)

⁷¹*Ibid.*

chilling effect on legitimate incidental usage and overburdens the judiciary with factual determinations that could be mitigated by precise, adaptive legislative language.⁷³

This legal uncertainty could potentially hinder legitimate instances of incidental inclusion where producers, fearing costly litigation and unpredictable outcomes, resort to expensive licensing or avoid including common visual elements altogether.⁷⁴ Conversely, a lack of precise boundaries could embolden bad-faith actors to strategically argue incidental inclusion for uses that are, in reality, functionally central or commercially parasitic, thereby undermining the economic rights of creators. To sustain the delicate balance between the copyright holder's economic monopoly and the public's interest in expressive freedom, the law must strive for maximum predictability.

To address this structural deficiency, the Legislature should consider codifying the key judicial findings, defining the tests enumerated above based on a tiered assessment of the host work's commercial purpose and the contribution of the copyrighted element. Criteria, similar to the deduction made under Part I of this paper, should be established that explicitly state the exception does not apply where the protected work is (i) *the primary subject matter of the host work*; (ii) *featured for a duration or prominence that exceeds a de minimis threshold*; or (iii) *demonstrably relied upon to establish the core message or aesthetic appeal of the host work*.

Such precise statutory criteria would serve to maintain fairness, enhance predictability for content creators, and ensure that the incidental inclusion defense remains a



With the rise of internet use, Kenya's 2019 and 2022 amendments introduced digital enforcement provisions, including: Liability of Internet Service Providers (ISPs) that knowingly host or share infringing content, creators can notify ISPs or platforms to remove infringing materials and Digital Rights Management (DRM) and technological protection measures (TPMs) — tools to restrict unauthorized copying or access.

balanced, equitable instrument of copyright law, effectively serving its purpose as a narrowly tailored exception in a rapidly expanding digital economy.

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⁷²Hilty, R, 'The Incidental Use of Copyrighted Works' (2022) 64 *Arizona Law Review* 1

⁷³*Ibid.*

⁷⁴Band, H, 'Fair Use and the Right to Parody' (SSRN 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4620875> accessed 13 October 2025

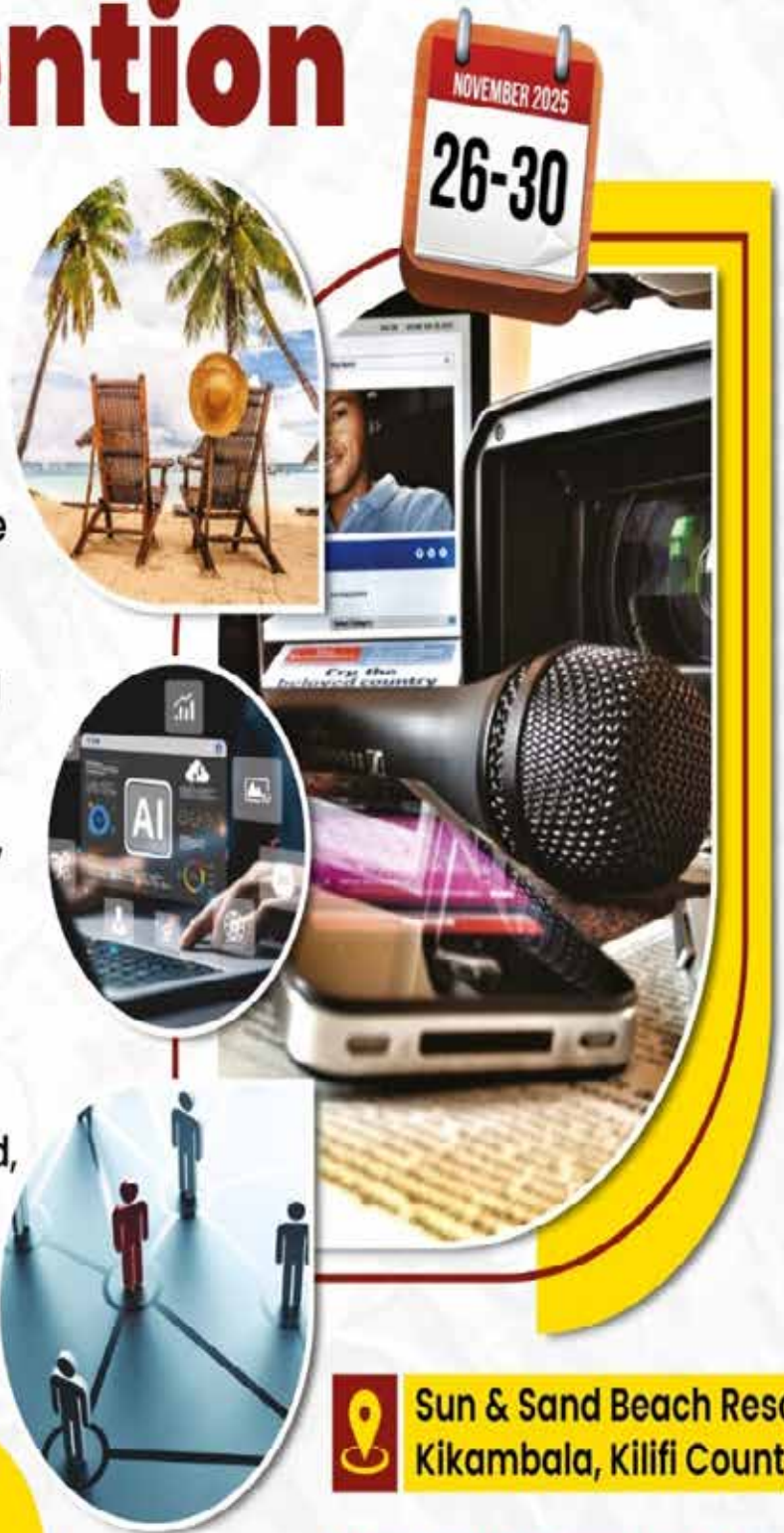
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Reforming Kenya's unfunded pension schemes through enhancing vesting and portability



By Joshua Kipyego Fwamba



By Eugene Ouma

1.0 Abstract

This paper evaluates the rights and obligations of employers and employees under Kenya's unfunded pension schemes. It will focus on the Pensions Act,¹ Pensions (Increase) Act,² Provident Fund Act,³ and Widows' and Orphans' Pensions Act.⁴ The pay-as-you-go (PAYG) system exposes retirees to risks such as delayed payments, inadequate adjustments for inflation and limited portability. This undermines financial security and job mobility.

Through an analysis of various statutory provisions this paper identifies gaps in

vesting and portability rights. The paper proposes necessary and achievable reforms so as to create a sustainable and equitable pension framework. These recommendations and reforms aim to align Kenya's pension system with constitutional guarantees of social security and global best practices.

1.1 Introduction

Kenya's public sector pension system is primarily governed by the Pensions Act.⁵ The system relies on a pay-as-you-go (PAYG) framework where revenue from current contributions are used directly to pay for current retirement benefits.⁶ This is different from the pre-fund]ed framework where pensions in which contributions are made are invested over time and then used to pay pension benefits in the future.⁷ This system, supplemented by the Pensions (Increase) Act,⁸ Provident Fund Act,⁹ and Widows' and Orphans' Pensions Act,¹⁰ aims to provide social security for public servants and their dependants, as mandated by Article 43(1) of the Constitution of Kenya 2010.¹¹ Despite its relevance, the PAYG model faces significant challenges: payment delays due to fiscal

¹Pensions Act (Cap 189, Laws of Kenya).

²Pensions (Increase) Act (Cap 190).

³Provident Fund Act (Cap 191).

⁴Widows' and Orphans' Pensions Act (Cap 196).

⁵Pensions Act (n 1).

⁶David Eatock, *European Union Pension Systems: Adequate and Sustainable* (EPRS | European Parliamentary Research Service Briefing, PE 571.327, November 2015) 2 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/571327/EPRS_BRI\(2015\)571327_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/571327/EPRS_BRI(2015)571327_EN.pdf)> accessed 3 July 2025.

⁷ibid.

⁸Pensions (Increase) Act (Cap 190).

⁹Provident Fund Act (Cap 191).

¹⁰Widows' and Orphans' Pensions Act (Cap 196).

¹¹Constitution of Kenya 2010, art 43(1).



Kenya's pension environment has a mix of funded and unfunded schemes. The unfunded ones (especially public-sector and quasi-government) pose risks because they depend on future revenues rather than accumulated assets. The issue is compounded by large unremitted contributions, delayed payments to retirees, and low overall coverage. Reform efforts are ongoing but significant challenges remain.

constraints, lengthy vesting periods that exclude short-serving employees and limited portability that restricts job mobility. These issues compromise the financial security of retirees and violates the principles of fairness and equity enshrined in the Constitution.¹²

This paper critically examines the rights and obligations of employers and employees under the specified pension laws. It does this by drawing on statutory provisions, relevant case law and authoritative academic research. The paper proposes targeted reforms to enhance vesting and portability. For avoidance of doubt, vesting refers to the legal ownership of the accrued benefits in the scheme for a member including what has been contributed by the Government and returns thereon.¹³ Portability on the other hand, is the ability of a plan member to transfer the commuted

value of his or her deferred vested benefits to another retirement savings arrangement on termination of employment before retirement.¹⁴ All this is compounded by the need to create a sustainable pension system that upholds workers' constitutional rights and supports Kenya's socio-economic development.

1.2 Legal framework and analysis

1.2.1 Pensions Act (Cap 189)

The Pensions Act (Cap 189) regulates retirement benefits like pensions, gratuities and other allowances in respect of the public service of officers under the Government of Kenya.¹⁵ It provides for pensions, gratuities and allowances upon retirement, death or termination in the public interest.¹⁶ Being the employer, the government is obligated to fund these benefits through annual

¹²ibid, arts 10, 27.

¹³The National Treasury and Planning, *Public Service Superannuation Scheme (PSSS) Handbook* (October 2020) 7.

¹⁴Republic of Kenya, The National Treasury and Economic Planning, *National Retirement Benefits Policy* (October 2023).

¹⁵Pensions Act (n 1).

¹⁶ibid s 6(1)(f).

budgetary allocations managed by the National Treasury's Pensions Department.¹⁷ Employees qualify for benefits if they serve on permanent and pensionable terms and meet conditions such as a minimum of 10 years' service for dependants' pensions.¹⁸ To illustrate this, upon an employee's death, their widow or children may receive a pension provided the employee meets the service threshold.

The PAYG system is however inherently unstable. Benefits depend on the government's fiscal capacity, which is often strained by competing priorities such as health-care and infrastructure.¹⁹ Delays in pension payments that have been reported in public complaints and judicial cases undermine retirees' financial security. These have necessitated the calling for a comprehensive overhaul of Kenya's pension system to address the long-standing delays and injustices.²⁰ The 10-year service requirement excludes workers with shorter tenures denying them benefits despite contributions through service.²¹ Portability is also restricted as benefits are tied to public service and cannot be easily transferred to private sector schemes or abroad.²² These limits job mobility and financial planning.

1.2.2 Pensions (Increase) Act (Cap 190)

The Pensions (Increase) Act mandates biennial pension adjustments to account

for inflation ensuring retirees' incomes remain adequate.²³ Since July 2005, these increases have been capped at 3% every two years.²⁴ The government is obligated to budget for these adjustments and in the same measure, retirees have a right to expect them to maintain their purchasing power.²⁵ However, the 3% cap is often inadequate especially when inflation exceeds this rate as it frequently does in Kenya due to economic volatility.²⁶ For example, Kenya's inflation rate averaged 7.8% between 2020 and 2024, eroding pensioners' real income.²⁷ The PAYG system exacerbates this issue as adjustments are subject to budget availability, risking under-funding and leaving retirees vulnerable to rising costs of living.²⁸

1.2.3 Provident Fund Act (Cap 191)

The Provident Fund Act (Cap 191) governs defined contribution schemes where employees and employers contribute to a fund, the Provident Funds, and workers receive a lump sum upon retirement, termination or other qualifying events.²⁹ Employers must make regular contributions, ensure proper fund management and register schemes with the Retirement Benefits Authority (RBA) under the Retirement Benefits Act.³⁰ Employees benefit from immediate vesting meaning they can access their contributions, employer contributions and accrued interest without delay.³¹ This makes provident funds

¹⁷ibid.

¹⁸ibid s 17.

¹⁹David B Nyakundi, 'Problems Facing Kenya's Pension System: A Case for Reforms of Laws Relating to Pensions' (University of Nairobi eRepository, 2020) < <https://erepository.uonbi.ac.ke> > accessed 3 July 2025.

²⁰Commission on Administrative Justice (Office of the Ombudsman), 'Ombudsman Calls for the Overhaul of Kenya's Pensions System to Address Decades Long Delays and Injustices' (Press Release, Nairobi, 13 February 2025) < <https://ombudsman.go.ke/sites/default/files/2025-03/Press%20Release--%20Overhaul%20Pensions%20System%202025.pdf> > accessed 3 July 2025

²¹Pensions Act (n 1) s 17.

²²The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, Legal Notice No 119 of 2000, reg 19(5).

²³Pensions (Increase) Act (n 8), s 3.

²⁴ibid.

²⁵The National Treasury, 'Pensions' (10 June 2021) < <https://www.treasury.go.ke> > accessed 3 July 2025.

²⁶World Bank, 'Pension Systems in Sub-Saharan Africa: Challenges and Opportunities' (World Bank, 2023) 45.

²⁷Kenya National Bureau of Statistics, 'Consumer Price Index 2020-2024' (KNBS, 2024).

²⁸David B Nyakundi, 'Problems Facing Kenya's Pension System: A Case for Reforms of Laws Relating to Pensions' (n 19).

²⁹Provident Fund Act (n 9), s 3.

³⁰Retirement Benefits Act (No 3 of 1997, Laws of Kenya), s 23



Before Kenya's contributory pension reforms, most civil service pensions were non-contributory and unfunded – paid from the Consolidated Fund. However, since civil servants' spouses and dependents were left vulnerable on the death of a serving or retired officer, the government established this separate law to support dependents (widows and children) through periodic pension payments.

fairer than pensions under the Pensions Act as workers face no lengthy service requirements. Provident funds also offer greater portability since employees can transfer funds to other Retirement Benefits Authority-approved schemes upon changing jobs or emigrating.³²

On the other side of the coin, portability is subject to the receiving scheme's rules which may impose restrictions or delays. Another imminent problem is that even though lump-sum payments are flexible, they may not provide long-term security compared to annuity-based pensions, as retirees may deplete funds if not managed prudently.³³

1.2.4 Widows' and Children's Pensions Act (Cap 195)

The Widows' and Children's Pensions Scheme (WCPS), established under Cap 195, provides pensions for widows and children of deceased male public officers who were scheme members.³⁴ The government must administer the scheme and pay benefits to eligible dependants, with pensions divided equally in polygamous families.³⁵ Widows receive lifelong pensions for a period of five years next following the date of the officer's death,³⁶ unless they remarry,³⁷ and children, as long as there are persons for whose benefit the children's pension can endure.³⁸

³¹The Retirement Benefits Regulations (n 22), reg 20.

³²*ibid* 19(5).

³³Ronalds LLP, 'Kenyan Employers Guide on Pension and Benefits' (20 April 2020) <<https://ronalds.co.ke>> accessed 3 July 2025.

³⁴Widows' and Children's Pensions Act, Cap 195, Laws of Kenya, published in *Kenya Gazette* Vol LXVII-No 55, 30 November 1965, assented to on 24 November 1965.

³⁵*ibid* s 8 (6).

³⁶Pensions Act (n 1) s 17.

³⁷Widows' and Children's Pensions Act (n 35), s 8(1)(b).

³⁸*ibid* s 11.

The scheme's restriction to male officers raises equality concerns as it potentially violates Article 27 of the Constitution which guarantees non-discrimination.³⁹

1.3 Challenges with vesting and portability

1.3.1 Vesting challenges

As explained earlier, vesting, in this case pension vesting, refers to the process by which an employee becomes entitled to receive retirement benefits from a pension scheme.⁴⁰ It establishes the point at which you gain ownership of the contributions made to your pension fund, allowing you to access your hard-earned savings at retirement. To become eligible for pension vesting, you must meet the minimum service period specified by the pension scheme. The Pensions Act's vesting period is 10-years.⁴¹ By vesting period, I mean the duration an employee must remain actively contributing to a pension scheme before becoming fully vested or eligible for pension benefits.⁴²

As stated, the Pensions Act's vesting period is 10-years' service. This requirement for dependants' pensions excludes workers with shorter tenures. This denies them benefits despite years of service done by the deceased public officer. This, in some way, perpetuates some form of discrimination as dependants of public officers whose service were short term services (less than 10 years) are treated differently and disproportionately affected compared

to dependants of public officers whose service were long term services.⁴³ The PAYG system's reliance on annual budgets risks under-funding as evidenced by frequent payment delays reported by pensioners.⁴⁴ This further affects the vesting rights of retirees in that their legal ownership over the accrued benefits stands at jeopardy, with no surety as to when they will be entitled to their retirement benefits. As reported by the Office of the Ombudsman, as at 13 February 2025, over 647 complaints were meted against the Pensions Department.⁴⁵ The complaints were mostly due to the delay and disbursement of the retirees' benefits due to unavailability of funds.⁴⁶ These further exacerbates the vesting challenges present in our current pension scheme.

Additionally, pension schemes under the Pension Act, upon crystallisation of the vesting rights, pays part of the benefits as a lump sum and the remaining portion on a periodical basis.⁴⁷ In contrast, the Provident Fund Act's Provident funds pays out benefits in one lump sum.⁴⁸ This ensures immediate vesting making it more dependent. The gradual growth of provident funds as opposed to pension schemes demonstrates a lack of appreciation of longevity risks in retirement. The WCPS vests benefits for dependants but is limited by its gender-specific design and five-year cap on some pensions, which is inadequate for long-term support.⁴⁹ In the event of a public officer who was killed on duty, the widow's pension is subject to a maximum of 6 children only.⁵⁰ These exposes huge families at risk

³⁹Constitution of Kenya (n 11), art 27.

⁴⁰Divani Editorial Team, *Unlocking Your Retirement Savings: A Guide to Pension Vesting in Kenya* (Divani, 2025) <<https://divani.co.ke/unlocking-your-retirement-savings-a-guide-to-pension-vesting-in-kenya/>> accessed 4 July 2025.

⁴¹Pensions Act (n 1) s 17.

⁴²Divani Editorial Team (n 40).

⁴³Constitution of Kenya (n 11), art 27.

⁴⁴Commission on Administrative Justice (n 20).

⁴⁵Commission on Administrative Justice (n 20), 1.

⁴⁶*ibid* 2, 6.

⁴⁷Republic of Kenya (n 14), 3.

⁴⁸*ibid*.

⁴⁹Widows' and Children's Pensions Act (n 35), s 8.

⁵⁰The National Treasury and Planning (n 15), 11.

of not being catered for and also tends to breed hostility and wrangles among family members, especially children, as they will have to choose and decide who amongst them will not be covered by the pensions, in case they are more than 6 children in that family. Additionally, it is discriminatory against female officers as they are required to meet certain additional conditions to be allowed to contribute towards WCPS.⁵¹ On that end, it is discriminatory to male officers on account of marriage gratuity and widowers' pension.⁵²

1.3.2 Portability challenges

Portability is the ability of a plan member to transfer the commuted value of his or her deferred vested benefits to another retirement savings arrangement on termination of employment before retirement.⁵³ In the pension scheme as provided by the Pensions Act and WCPS, pension benefits are not portable since accrued benefits are not transferable.⁵⁴ This is because the Pensions Act and WCPS tie benefits to public service, and the payments are made from the consolidated fund, making transfers to private schemes or abroad difficult.⁵⁵ However, benefits in the Provident funds under the Provident Funds Act are portable.⁵⁶ An employee can transfer pension benefits from one registered scheme to another of a similar nature irrespective of the sector (private or public).⁵⁷ This offers better portability. However inconsistent rules across schemes create barriers where schemes are of different designs and/ or different legislation.⁵⁸

At the same time, cross border labour mobility is becoming common globally. Kenyans in the diaspora, including the EAC region, may contribute to the various retirement benefits arrangements in their host countries.⁵⁹ On conclusion of their contracts, portability of retirement benefits savings becomes a challenge due to lack of relevant agreements, such as those on double taxation.⁶⁰

Regional and international labour mobility raises questions about retirement benefits for workers who migrate to other countries in the region or internationally. Cross border portability of benefits is hindered by a number of factors including; different designs of pension systems, varied taxation regimes, investment environment which are dissimilar, lack of reciprocal agreements and lack of totalisation of contribution periods.⁶¹ These frustrates workers' mobility and financial planning disproportionately affecting younger workers and those in dynamic labor markets which limits their career flexibility.

1.4 Proposed reforms

The following reforms are proposed to secure vesting and portability rights while ensuring a sustainable pension framework:

a) Transition to Funded Schemes: Replace the PAYG system with fully funded schemes like the PSSS where contributions are invested in individual accounts. The transition from the Pay-As-You-Go (PAYG) system to fully funded schemes such as

⁵¹ibid.

⁵²ibid.

⁵³Republic of Kenya (n 16), v.

⁵⁴The National Treasury and Planning (n 13), 16.

⁵⁵ibid 17.

⁵⁶ibid 16.

⁵⁷ibid 13.

⁵⁸Republic of Kenya (n 14), 9.

⁵⁹ibid.

⁶⁰ibid.

⁶¹ibid.

the Public Service Superannuation Scheme (PSSS) is vital for fiscal sustainability and intergenerational equity. The PAYG model has repeatedly proven unsustainable as it depends on annual budget allocations rather than accumulated savings. The PSSS, implemented in 2021, should be expanded to cover all public servants including those currently under PAYG to ensure benefits are secure and transferable.⁶² This aligns with global best practices, as seen in countries like Chile, which successfully transitioned to funded pension systems.⁶³ Funded schemes, by contrast, ensure that contributions are invested and benefits are available when due, protecting retirees from budgetary volatility.

b) Shorten Vesting Periods: Amend the Pensions Act to reduce the 10-year service requirement to 3–5 years, aligning with private sector standards under the Retirement Benefits Regulations.⁶⁴ This would ensure more workers qualify for benefits, promoting inclusivity and fairness particularly for short-serving employees. Shorter vesting periods would also expand benefit coverage, promote labour mobility, and increase public confidence in the pension system.⁶⁵ The government must conduct actuarial valuations to ensure sustainability before implementation.

c) Standardize Portability Protocols: Enact Retirement Benefits Act regulations to standardize transfers between public and private schemes, with clear timelines to prevent delays as showcased by the office of the ombudsman. This reform promotes job mobility and recognizes Kenya's growing

integration into the East African Community labour market.

d) Revise the Widows' and Children's Pensions Scheme: Amend the Widows' and Children's Pensions Act to include dependants of female workers, ensuring compliance with Article 27 of the Constitution. Remove the five-year limit on pensions to provide long-term support for families aligning with social security principles.

e) Strengthen Retirement Benefits Authority (RBA) Oversight: Empower the Revenue Benefits Authority to enforce strict timelines for payments and transfers with penalties for non-compliance.⁶⁶ Establish a dedicated pension tribunal to resolve disputes swiftly addressing administrative failures as addressed by the Ombudsman.

f) Link Pension Increases to Inflation: Replace the 3% biennial cap under the Pensions (Increase) Act with adjustments tied to the Consumer Price Index, ensuring pensions reflect economic realities. Replacing the 3% biennial cap under the Pensions (Increase) Act with adjustments tied to the Consumer Price Index (CPI) would also preserve retirees' purchasing power.⁶⁷ Regular actuarial reviews would maintain scheme sustainability.

g) Enhance Worker Awareness: Mandate employers to provide annual pension statements and educate workers on vesting and portability rights.⁶⁸ Including employees in scheme governance, such as through trustee representation, would enhance transparency and accountability.

⁶²Public Service Superannuation Scheme Act (No 8 of 2012, Laws of Kenya).

⁶³Republic of Kenya (n 14), 5.

⁶⁴The National Treasury and Planning (n 13), 16.

⁶⁵Brooks, Sarah M. 'Social protection and economic integration: The politics of pension reform in an era of capital mobility' *Comparative Political Studies* 35.5 (2002): 491-523.

⁶⁶Retirement Benefits Act (No 3 of 1997, Laws of Kenya), s 46.

⁶⁷Hohnerlein, Eva Maria. 'Pension indexation for retirees revisited—Normative patterns and legal standards' *Global Social Policy* 19.3 (2019): 246-265.

⁶⁸Retirement Benefits Authority, 'Retirement in Kenya: Pensioner Survey 2024 Reveals a Mixed Bag of Challenges and Hope' (RBA, 8 August 2024) <<https://www.rba.go.ke>> accessed 3 July 2025.



The issue of unfunded pension schemes in Kenya primarily affects the legacy defined benefit system for civil servants, which relies on annual government allocations rather than accumulated contributions. This has led to significant payment backlogs, despite recent reforms to transition to a funded, contributory system

h) Leverage Technology: Develop an online platform for tracking pension contributions and transfers, reducing paperwork and delays. This aligns with the RBA's 2024 findings on technology's potential to transform Kenya's pension landscape.⁷⁰

1.5 Conclusion

Kenya's unfunded pension schemes, governed by the Pensions Act (Cap 189), Pensions (Increase) Act (Cap 190), Provident Fund Act (Cap 191), and Widows' and Orphans' Pensions Act (Cap 196), provide a framework for public sector retirement benefits but are plagued by systemic flaws. The PAYG system's reliance on annual budgets leads to payment delays and under-funding, while lengthy vesting periods and limited portability restrict workers' financial security and job mobility.

The Provident Fund Act offers a model for immediate vesting and portability, which

should be extended to other schemes. Proposed reforms including transitioning to funded schemes, shortening vesting periods, standardizing portability and leveraging technology aim to create a fairer and a more sustainable pension system. By implementing these changes, Kenya can uphold its constitutional commitment to social security, enhance workers' financial well-being and align with global pension standards. Therefore, implementing these reforms would restore dignity to retirees, strengthen public trust, and align Kenya with international best practices. Ultimately, a reformed pension system is both a moral and constitutional obligation.

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⁶⁹ibid.

⁷⁰ibid.

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