

ARTICLES

LEADERSHIP AND INTEGRITY:
THE CITADELS FOR CONSTITUTIONALISM IN KENYA

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Abstract

Chapter 6 of the Constitution of Kenya, 2010 provides for the modicum of constitutionalism that state officers ought to espouse in exercising public authority. Kenya has a robust legal and institutional framework that is mandated to implement the provisions of Chapter 6 of the 2010 Constitution in remedying historical accounts of corruption among state officials. This article appraises the strides made and the notable roadblocks faced since the promulgation of the 2010 Constitution. In doing so, it primarily employs a doctrinal research methodology analysis. It is argued that an obscured definition of leadership and integrity and insufficient institutional capacity have slowed down the implementation of Chapter 6. This article proposes minimum statutory penalties, a harmonised understanding of the standards of integrity to be attained and the security of tenure of offices such as special magistrates.

Keywords: Constitutionalism, Leadership and Integrity, Constitution of Kenya, Public authority, Discretionary powers.

1. Introduction

27 August 2010 is a date that will remain forever etched in the minds of Kenyans; it has all the makings of an Independence Day. On that day a new constitution was promulgated, bringing to an end the near two decades journey of the constitutional reform process. The 2010 Constitution captures the aspirations of all Kenyans “for a government based on the essential values of human rights, equality, freedom,

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democracy, social justice and the rule of law".¹ It is definitely not sufficient to promulgate a good constitution: concrete and steadfast steps must be taken to ensure that the hard-earned provisions are fully implemented in order to consummate the noble aspirations of the citizenry. Learning from the history of Kenya, it is clear that the repealed Constitution was not implemented properly and, on many occasions, it was violated blatantly leading to a near breakdown of the rule of law. The reason for such a pitiable outcome was identified by Hastings Okoth-Ogendo in his seminal academic piece entitled 'Constitutions without Constitutionalism: an African paradox'.² The thrust of his argument is that it is not enough to promulgate a constitution: a culture of constitutionalism ought to be cultivated and espoused by the country's leadership in particular and by its citizenry in general.

This manifested in numerous instances of corruption to the point that Kenya's Parliament noted that corruption was almost acceptable, almost legal since most people engaged in corrupt practices knowing that nothing could be done.³ This may be tracked from the Report of the Public Service Structure and Remuneration Commission 1970-71, popularly known as the Ndegwa Commission Report which allowed senior civil servants to engage in private business ventures.⁴ This move sowed the seeds of a conflict of interest that Parliament would recognise 30 years later. Hon. Omingo Magara, then the Member of Parliament (MP) for South Mugaringo Constituency advised the Minister of Finance on 27 June 2002 that allowing civil servants to do business would mismanage Kenya's economic development since influential people formed companies and looted the nation.⁵ The spread of this wanton looting was one of the major catalysts that sparked the dire need for constitutional reforms.

Against the backdrop of this history, Kenya embarked on a two-decade-long quest for constitutional reform culminating in 2 reports. The first was the 2005 report by the Constitution of Kenya Review Commission (CKRC)⁶ and the second was the 2010 report by The Committee of Experts (CoE)⁷ which succeeded the former. Both reports reflected the general consensus of Kenyans to hold their leaders accountable

¹ Preamble. *Constitution of Kenya* (2010).

² Hastings Wilfred Opinyo (H.W.O) OKOTH-OGENDO: 'Constitutions without Constitutionalism: Reflections on an African Political Paradox'. In: Daugles GREENBERG – Stanley N. KARTZ – Melanie Beth OLIVIERO – Steven C. WHEATLEY (ed.): *Constitutionalism and Democracy Transitions in the Contemporary World*. New York, Oxford University Press, 1993.

³ Parliament Hansard Report, 20th April 1972. These remarks were made by Hon Nthenge during the debate on the motion to approve the Report of the Select Committee on Stock Theft.

⁴ Parliament Hansard Report, 20th April 1972. This remark was made by Hon Gichoya in the debate on the motion to approve the Supplementary Estimate No. 1 of 1971/72 – Recurrent. In that debate, it came out clearly that the Ndegwa Commission Report had not been approved by Parliament and that the House only got a chance to question it substantially when the Supplementary Estimate was presented to it as it carried several expenditure items arising from the implementation of that Report.

⁵ Parliament Hansard Report, 27th June 2002. Remarks by Hon Omingo Magara.

⁶ Constitution of Kenya Review Commission (CKRC), *Final Report*, 2005. 219.

⁷ Republic of Kenya, *Final Report of the Committee of Experts on Constitutional Review*, 2010. 111.

for their actions based on a code of conduct established under the new constitution to mitigate the prevalent cases of corruption that occurred at very high levels of society. This informed the establishment of an independent and constitutionally protected anti-corruption body which would investigate the powerful members of the Executive and be an important means of checking the exercise of executive power.⁸

The modicum of constitutionalism is captured in Chapter 6 of the Constitution premised on leadership and integrity. The Constitution sets out an integrity threshold for state officers at the point of appointment or election and to maintain that threshold whilst in office. A key hindrance in the implementation process has precisely been the identification, election or appointment of leaders who espouse the provisions of Chapter 6 on leadership and integrity which is grounds for removal from State Office. These provisions also extend to judges at Kenya's Judiciary, the principal enforcers of Chapter 6, who ought to not only adhere to them but also be persons of high moral character and integrity.⁹ These provisions aim to solidify proper checks and balances between and among the three organs of Government, Parliament, Executive and Judiciary) to ensure accountability of the Government and its officers to the people of Kenya.¹⁰

The question then is whether, on the tenth anniversary of the promulgation of the Constitution (27 August 2020), Kenya has managed to foster the requisite levels of constitutionalism for the implementation process. Has the country managed to have holders of State Offices who meet the minimum threshold of integrity established by Chapter 6? This article examines the challenges faced with the implementation and the adequacy of the current mechanisms that facilitate the implementation of Chapter 6 accordance with the wishes of the drafters and the Kenyan populace who approved the 2010 Constitution by way of referendum.

Therefore, this article clarifies essential terms, analyses the relevant legal provisions, assesses the institutional arrangements in place to deal with leadership and integrity and scrutinises relevant judicial decisions on this matter. In doing so, the article adopts the following four-part roadmap. The first part analyses the concepts of leadership and integrity and their relationship to constitutionalism while the second part inspects the constitutional and legal framework on leadership and integrity in Kenya under the 2010 Constitution. The third part entails an exposition of the nature and dynamics of various institutions constitutionally and statutorily mandated to enforce legal provisions on leadership and integrity. The paper concludes in the fourth part with a summary of key findings from the watershed court cases on the implementation of the provisions on leadership and integrity

⁸ Committee of Experts (CoE), *Final report*, 2010. 111–112.

⁹ Article 166 (2) (c) *Constitution of Kenya* (2010).

¹⁰ Constitution of Kenya Review Act (2008), s. 4 (c).

2. A Constitutionalism premised on leadership and Integrity

2.1. Constitutionalism

The traditional conception of constitutionalism opines that government can and should be legally limited in its powers and that its authority depends on it observing these limitations.¹¹ It is assumed that these powers are assigned and delineated in a constitution be it written or not. Constitutionalism thus conceived must of necessity piggyback on the separation of powers doctrine. Importantly, this perennial view has attracted critique from scholars such as M.J.C. Vile who posit that the absolute separation of powers is not only impossible but has never been achieved.¹² Apart from showing that the three arms of government as traditionally conceived frequently exercise all the three functions of government, Vile asserts that there is a fourth function which is discretionary in nature and thus 'largely free from pre-determined rules'.¹³ Thus if constitutionalism is limited to government abiding by laid down rules, a big gap would arise simply because in practice not all governmental actions are amenable to legal control.

This conception of constitutionalism is opposed to the one formulated by de Smith in which rules curb the arbitrariness of discretion.¹⁴ However, it is in keeping with the perennial view that a middle path must always be sought between a discretion 'too wide for safety on one hand, and too narrow for convenience on the other'.¹⁵ Failure to provide for this discretion may make the exercise of power inflexible and intricate hence increasing the risk of mischance.¹⁶ Besides, it is practically impossible to have a set of rules that envisage every possible situation given that society is dynamic and hence law follows life.

Whether the 'discretionary function' will be exercised reasonably and in good faith in favour of the common good and not in favor of other interests largely depends on the integrity of the prevailing leadership (be it a judge, a legislator or an administrator). True constitutionalism would consist in the reasonable and *bona fide* exercise of discretion by the country's leadership and this is based on the commitment to 'nurturing and protecting the well-being of the individual, the family, communities and the nation' contained in the preamble of the 2010 Constitution. This conceptualization of constitutionalism augurs well with the view expressed

¹¹ See "Constitutionalism," In: *Stanford Encyclopedia of Philosophy*. San Francisco, Stanford University, 20 Feb 2007. <http://plato.stanford.edu/entries/constitutionalism/>

¹² Maurice John Crawley VILE: *Constitutionalism and Separation of Powers*. (2 ed.) Indianapolis, Liberty Fund, 1998. 347.

¹³ Ibid. 358.

¹⁴ Stanley de SMITH: *The New Commonwealth and Its Constitutions*. London, Stevens & Sons, 1964. 106.

¹⁵ Maurice John Crawley VILE: *Constitutionalism and Separation of Powers*. (2 ed.) Indianapolis, Liberty Fund, 1998. 347

¹⁶ Stanley de SMITH: *The New Commonwealth and Its Constitutions*. London, Stevens & Sons, 1964. 106.

earlier on by Okoth-Ogendo that the essence of constitutionalism lies in the ‘fidelity to the principle that the exercise of state power must seek to advance the ends of society’.¹⁷ Additionally he asserted that the mere promulgation of a constitution does not of itself produce the optimal balance between ‘the few on whom the constitution confers power and the majority for whose benefit it is supposed to be exercised’.¹⁸ Constitutionalism accordingly would only flourish if the right ‘social, economic, cultural and political’ conditions are present.¹⁹

The 2010 Constitution secures constitutionalism as conceived by introducing requirements as to leadership and integrity on the part of State officials. This is because the State officer will exercise public authority in serving the people, rather than the power to rule them’.²⁰ The power and authority of the Government is thus channelled towards serving the people rather than placed within confines in order to protect the people from abuse. The 2010 Constitution is thus not only a ‘power map’ but also a ‘basic law’ that directs the exercise of authority towards the achievement of stated and desired societal goals. It clarifies the common good to be pursued by clearly laying down national values and principles of governance which must be adhered to by any person who interprets and applies its provisions and remedies the often elusive, unwritten and unstated spirit of the law.²¹

It further empowers the superior courts to decide questions and disputes regarding constitutional application and interpretation with finality. Hence, the Judiciary must assert itself in its role of adjudicating disputes and developing rules to ensure that the 2010 Constitution achieves its intended purpose. The Judiciary literally breathes the spirit into the law and judges ought to exercise wide discretion in a proper, appropriate and opportune manner. Judges should not simply exhibit ‘readiness to acquiesce in governmental and administrative acts’ which subvert the common good.²² They must exhibit courage and vigilance to ensure that the power entrusted to the Government by the people is exercised in good faith and not arbitrarily in pursuit of obscure interests. On the other hand, the exercise of judicial discretion is often limited by political actions that are beyond judicial control. For instance, Parliament may pass legislation overturning a judicial decision contra to administrative action.²³

¹⁷ Hastings Wilfred Opinyo (H.W.O) OKOTH-OGENDO: ‘Constitutions without Constitutionalism: Reflections on an African Political Paradox’, 79.

¹⁸ Ibid. 80.

¹⁹ Ibid.

²⁰ Article 73 (1) (b), *Constitution of Kenya* (2010). This implies a service leadership as opposed to a domineering or ruling leadership. There is almost a Copernican revolution introduced by the 2010 Constitution in that state officers are no longer servants of the crown but of the people.

²¹ Article 10 (1), *Constitution of Kenya* (2010).

²² Maurice John Crawley VILE: *Constitutionalism and Separation of Powers*. (2 ed.) Indianapolis, Liberty Fund, 1998, 352.

²³ Ibid.

2.2. Leadership and Integrity

Leadership presupposes a fiduciary relationship between a leader and those being led, where the leader exercises their authority in good faith solely for the benefit of the community of followers and never for any other selfish or obscure purposes. Those being led hold their leader accountable and once their integrity disappears, the led (followers) could initiate mechanisms to depose the leader by any means possible or declare allegiance to another leader to whom they can entrust their causes to. The authority and legitimacy of the leader ultimately flows from the connection with those being led. Alejo Sison, for instance, argues that a leader's exercise of power is legitimised by their beneficial moral influence over the followers.²⁴ The leader must be honest enough to place the interest of the people above all other interests.²⁵

A negative point of departure may be useful in comprehending the concept of leadership: nobody in their right senses desires to be subject to a bad leader or to be misled. Leadership therefore connotes something positive and noble. The Oxford Advanced Learner's Dictionary defines the verb 'lead' as 'to show the way' or make someone go in the right direction.²⁶ These definitions imply that the leader should not mislead and thus should have rectitude or integrity. To guide in the right direction presupposes integrity: a person without integrity is unlikely to lead others in the right direction. And what is this right direction? In this context, the right direction must mean the achievement of the purposes and objects of the 2010 Constitution which generations of Kenyans fought for.

Integrity, in the context of constitutional implementation, encompasses the unified possession of certain traits which capacitate the leader to direct and guide the citizens under their care towards the achievement of the purposes of the 2010 Constitution. Since leadership is a relationship between a leader and followers, the first trait of necessity is justice. The leader must be prepared at all times to give the followers what is due to them and on the flip side the leader must not exert from the followers more than what is just. Secondly, the leader must possess prudence which is a trait that enables one to apply practical reason in assessing and devising the means necessary to achieve various ends or objectives. The Court of Appeal of Kenya alluded to this trait in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, when it stated that in fashioning a judicial test to determine constitutionality of appointments on grounds of integrity, the rationality test is equally controlling 'if properly applied in terms of the means-ends analysis'.²⁷ All leaders must grapple with

²⁴ Alejo SISON: *Moral Capital of Leaders: Why Virtue Matters*. Edward Elgar Publishing, Cheltenham, UK, 2003, 37.

²⁵ This sentiment was expressed by the people of Kenya during the constitutional review process as evidenced by the commentary by the Constitution of Kenya Review Commission (CKRC). At page 217, the final report reads: 'Integrity...plays an important role in ensuring that leadership remains focused on the interest of the people and desired by the people'.

²⁶ Albert Sidney HORNBY: *Oxford Advanced Learner's Dictionary*. 8th edition. Oxford, OUP, 2010.

²⁷ (2013) eKLR (Kenya Law Reports – online database), paragraph 60.

the means-end analysis if they are to rightly and appropriately achieve the goals and purposes of the societies they are responsible for.

The other two traits (self-control and courage) that the leader must possess may be glimpsed from the provision of Article 73(1)(b) of the 2010 Constitution which states that the authority assigned to a State officer ‘vests in the State officer the responsibility to serve the people, rather than the power to rule them’. The desire to rule, exercise power and to be served by the people is a strong one by any standards and a leader must possess a good dosage of self-control. Self-control aids a leader in putting their human desires in check and consequently enables them to use their office for its established purpose. Since it is harder to serve than to be served, it is also necessary for the leader to demonstrate courage.²⁸ Courage is a trait that enables one to achieve difficult objectives and overcome obstacles. And yes some of the objectives contemplated by the 2010 Constitution will be difficult to achieve and will encounter many obstacles. For example, the implementation of Chapter 6 is itself fraught with difficulties and resistance from the old order. The modicum of courage required is perhaps best expressed in the words of John Kennedy who stated that ‘a man does what he must in spite of personal consequences, in spite of obstacles and dangers and pressures and this is the basis of all human morality’.²⁹ Leaders must then do what they ought to do in order to achieve the ends of the community of persons under their care.

Having summarised the traits necessary for one to lead with integrity, it is then necessary to clarify one common error about integrity: that integrity is only about justice and incorruptibility. This notion may be fuelled by the 2010 Constitution’s preoccupation of eradicating corruption, which is by no means a small feat.³⁰ However, from a keen reading of Chapter 6, integrity of the leaders is concerned with the welfare of society as a whole and not just financial rectitude of those in public office. This position is supported by the guiding principles of leadership and integrity outlined in Article 73(2) which include: ‘selfless service based solely on the public interest’; and ‘discipline and commitment in service to the people’.

Be that as it may, one would be remiss to conclude that the foregoing analysis of the terms is conclusive. The definition of the terms leadership and integrity defy easy definition as expressed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others*³¹ in the quoted judgement:

(59) We wish to reiterate, having disposed of the issue of separation of powers, that leadership and integrity are broad and majestic normative ideas. They are the genius of our constitutional fabric. However, their

²⁸ Constitution of Kenya Review Commission (CKRC). 217. Courage was identified in the *Final Report of the Constitution of Kenya Review Commission*, 2005. 217. as one of the values required of a leader.

²⁹ John F. KENNEDY: *Profiles in Courage*. New York, Harper Collins, 1955. Quoted in David WRIGHT: *America in the 20th Century, 1960–1969*. (2 ed.) New York, Marshall Cavendish, 2003. 885.

³⁰ Articles 75–77, *Constitution of Kenya* (2010).

³¹ (2013) eKLR.

open-textured nature reveals that they were purposefully left to accrue meaning from concrete experience. Restated, whereas these concepts germinate from the ground of normativity, they grow in the milieu of the facticity of real experience. Their life blood will therefore be our experience, not merely the abstract philosophy or ideology that may underlie them. (Emphasis supplied.)

Perhaps the Court of Appeal may be faulted for its decision since a case filed before the courts is part of that ‘milieu of the facticity of real experience’ within which the concepts grow. It may very well be that the Court of Appeal abdicated its responsibility of defining with finality what integrity and leadership means. Instead, the Court of Appeal diffused responsibility and stated that the function of advancing the frontiers of the emerging jurisprudence on integrity belonged to the courts, other organs of government and the people.³² It is not lost to observation that the people and other organs of government look forward to the courts for guidance when the law is ambiguous. This is a constitutional matter and if there is ambiguity, the courts ought to supply an answer. As shown later in this chapter, the High Court, whose decision was the subject of the appeal, had done a laudable job with regard to advancing the frontiers of this emerging jurisdiction. Since the 2010 Constitution provides for leadership and integrity prominently, Kenyans must continue labouring to decipher these provisions and gain full advantage of them.

2.3 The premising

The nexus between constitutionalism, leadership and integrity could not have been expressed better than Rajendra Prasad’s following statement uttered at the time of the adoption of India’s Constitution in 1949:

Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way the country is administered. That will depend upon the men who administer it... If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution, like a machine, is a lifeless thing. It acquires life because of the men who control and operate it...³³

It is thus clear that if the country’s leadership is not composed of persons of character and integrity, then the constitution however brilliantly conceived would not help the country at all. With these definitions well captured, this article further

³² (2013) eKLR, paragraph 88.

³³ Dr. Ranjendra PRASAD, quoted in B. L. WAHEDRA: *Public Interest Litigation (Dr. Ranjendra Prasad Quoted)*. 2 ed. New Delhi, Universal Law Publishing, Co. Pvt. Ltd, 2009. 8.

explores Chapter 6 of the 2010 Constitution and the Kenya's statutory efforts aiding its implementation.

3. The Constitutional and statutory provisions on leadership and integrity

3.1 Constitutional provisions

Chapter 6 of the 2010 Constitution boasts six novel provisions to ensure accountability of state officials exercising public authority beginning with the Establishment of service leadership and authority as a public trust. Leadership is a fiduciary entrusted with public office to serve the people and it does not accord a leader the chance to rule over them. The 2010 Constitution then must not be viewed as a power map: it is a service charter.

Secondly, there is the delineation of principles of leadership and integrity.³⁴ These cover matters such as the selection to public office should be based on integrity and competence in free and fair elections. The proviso raises the question whether elected persons should or should not possess integrity and competence. It would seem that these are applicable to leaders who occupy appointive positions as opposed to elective ones. The standard of service that the leader is supposed to serve selflessly with discipline and commitment in line with the public interest.³⁵ Decision making should be done with objectivity, impartiality and accountability.³⁶

Thirdly, is the primacy of public interest over all other interests. Chapter 6 specifically forbids conflict of interest and requires State officers to place public interest above all other interests. State officers are to achieve this through the declaration of any private interest that may conflict with public duties³⁷ in all aspects of their lives and to avoid conflict between personal interest and official duty.³⁸

Fourthly is the prohibition of specific conduct. Chapter 6 also goes on to take the format of a code of ethics and conduct by proscribing and prescribing specific conduct such as delivery of gifts given to State officers on official occasions,³⁹ prohibition from maintaining foreign bank accounts,⁴⁰ prohibition against soliciting or accepting personal loans and benefits in circumstances that may compromise the integrity of public office⁴¹ and the restriction of full time State officers from holding other gainful employment and of appointed officers from holding positions in political parties.⁴²

³⁴ Article 73 (2) (a) *Constitution of Kenya* (2010).

³⁵ *Ibid.* Article 73 (2) (c & e).

³⁶ *Ibid.* Article 73 (2) (b & d).

³⁷ *Ibid.* Article 73 (2) (c–ii).

³⁸ *Ibid.* Article 75 (1) (a).

³⁹ *Ibid.* Article 76 (1).

⁴⁰ *Ibid.* Article 76 (2).

⁴¹ *Ibid.* Article 76 (2).

⁴² *Ibid.* Article 77.

Breaching any of these provisions exposes the State officer to disciplinary procedures established for the relevant office which may include dismissal or removal.⁴³

Moreover, state officers are required to take the prescribed oath or affirmation before assuming State office.⁴⁴ These oaths, contained in the Third Schedule, bind the respective deponents to obey, respect and uphold the Constitution, a further manifestation that leadership and integrity are necessary for constitutionalism in the 2010 dispensation.

Lastly, Chapter 6 obliges Parliament to enact legislation with a twofold purpose. Firstly, Article 79 provides for enactment of statute establishing an independent ethics and anti-corruption commission. From this Article, it is clear that the commission has to be independent and besides dealing with corruption, it ought to promote ethics. Secondly, Article 80 requires Parliament to legislate on leadership tackling the procedures and mechanisms of effectively administering the provisions of Chapter 6, the prescription of additional penalties that may be imposed for contravention of Chapter 6 and the Application of Chapter 6 with requisite modifications to public officers.⁴⁵

The legal provisions in place to implement Chapter 6 could be categorised into two: statutes that pre-existed the 2010 Constitution and statutes made pursuant to it. With regard to pre-existing statutes, it is important to note that they ought to be re-examined to ensure that they are consistent with the 2010 Constitution: otherwise, the 2010 Constitution will suffer the same fate as the Repealed Constitution which was made subservient to a monolithic body of statutes of colonial origin.⁴⁶ The relevant statutes are briefly discussed below.

3.2 Statutory Provisions

3.2.1 *Ethics and Anti-Corruption Commission Act of 2011*

The Ethics and Anti-Corruption Commission Act (EACC Act) establishes the Ethics and Anti-Corruption Commission (EACC) as required by Article 79 of the 2010 Constitution. Unlike its predecessors, the EACC is ontologically different on two accounts. First, it is a constitutional commission with status and powers of similar commissions established under Chapter 15 of the 2010 Constitution.⁴⁷ Second, the EACC is supposed to deal with ethics and not just corruption. KACA and KACC

⁴³ Ibid. Article 75 (2) and 76 (2). The disciplinary procedures for specific state offices are not contained in the constitution and therefore unless there are statutes with clear disciplinary procedures for various state offices, this particular constitutional provision may be rendered nugatory.

⁴⁴ Ibid. Article 74.

⁴⁵ Chapter 6 is applicable primarily to State Officers who are holders of any of the state offices listed under Article 260 of the Constitution. All other persons performing functions within state organs and who hold public offices which are not categorised as “State offices” are the public officers referred to in Article 80.

⁴⁶ OKOTH-OGENDO op. cit.

⁴⁷ Articles 249, 252 and 253, *Constitution of Kenya* (2010).

were simply anti-corruption commissions and played minimal or no role in the cultivation of ethics in public service.

The EACC Act of 2011 provided for a chairperson and two members.⁴⁸ This number was then raised to five vide section 2 of the EACC (Amendment) Act of 2015. This followed Article 250 of the 2010 Constitution which requires constitutional commissions to consist of at least three members.⁴⁹

Section 11 of the Act provides for EACC's functions which include the:

- Development of a code of ethics, standards and best practices in integrity and anti-corruption for State officers. In addition, EACC is to exercise oversight in the enforcement of codes of ethics prescribed for public officers.
- Reception of complaints on breach of codes of ethics by public officers.
- Investigation of any acts of corruption, economic crimes and violation of code ethics. Upon investigations, the EACC may make recommendations for prosecution to the office of the Director of Public Prosecutions (DPP).

Institution and carrying out of court proceedings for purposes of the recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

The EACC plays a key role in both the recruitment and removal processes of state officials in ensuring that public offices are occupied by persons of integrity. At the recruitment stage, applicants for State offices are required to seek clearance from the EACC in order to qualify for vetting.⁵⁰

The last two additional functions are essential in preparing EACC for the efficacious execution of its mandate. The Act does not give EACC prosecutorial powers: it is to depend on the DPP. This has been criticised given the inefficacious of previous anti-corruption bodies due to lack of prosecutorial powers and constitutional mandate. The 2010 Constitution does not bar the granting of prosecutorial powers and Article 157(12) vests Parliament with discretion to enact legislation conferring powers of prosecution on authorities other than the DPP. This could be an indication that the fight against corruption is yet to be given the requisite amount of attention for it to bear lasting results. EACC is also required to apply the Anti-Corruption and Economic Crimes Act of 2003 in its functions.

⁴⁸ Ethics and Anti-Corruption Commission Act, s. 4, *Laws of Kenya*.

⁴⁹ Article 250, *Constitution of Kenya* (2010).

⁵⁰ See Leadership and Integrity Act (2012), s. 13 (2). This section requires persons who wish to be elected into any State Office to submit a self-declaration form to the Independent Electoral and Boundaries Commission. The original Act was amended and Section 12B was added requiring persons intending to be appointed to a State Office to submit the self-declaration form to EACC (this was done through the Statute Law (Miscellaneous Amendment) Act (No. 18) of 2014). The Form is set out in the First Schedule of the Leadership and Integrity Act. Thus the requirement for an ethical clearance now applies to both appointive and elective positions.

3.2.2 EACC's appraisal as an institution concerned with leadership and integrity

The EACC may institute civil proceedings in line with its power to sue and be sued granted by dint of its incorporation under Article 253 of the 2010 Constitution. The EACC has so far made use of this provision and has instituted a number of civil cases for the recovery of assets stolen from the public and in others for the freezing of assets pending investigations. In the 2017-2018 year, EACC recovered assets in form of cash and immovable properties worth 352 million Kenya shillings through 17 civil cases that were settled through both adjudication and by out-court negotiations.⁵¹ Earlier on, in the 2014-2015 year, EACC recovered assets worth 140 million shillings and also instituted 12 civil cases for the recovery of illegally acquired public assets and for the preservation of property.⁵² The flip side of this provision is that the EACC has also been sued and it has had to defend several civil suits in the form of constitutional references and judicial review filed against it by various public cogners whom it has sought to investigate or prosecute.

In the 2014/2015 year alone, it had to defend a record 68 suits filed against it by various public officers and interested parties who sought a wide range of remedies which included injunctions stopping the EACC from conducting investigations, compensation for malicious prosecution, orders of mandamus in respect of property and certain reports in its possession, conservatory orders restraining the EACC from initiating prosecution, and even damages for defamation.⁵³ In the 2017-2018 year, the agency faced a further 67 suits of a similar kind.⁵⁴ The multiplicity of these cases serve to slow down the pace of the EACC and further constrain its resources as it has to spend time and money defending these civil suits.

3.2.3 Leadership and Integrity Act of 2012

This Act was enacted pursuant to Article 80 of the 2010 Constitution and in essence it is bound to the Ethics and Anti-Corruption Commission Act discussed above, principally because its enforcement is entrusted with the EACC. Section 4(3) of this Act allows the EACC to request the assistance of other State organs in the execution of its mandate to enforce the Act and Chapter 6 of the Constitution. This request for assistance may sound like a soft one but in essence, the EACC may apply to the High Court in case a State organ fails to comply with its request.⁵⁵

⁵¹ See, Ethics and Anti-Corruption Commission (EACC), *Annual Report 2017–2018*. Kenya, EACC, 2018. 39–40.

⁵² See, Ethics and Anti-Corruption Commission (EACC), *Annual Report 2014–2015*. Kenya, EACC, 2015. 41–42.

⁵³ See, Ethics and Anti-Corruption Commission (EACC), *Annual Report 2014–2015*. Kenya, EACC, 2015. 43–48. In the 2014–2015 year, EACC faced 68 suits challenging its actions and mandate.

⁵⁴ See, Ethics and Anti-Corruption Commission (EACC), *Annual Report 2017–2018*. Kenya, EACC, 2018. 35–38.

⁵⁵ Leadership and Integrity Act (2012), s. 4 (5) *Laws of Kenya*.

One of the key purposes of this statute is the establishment of procedures and mechanisms for the effective administration of Chapter 6. It has been argued that the statute is weak and lacks sufficient mechanisms to back the enforcement of the constitutional provisions on integrity.⁵⁶ The bulk of the statute deals with the general code of ethics for State officers in Kenya. Besides the general code, the statute requires each public entity to put in place a specific code for its State officers.⁵⁷

The Leadership and Integrity Act mirrors the structure of the Public Officer Ethics Act of 2003, which is incorporated into the general code of ethics by virtue of Section 6(3). The main difference between the Leadership and Integrity Act and the Public Officer Ethics Act is that under the former, the EACC is the responsible commission while under the latter, responsibility for ethics is diffused in several commissions.

3.2.4 *Anti-Corruption and Economic Crimes Act of 2003*

This is arguably one of the most comprehensive and forward-looking pieces of legislation enacted in the history of Kenya to combat corruption. The Act has several laudable provisions which include a very clear definition of corruption,⁵⁸ bribery⁵⁹ and economic crimes. Section 3 of the Act involves a bold step as it provides for the appointment of special magistrates to hear and determine cases concerning corruption, economic crimes and related offences. Basically, the Act does not stop at descriptions of proscribed conduct: it goes the whole length by providing for detailed mechanisms of investigations,⁶⁰ collection of evidence, determination of cases⁶¹ and recovery of public assets. Part V of the Act further outlines the offences for which a person may be investigated, arrested and charged in court. The offences include: bribery, conflict of interest, bid rigging, abuse of office etc. Section 48 of the Act goes ahead to stipulate the penalties applicable for the offences under Part V of the Act. However, the shortcoming is that the penalty is stated as a ceiling rather than a floor

⁵⁶ Juliet OKOTH: "The Leadership and Integrity Chapter of the Constitution of Kenya 2010: The Elusive Threshold." In: Morris KIWINDA et al (ed.): *Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal*. Pretoria, Pretoria University Law Press, 2015. 296.

⁵⁷ Leadership and Integrity Act (2012), s. 37 *Laws of Kenya*.

⁵⁸ Leadership and Integrity Act (2012), s. 2 *Laws of Kenya*. Corruption is defined to include not just bribery and embezzlement of funds but also matters such as abuse of office and breach of trust. This augurs well with Article 73 of the 2010 Constitution which defines authority of state officers as a public trust.

⁵⁹ Anti-Corruption and Economic Crimes Act (2012), s. 39. *Laws of Kenya*. It covers both the giver and the recipient of the bribe.

⁶⁰ *Ibid.* s. 23 (4). It extends police power to EACC investigators to enable them investigate and in fact they are accorded the power to arrest persons in the like manner that police do it in section 32 of the Act.

⁶¹ Part II of the Act provides for the appointment of special magistrates and their jurisdiction. Section 5 (1) even confers on them the power to grant full amnesty to any person who makes full and true disclosure of the circumstances of the offence in question.

i.e. a maximum of shillings one million or ten years imprisonment.⁶² This grants the courts wide discretion in sentencing which could lead to very lenient penalties being imposed and which in return would not serve to inhibit corruption. In spite of the foregoing, this statute is quite detailed and although it predates the 2010 Constitution, it is a very useful tool for implementing the requirements on financial probity of State officers outlined in Chapter 6 of the 2010 Constitution. The statute also recognises that corruption has for long been considered part of ‘business culture’ in Kenya and thus under Section 49 it acknowledges that bribery is a customary practice in any business, profession or calling.

3.2.5 *Bribery Act of 2016*

This Statute was enacted to provide for the prevention, investigation and punishment of bribery by both private and public entities. The EACC is the agency entrusted with the enforcement of the new statute. Part II of the Act gives elaborate details as to what entails bribery as well as the culpability of givers, recipients and third parties. Part II of the Act further requires private and public entities to put in place adequate procedures for the prevention of bribery and corruption. Part II of the Act also mandates the EACC to assist such entities in the formulation of procedures. Part V of the act prescribes stiff penalties which include: imprisonment; fines equivalent to five times the value of the bribe; disqualification from holding State or Public Office; and disqualification from being a partner or a director in private entities. Part VI of the Act finally makes provisions for the protection of whistleblowers and witnesses.

EACC developed the draft Corruption Prevention Guidelines and Regulations in the 2017-2018 year under the Bribery Act.⁶³ EACC also commenced implementation of the Act by undertaking investigations into complaints of bribery though not without hurdles. For instance, in 2018, it had to defend a judicial review application in which some Members of County Assembly (MCAs) sought an order of Prohibition to prevent it from summoning them for investigation “over alleged bribery allegedly undertaken in the course of performance of their duties within the precincts of Nairobi City County Assembly.”⁶⁴ The MCAs argued that actions done within the precincts of the County Assembly were protected under the County Assemblies Powers and Privileges Act and could only be investigated by the Committee on Powers and Privileges. The Anti-Corruption and Economic Crimes Division of the High Court in Nairobi determined this application in favour of EACC and among

⁶² Anti-Corruption and Economic Crimes Act (2012), s. 48 *Laws of Kenya*. This gives the courts wide discretions which means that they could impose very lenient penalties which would not serve to inhibit corruption in light of the cost-benefit analysis.

⁶³ See, Ethics and Anti-Corruption Commission (EACC), *Annual Report 2017–2018*. Kenya, EACC, 2018. 42.

⁶⁴ Republic vs Ethics and Anti-Corruption Commission: Ex parte Margaret W. Mbote & 8 others (2018) eKLR.

other things recognised that under section 3 of the Bribery Act, EACC has the mandate to implement the Act⁶⁵. The Court in its ruling, noted that

“Bribery is an offence which must be investigated and no privilege should bar such an investigation. I add that the Powers and Privileges Act is there to enable Hon. Members of the National and County Assemblies to conduct the business of the house in a conducive environment and not to perpetuate or cover up criminal activities.”⁶⁶

The full implementation of this new statute will only be on course once EACC commences investigations of private entities involved in bribery. The cases decided so far only point to officers serving in public offices. The effect of this statute is yet to be seen given that after its enactment, the incidence of bribery rose sharply from 46% in 2016 to an astounding 62% in 2017⁶⁷.

4. Institutional framework concerned with leadership and Integrity

Three institutions are charged with promoting leadership and integrity. Firstly, the EACC discussed prior, which is the body constitutionally mandated to enforce and ensure compliance with the provisions of Chapter 6.⁶⁸ Secondly there are constitutional commissions and independent offices established under Chapter 15 with the mandate to promote constitutionalism and ensure that all State organs adhere to democratic values and principles, among other things.⁶⁹ Finally there is the Judiciary, which cuts across all spectrums of leadership and integrity in its adjudicatory, advisory and interpretative role. This section inspects the Independent Commissions and Offices and the Judiciary.

These institutions are not supposed to be superimposed one on the other but they should blend and arrange themselves in due relation to each other in order to converge towards the same end i.e. the achievement of the purposes of Chapter 6 of the 2010 Constitution. It cannot be over-emphasised that Chapter 6 is the soul of the 2010 Constitution.⁷⁰

4.1. Commissions and independent offices

The Commissions and Independent offices established by the 2010 Constitution play a key role in determining who joins the public service: for instance the Judicial

⁶⁵ Ibid. paragraph 24.

⁶⁶ Ibid. paragraph 34.

⁶⁷ Ethics and Anti-Corruption Commission (EACC), *Annual Report 2017–2018*. Kenya, EACC, 2018. 58.

⁶⁸ Article 79, *Constitution of Kenya (2010)*.

⁶⁹ Ibid. Article 249 (1).

⁷⁰ OKOTH op. cit. 288.

Service Commission is mandated with the selection of persons to be appointed judges and it also appoints magistrates;⁷¹ the Independent Electoral and Boundaries Commission plays an important role in determining who qualifies to vie for elective posts.⁷² Besides this role of selecting potential leaders, the commissions are required to enforce codes of ethics amongst the public servants under their jurisdiction.⁷³ Finally, the commissions also execute a disciplinary role and often are mandated to initiate the removal process of State officers who may have breached the provisions of Chapter 6.⁷⁴

Among the commissions and independent offices established under the 2010 Constitution, it is important to single out the offices of the Auditor General and Ombudsman in light of the endemic and systematic nature of corruption as well as mal-administration in Kenya's public service.

4.1.1. Auditor General

The Auditor General plays a key role in unearthing misuse of public funds and instances of abuse of office by leaders.⁷⁵ Since the Auditor General has to investigate and audit the accounts of all Government organs, the office should be independent and free from control or direction by any person.⁷⁶ Unlike in the Repealed Constitution, the independence of the office of the Auditor General is bolstered by constitutionally guaranteed tenure. The Auditor General's term of office is eight years (non-renewable)⁷⁷ and the incumbent can only be removed from office in accordance with the stringent provisions of Article 251 of the 2010 Constitution. Article 251 specifies

⁷¹ Article 172, *Constitution of Kenya* (2010).

⁷² Under Elections Act (2011), s. 74 *Laws of Kenya*, the IEBC is empowered to resolve disputes arising from nominations. These include decisions regarding disqualification under section 24 and 25 of the Elections Act. This mandate was emphasised by the High Court in the case of the *International Centre for Policy and Conflict & others vs The Attorney-General and 4 others* [2013] eKLR, in which the suitability of Uhuru Kenyatta and William Ruto to contest for state office in Kenya was investigated. A five Judge bench of the High Court held that the IEBC and the EACC were the organs bestowed with the power to inquire into the integrity of those aspiring to be elected into State Office (paragraph 137).

⁷³ Public Officer Ethics Act (2003), s. 5 (1) *Laws of Kenya*. This is also alluded to in Leadership and Integrity Act (2012), s. 37(1).

⁷⁴ This can be gleaned from Article 80 (c) of the *Constitution of Kenya* (2010) read with the Leadership and Integrity Act (2012), s. 52(1) and (2). The Act provides that Pursuant to Article 80 (c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of this Act except section 18 shall apply to all public officers as if they were State officers. The relevant public entity recognised or established pursuant to section 3 of the *Public Officer Ethics Act* No. 4 of 2003, *Laws of Kenya* shall enforce the provisions of this Act as if they were provided for under the *Public Officer Ethics Act* (2003), *Laws of Kenya*. Under the *Public Officer Ethics Act* (2003), s. 30. *Laws of Kenya*, it is notable that commissions are required to investigate conduct that contravenes the Code of Conduct and Ethics. It may then take disciplinary action if it has the power to do so.

⁷⁵ Article 229, *Constitution of Kenya* (2010).

⁷⁶ The independence of the office of is also guaranteed in the Article 248 (3) *Constitution of Kenya* (2010).

⁷⁷ Article 229 (3), *Constitution of Kenya* (2010).

the grounds of removal and the applicable procedure. In a nut shell, the removal of the Auditor General can only be sanctioned by a tribunal appointed by the President at the request of the National Assembly.

It is mandatory that the Auditor-General audits the accounts of all State organs and Government agencies⁷⁸ to ‘confirm whether or not public money has been applied lawfully and in an effective way’.⁷⁹ The recipients of the audit reports are Parliament and the relevant county assembly which should consider the reports and take appropriate action.⁸⁰ The audit questions costs such as unsupported expenditure, pending bills, un-surrendered imprests and excess expenditure and the audit reports usually induces the EACC to investigate specific matters.⁸¹ For instance, the auditor-general’s report on the County Assembly of Nairobi City noted that the financial statements did not present fairly, the financial performance of the County Assembly as at June 30th 2018 in accordance with the International Public Sector Accounting Standards (Cash Basis), the Public Finance Management Act of 2012 and the County Government Act of 2012.⁸²

Within the Ministry of Health, the auditor general raised a total of 25 audit queries⁸³ in the financial year of 2013/2014, 18 in the financial year 2014/15 and 13 in the financial year of 2015/16.⁸⁴ This questions pertained to transactions involving Kshs 17.5 billion in the financial year of 2013/14, Kshs 13.88 billion and Kshs 17.72 billion in the financial year 2014/15 and in the financial year of 2015/16 respectively.⁸⁵ In comparison to the actual spending for the entire Ministry, the queried amounts represented 63%, 36% and 42% for the three consecutive years.⁸⁶ The Ministry of Health was notably found on the spot following the ‘Afya House Scandal’ where the Office of the Auditor General raised a query over Ksh.10.9 billion that could be accounted for in the financial year that ended on June 30th 2018.⁸⁷ This, along with preceding scandals in the same docket, elicited the concern of the Ethics and Anti-

⁷⁸ Ibid. Article 226 (3).

⁷⁹ Ibid. Article 229 (6).

⁸⁰ Ibid. Article 229 (7 and 8).

⁸¹ Transparency International Kenya, *Strengthening Public Audit Accountability in Kenya: A Baseline Survey Report*, 2019, 20 <https://tikenya.org/strengthening-public-audit-accountability-in-kenya/> accessed on 4th August 2020.

⁸² Office of the Auditor General, ‘*Report of the Auditor-General on the Financial Statements of County Assembly of Nairobi City For the Year Ended June 30th 2018*’ (Auditor General 2018) 8.

⁸³ These are questions raised by the auditor general with regard to compliance with financial rules and regulations.

⁸⁴ Institute of Economic Affairs, ‘An Analysis of the Auditor General’s Reports on the Financial Statements of National Government’, 2019. 17.

⁸⁵ Ibid. 18.

⁸⁶ Ibid.

⁸⁷ Francis GACHURI: ‘Another Afya House scandal as Auditor General unmasks Ksh.10.9B scam’. *Citizen Digital*, July 4th 2019 <https://tinyurl.com/52pst3rc/>

corruption Commission which has failed to make any clear progress on the matter despite its intent on directing the investigations.⁸⁸

While these reports have raised glaring anomalies, there is a concern that they are often left unheeded.⁸⁹ Furthermore, most of the questioned costs in public audit reports are reportedly of a recurring nature owing to the lack of an effective follow-up mechanism on the implementation of the recommendations given. This breeds delays in the preparation and dissemination of the public audit reports by the Office of the Auditor General (OAG) to audit accountability.⁹⁰

4.1.2. Commission on Administrative Justice (CAJ)

Although the Commission on Administrative Justice (CAJ) is not listed as a commission or an independent office under Chapter 15, it enjoys equivalent status and powers by dint of Article 59(4) and (5) of the 2010 Constitution, which grants Parliament the discretion to restructure the Kenya National Human Rights and Equality Commission into two or more separate commissions with the status and powers of commissions under Chapter 15. Pursuant to this provision, Parliament enacted the Kenya National Commission on Human Rights Act, 2011 which established the Kenya National Commission on Human Rights (KNCHR). It also enacted the National Gender and Equality Commission Act, 2011 which established the National Gender and Equality Commission and the Commission on Administrative Justice Act of 2011 which established the CAJ.

The stated mission of the commission is ‘to enforce administrative justice and promote constitutional values by addressing mal-administration through effective complaints handling and dispute resolution’.⁹¹ The functions of CAJ, outlined in the Act include investigating any alleged misconduct in public administration by any State organ or State officer in National and County Governments.⁹² Such misconducts extends to complaints of abuse of power, unfair treatment, manifest injustice and oppressive conduct within the public sector. From these inquiries, the CAJ submits a biannual report to the National Assembly and publishes periodic reports on the status of administrative justice in Kenya. The commission may also give remedial actions and also provide advisory opinions including legislative review. The CAJ is also mandated to build institutional capacities in the public sector to promote Alternative Dispute Resolution mechanisms and appropriate remedies to resolve

⁸⁸ See Ibid. and Stellar MURUMBA and Obed SIMIYU: ‘EACC investigators storm Afya House over Sh5bn scandal’. *Business Daily*, October 28th 2016. <https://tinyurl.com/tetup39t>

⁸⁹ See Kepha MUIRURI: ‘IEA – Parliament not taking Auditor General’s reports seriously’. *Citizen Digital*, March 22nd 2019 <https://tinyurl.com/3sbnrwep> accessed on August 4th 2020; and David OGINDE: ‘It’s time we took the office of Auditor General seriously’. *The Standard*, September 1st 2019 <https://tinyurl.com/339w95ta>

⁹⁰ Transparency International Kenya, *Strengthening Public Audit Accountability in Kenya: A Baseline Survey Report*, 2019. 20 <https://tikenya.org/strengthening-public-audit-accountability-in-kenya/> .

⁹¹ The Commission on Administrative Justice, *Annual Report Nairobi*, Republic of Kenya, 2016.

⁹² Commission on Administrative Justice Act (2011), s. 8 *Laws of Kenya*.

disputes against administrative bodies. This extends to promoting public awareness of these mechanisms and requires close collaboration with the KNCHR in promoting human rights in public administration.⁹³

The scope of the matters CAJ investigates is limited by Section 30 of the Act which aims at avoiding overlap of jurisdiction. For instance, the CAJ cannot investigate criminal offences or any matters pending before the courts and if such matters were to be brought before it, it can only advise the complainant on the right forums for relief.⁹⁴

Article 249 of the 2010 Constitution mandates constitutional commissions to promote constitutionalism. The CAJ discharges this mandate through a multifaceted approach which includes the promotion leadership and integrity. For instance, in 2014, the CAJ intervened on allegations of breaches of principles of leadership and integrity. In its 2014 annual report it stated thus:

The interventions related to issues such as non-compliance with the law on appointments and promotions to public offices, misuse of public resources, disobedience of court orders, abuse of power, and unethical, improper or unlawful conduct.⁹⁵

Since its establishment, the CAJ has been quite active in discharging its mandate including handling a total of 111,505 new cases, out of which 100,720 cases were resolved, resulting to a resolution rate of 85% in the year 2016.⁹⁶ Most of the cases received and dealt with concerned maladministration, delay, abuse of power and unfair treatment.⁹⁷ From this, the CAJ issued numerous advisory opinions on various issues of public importance including ten advisory opinions in 2015. Some of these advisory opinion concerned the restructuring of the Ethics and Anti-Corruption Commission, the vetting of Cabinet and Principal Secretaries nominees and the boundary disputes between the County governments.⁹⁸

It has also been involved in other initiatives in order to engender good public governance such as the promotion of alternative dispute resolution and through public interest litigation despite the financial good will from the Exchequer.⁹⁹ Furthermore, while the CAJ can make decisions and recommendations on the conduct of public institutions, these cannot be enforced without their good will to comply with the

⁹³ Ibid.

⁹⁴ Ibid. 30.

⁹⁵ The Commission on Administrative Justice, *Annual Report*, 2014. 87.

⁹⁶ The Commission on Administrative Justice, *Annual Report*, 2016. VIII.

⁹⁷ Ibid.

⁹⁸ For other Advisory Opinions See The Commission on Administrative Justice, *Annual Report*, 2015. X. Examples include the Advisory Opinion on the Directive to County Commissioners regarding the co-ordination and delivery of Comprehensive HIV/AIDS Services to Counties; Advisory Opinion on the Framework for Co-operation between the Senate and the Council of Governors; Advisory Opinion on the Parliamentary Service Bill, 2015; Advisory Opinion on the Proposed Amendment to the Independent Policing Oversight Authority Act, 2011.

⁹⁹ The Commission on Administrative Justice, *Annual Report*, 2015. 82.

same.¹⁰⁰ As a result, it is difficult for the Commission to meet the high expectations from members of the public to quickly address various aspects of maladministration that continue to manifest in the public sector.¹⁰¹

Hence, in order to deal with unresponsiveness, the CAJ resorted to the use of a citation register and performance contracting where ministries, departments and agencies are certified and rated on compliance based on the 'Resolution of Public Complaints Indicator' which was introduced in the National Government Performance Contracting System.¹⁰² The indicator requires all public institutions, including the CAJ, to promptly address and resolve public complaints lodged with and against them.¹⁰³

The CAJ maintains a citation register records unresponsive institutions and officers based on five criteria including the public body's failure to respond to inquiries on complaints (by the CAJ), failure to implement any determination CAJ without any reasonable cause, failure to honour summons, improper conduct during investigations and lack of appeals from public officers found guilty of abuse of office.¹⁰⁴ In 2014, it cited 31 public officers and one institution under this register.¹⁰⁵ This register could supplement performance appraisals of the affected public officers with the effect that they may be forced to either improve or face removal from office for incompetence.

4.2. The Judiciary

As earlier stated, the Judiciary is the fulcrum upon which the entire leadership and integrity project hinges. It is now accepted universally that without an independent and accountable judiciary, a constitution would be mere hortatory if not dead letter law. The Judiciary therefore plays the key role of adjudicating disputes with finality regarding qualifications for public office and in particular determining whether a candidate fulfils Chapter 6 requirements in the fight against corruption.

However, the Judiciary cannot intervene on its own motion; it must be moved by a party to pronounce judgement and so the extent and quality of its intervention in matters of leadership and integrity is as good as the causes that are brought before it. If no matters are brought before it, then it has no way of exerting influence and if matters brought before it are poorly prosecuted, then its influence will be poor and ineffectual.

Judicial mandate may be invoked to deal with matters of leadership and integrity through public interest litigation any member(s) of the public may institute suits

¹⁰⁰ These decisions and recommendations are not legally binding on public institutions. See The Commission on Administrative Justice, *Annual Report*, 2016. 59.

¹⁰¹ The Commission on Administrative Justice, *Annual Report*, 2015. 85.

¹⁰² The Commission on Administrative Justice, *Annual Report*, 2014. XIV.

¹⁰³ *Ibid.* 2014. 67.

¹⁰⁴ *Ibid.* 2014. XIV.

¹⁰⁵ *Ibid.*

challenging constitutionality of laws and of appointments to public office.¹⁰⁶ The public may also participate by lodging complaints with the EACC against incumbent officials whom they suspect of breaching integrity provisions. However, such complaints may or may not end up before the Judiciary for determination since the EACC investigates and decides on whether to forward the matter to the DPP, who has the discretion to prosecute or not.¹⁰⁷ This introduces an intricate interplay between the EACC, the DPP and the Judiciary.

From the table below it is clear that there is a hitch as indicated by the fact that in any given year over 30% of cases forwarded by EACC are not accepted for prosecution by the DPP. Therefore, it is necessary to interrogate why such a huge number of cases is rejected or returned to EACC for further investigations: this should guide the interventive measures devised to ensure that the maximum number of cases are accepted for prosecution.

Table 1. Cases forwarded by EACC to the DPP

	2014/15	2015/16	2016/17	2017/18	2018/19
Total Cases forwarded to DPP	117	167	143	183	234
Cases accepted for prosecution	74	117	89	113	77
Cases returned for further investigation	12	14	13	18	59
% of cases accepted for prosecution	63.24%	70.05%	62.23%	61.74%	32.90%

Source: Kenya National Bureau of Statistics, Economic Survey, 2020 (Table 17.7: Files forwarded to the office of the Director of Public Prosecutions and Action Taken, 2014/15 -2018/19), page 309.

In the 2018/19 year, a record 51 cases were awaiting the DPP’s action which is quite high given that in the previous years reported in the table above, the number of such cases was either zero or a single digit. The Judiciary also seems to be suffering from inadequate capacity in its High Court Anti-Corruption Division at Milimani as shown in the table below depicting the number of pending cases:

Table 2. Cases pending before the Anti-corruption Division of the High Court

	Criminal	Civil	Total
Filed Cases 2018/2019 year	98	119	217
Resolved Cases 2018/2019 year	49	47	96
Pending cases as at 30 th June 2019	93	108	201

Source: State of the Judiciary and the Administrative of Justice Report of 2018/2019(pp 42-44).

¹⁰⁶ See Article 10, *Constitution of Kenya* (2010) on the value of public participation. See also Article 259 *Constitution of Kenya* (2010) on the right of every person to institute court proceedings claiming that a constitution provision has been violated or has been threatened with violation.

¹⁰⁷ Leadership and Integrity Act (2012), s. 43 (3) *Laws of Kenya*.

It is clear from the table above that the rate at which cases are being filed in the Anticorruption division of the High Court greatly exceeds the rate at which they are being resolved. The case backlog is indicative of a need to increase the capacity of the division to dispose of matters expediently. In the 2018–2019 year, the division had only two judges, one of whom doubled as a judge in the family division as well¹⁰⁸: effectively it had one full time judge who was expected to handle 217 cases filed in that year alone as depicted in the table above. Further the anticorruption division does not have a designated deputy registrar like other divisions which further debilitates its capacity to dispose of cases¹⁰⁹.

A similar trend of case backlog is at play in the Milimani anti-corruption Magistrate Court as depicted in the table below. However, the situation in the Magistrate Court needs further evaluation given that the Court has six magistrates assigned to it and hence the distribution of caseload per magistrate is lighter than at the High Court Level¹¹⁰.

Table 3: Cases pending before the Anti-corruption Magistrate Court

	Criminal	Civil	Total
Pending cases as at 30 th June 2018	148	0	148
Filed Cases 2018/2019 year	58	0	58
Resolved Cases 2018/2019 year	44	0	44
Pending cases as at 30 th June 2019	162	0	162

Source: State of the Judiciary and the Administrative of Justice Report of 2018/2019(p. 77).

One notable thing is that the anti-corruption courts (both Magistrate and High Court) are only based in Milimani, Nairobi despite the fact that corruption is not simply a city phenomenon: it is rife in the devolved governments as well. The resolution of anti-corruption cases could be expedited by setting up anti-corruption courts in County headquarters

5. Watershed court cases: Judiciary as the pacesetter

Many citizens and advocacy groups have taken the cue for public participation and there is a surfeit of cases dealing with leadership and integrity as demonstrated by the following discussion of watershed cases. The first two cases deserve a special

¹⁰⁸ See, State of the Judiciary and the Administrative of Justice Report of 2018/2019, 357. Hon. Lady Justice Grace Mumbi Ngugi was the only judge assigned to the anticorruption division on a full-time basis while Hon. Mr. Justice Onyiego John Nyabuto was supposed to serve in this division as well as in the family division.

¹⁰⁹ Ibid. 362. The Registrars of the various divisions are listed and it is clear that the anti-corruption division has no registrar.

¹¹⁰ Ibid. 363. The Milimani Anti-Corruption Court had 4 Chief Magistrates and 2 Senior Principal Magistrates in the 2018/2019 year.

mention as they arose soon after the Constitution was promulgated and they sought to challenge both the law and the institutions set up to deal with leadership and integrity. The first one sought to have the appointment of the Chairperson of the EACC nullified by the court while the second one sought to have the Leadership and Integrity Act declared unconstitutional.

5.1. Threshold for integrity in public office: the Trusted Society for Human Rights Alliance case

The case of *Trusted Society for Human Rights Alliance v the Attorney General & others*,¹¹¹ challenged the constitutionality of the appointment of Mr Mumo Matemu as the Chairperson of the EACC. The crux of the argument was that he should not have been appointed because he did not meet the integrity threshold established by the 2010 Constitution due to unresolved allegations of financial impropriety committed while he was the legal officer of a public institution.¹¹² The judgment was novel as it entailed an extensive discussion not only as to what integrity means but also as to the threshold of conduct which may support a finding that a certain person lacks integrity.

The High Court stated that ‘a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution’.¹¹³ From this statement, the High Court seems to suggest that, for the purposes of the 2010 Constitution, integrity is mainly focused on financial probity and specifically on being free of corruption or of unresolved allegations of corruption. It further stated that the constitutional test of integrity is that ‘there are sufficient serious, plausible allegations which raise substantial unresolved questions about one’s integrity’. In other words, the conduct in question need not rise to the threshold of criminality.¹¹⁴

Although the High Court found that the appointee failed the suitability test, the Court of Appeal later on overturned its findings and held that he had been validly appointed by whittling down the definition of integrity set down by the High Court.¹¹⁵ The court stated thus:

...that leadership and integrity are broad and majestic normative ideas. They are the genius of our constitutional fabric. However, their open-

¹¹¹ [2012] eKLR

¹¹² *Trusted Society for Human Rights Alliance versus the Attorney General & others*, (2012) eKLR, paragraph 40.

¹¹³ *Ibid.* paragraph 107.

¹¹⁴ *Ibid.*

¹¹⁵ *Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others* (2013) eKLR, paragraph 59.

textured nature reveals that they were purposefully left to accrue meaning from concrete experience.

Three years later the appointee resigned in the face of fresh allegations against him which led Parliament to vote on his removal after which the President suspended him from office and formed a tribunal to investigate the allegations.¹¹⁶ However he chose not to face the tribunal and resigned before the veracity of those allegations could be legally determined.¹¹⁷

Although the High Court decision was overturned by the Court of Appeal, the jurisprudence emanating from that decision on the threshold for integrity for appointment to public office has been adopted in other decisions. The most significant case to adopt that jurisprudence was the *International Centre for Policy and Conflict & others -v- The Attorney-General and 4 others* [2013] eKLR¹¹⁸, which concerned the suitability of Uhuru Kenyatta and William Ruto¹¹⁹ to contest for state office in Kenya as President and Deputy President respectively. In interpreting the constitutional provisions on integrity, the judges stated that they were in agreement with the definition of the High Court in the *Trusted Society for Human Rights Alliance* and quoted from it verbatim.¹²⁰

5.2. Constitutionality of Leadership and Integrity Act case

In the case of *Commission for the Implementation of the Constitution (CIC) v Parliament of Kenya and 5 others*,¹²¹ the CIC sought to have the Leadership and Integrity Act of 2012 declared unconstitutional on the ground that it fell short of the constitutional threshold required of the leadership and integrity law contemplated by Article 80 of the 2010 Constitution. CIC argued that the Leadership and Integrity Act did not contain specific procedures and mechanisms for the effective administration

¹¹⁶ Parliament of Kenya, The National Assembly, Official Record (Hansard), Wednesday 22nd April, 2015, 11–46. At page 11 of the Hansard, the reasons given for his removal are: serious violation of the Constitution; the Ethics and Anti-Corruption Commission Act, Anti-Corruption and Economic Crimes Act and the Penal Code. Parliament also found that besides being incompetent, there was gross misconduct in the performance of his functions.

¹¹⁷ See online media reports. <https://tinyurl.com/3treap5s> and <https://tinyurl.com/5n897sha>

¹¹⁸ Nairobi High Court Petition No. 552 of 2012.

¹¹⁹ The two were allowed to contest and they became the President and Deputy President respectively of the Republic of Kenya following a hotly contested presidential election in March 2013. The petition challenged the integrity of the two aspirants on the basis that they had criminal cases against them pending before the International Criminal Court (ICC). The charges were subsequently dropped. The High Court distinguished this case from the *Trusted Society for Human Rights Alliance case* by finding that the Court was not the right forum to undertake an assessment of the integrity of persons presenting themselves for public office (at paragraphs. 137–138).

¹²⁰ *International Centre for Policy and Conflict & 5 others vs Attorney General & 4 others* Nairobi High Court Petition No. 552 of 2012 (2012) eKLR, paragraph 132.

¹²¹ (2013) eKLR.

of Chapter 6 of the 2010 Constitution.¹²² Prior to the enactment of the Leadership and Integrity Act, the CIC, in an advisory opinion to the chairperson of the Departmental Committee on Justice, Legal and Constitutional Affairs, had identified three shortcomings in that the then Leadership and Integrity Bill failed to provide for the following:

- Way(s) for the comprehensive administration of Chapter 6 as required by Article 80(a) of the 2010 Constitution;
- Disciplinary mechanisms and penalties as required by Articles 75 and 80(b) of the 2010 Constitution; and
- A mechanism that would allow the EACC to prosecute cases of breach of Chapter 6 where the DPP refuses to prosecute without good cause as Article 79 contemplates.¹²³

The High Court found that the Leadership and Integrity Act was constitutional and, in its judgment, outlined its various provisions showing that are procedures for the administration of Chapter 6. The High Court seemed to suggest that the mainstay of the procedures and mechanisms provided by the Leadership and Integrity Act is the leadership and integrity code.¹²⁴ The High Court highlighted specific mechanisms and procedures provided in the Leadership and Integrity Act.¹²⁵ These include:-

- Each public entity is obliged to prescribe a specific leadership and integrity code which should include the provisions of the General Leadership and Integrity Code under Part II of the Act. The specific codes should be submitted to the EACC for approval.
- Enforcement of the code is provided for under Part IV of the Act, which requires each State officer to sign and commit to the specific code issued by the public entity in which he or she belongs at the time of taking office and not later than seven days of assuming office. Further, an officer who breaches the code may be subjected to disciplinary procedures which may include removal or dismissal.
- Lodging of complaints and their investigation is also provided for. Upon investigation, the causes of action include referral to the EACC or the AG in regard to civil matters and to the DPP if the allegations are criminal in nature.
- The EACC is mandated to make regulations for the better carrying out of the Act.

¹²² Article 80 (a), *Constitution of Kenya* (2010).

¹²³ *Commission for the Implementation of the Constitution vs Parliament of Kenya & 5 others* (2013) eKLR, paragraph 9.

¹²⁴ *Ibid.* paragraph 54. Part II of the Act provides for a General Leadership and Integrity Code which incorporates the provisions of Chapter 6 of the Constitution and those of the Public Officer Ethics Act, No. 4 of 2003 in so far as it is not inconsistent with the Act.

¹²⁵ *Ibid.* paragraphs 55–60.

The High Court also dealt with the question of the effectiveness of the mechanisms envisaged under Article 80(a) of the 2010 Constitution. The High Court adopted the plain and ordinary meaning of the word ‘effective’ as employed in that article and held that it had been demonstrated that the Act provided a means of achieving the objectives of Chapter 6.

Finally, the Court looked into the issue of whether the Act provided for penalties for infractions of integrity provisions. It concluded that these were provided for in Part V of the Act and in the Public Officer Act of 2003. The High Court highlighted the fine and prison term provided under Section 46 of the Public Officer Act (for the offence of hindering or obstructing any person undertaking duties under this Act); the forfeiture of property obtained in breach of the Public Officer Act under Section 49; and the disciplinary procedures for breach of the code.¹²⁶

5.3. The Waititu appointment and election Cases

There are two High Court cases concerning Ferdinand Waititu which depict a duality of standards of integrity applicable to appointed and elected State officers. In one case, their appointment to chair the board of a parastatal was nullified in one case while in another case he was cleared to vie for a parliamentary seat. In *Benson Riitho Mureithi v JW Wakhungu & 2 others*,¹²⁷ the High Court held that Ferdinand Waititu was not appointed to chair the Athi Water Services Board validly because due regard was not paid to the question of integrity and character as Chapter 6 requires. Barely a year later, Waititu sought to contest for a parliamentary by-election, upon which two cases were filed challenging his suitability to serve as an MP. The High Court consolidated the cases into one which is the *Godfrey Mwaki Kimathi & 2 others v Jubilee Alliance Party & 3 others*¹²⁸. The High Court dismissed the petition thereby allowing the aspirant (Waititu) to vie for the vacant parliamentary seat. The High Court did not consider the substantive issue of the aspirant’s integrity and character but determined the case on procedural issues finding that the petitioners should have addressed the matter to the Independent Electoral and boundaries Commission (IEBC) prior to the litigation.

These two cases send mixed signals with regard to whether there is a homogenous set of standards for all State officers regardless of whether they are elected or appointed. It is also not clear why the High Court in the first case went into the substance of the petition while in the second one it restricted itself to administrative/procedural issues and simply shelved its jurisdiction unless and until the IEBC had pronounced it on the matter. Be that as it may, the progression of life forced a determination of the matter as the protagonist proceeded to vie and garner the Kiambu gubernatorial seat in the 2017 elections but he was soon thereafter removed from office by impeachment

¹²⁶ Ibid. paragraphs 64–67.

¹²⁷ *Benson Riitho Mureithi vs JW Wakhungu & 2 others* (2014) eKLR (High Court Nairobi, Petition 19 of 2014).

¹²⁸ *Godfrey Mwaki Kimathi & 2 others vs Jubilee Alliance Party & 3 others*, (2015) eKLR.

for several reasons including gross violation of the Constitution of Kenya 2010, The County Government Act 2012, the Public Finance management Act of 2012 and the Public Procurement and Disposal Act of 2015¹²⁹.

5.4. The Swazuri Case on suspension from office

In *Muhammad Abdalla Swazuri & 16 others v Republic (2018)* the Anti-Corruptions and Economic Crimes Division of the High Court was approached with yet a different issue. The former chairperson of the National Land Commission Mohammed Swazuri had been charged with anti-corruption and economic crimes related offences.¹³⁰ In the case of *Nairobi Chief Magistrate's Anti-Corruption case no 33 of 2018*, he was granted bail on condition that he would be denied access to his office unless he had 'prior authorization from the Secretary or Chief Executive Officer (CEO) of the EACC to ensure minimised contact with witnesses who are expected to testify against them and the relevant evidence.¹³¹

Muhammad Swazuri challenged this decision on grounds that Constitutional officers like him were exempted from such a ruling under Section 62 (1) as read with Section 62 (6) of the Anticorruption and Economic Crimes Act (ACECA).¹³² Section 62 (1) provides that a public officer or State officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case. Section 62 (6) provides that suspension on account of a charge of corruption or economic crime does not apply with respect to an office, if the Constitution limits provides for the grounds upon which a holder of the office may be removed or circumstances which the office may be vacated.¹³³ According to Muhammad Swazuri, the conditions for his removal from office were already provided for in Article 181 of the Constitution of Kenya 2010.¹³⁴ Furthermore, Section 10 of the National Land Commission Act already provided for conditions upon which his office would become vacant, none of which contemplate a charge of a corruption or economic crime.¹³⁵

The High Court agreed with the Applicant's (Muhammad Swazuri) reasoning finding that Constitutional office holders like the Applicant are indeed exempted from suspension by virtue of section 62(6) of ACECA.¹³⁶ The High Court therefore set aside the order in *Nairobi Chief Magistrate's Anti-Corruption case no 33 of 2018* and substituted it with 'an order directing the Applicant to make an undertaking not to

¹²⁹ Parliament of Kenya, The Senate, Official Record (Hansard), Wednesday 29th January, 2020.

¹³⁰ Muhammad Abdalla Swazuri & 16 others vs Republic (2018) eKLR, paragraph 4.

¹³¹ Ibid. paragraph 4.

¹³² Ibid. paragraph 8.

¹³³ Section 62 (1) and 62 (6), Anti-corruption and Economic Crimes Act (Act no. 3 of 2003).

¹³⁴ Muhammad Abdalla Swazuri & 16 others vs Republic (2018) eKLR, paragraph 8.

¹³⁵ National Land Commission Act (2012), s. 10 provides for death, resignation, absenteeism, removal or expiration of their term.

¹³⁶ Muhammad Abdalla Swazuri & 16 others vs Republic (2018) eKLR, paragraph 35.

interact and/or interfere with the witnesses at his work place or any other witness.¹³⁷ He would also undertake not to interfere with the records and/or documents relevant to the case at hand.¹³⁸

5.5. County Governors barred from accessing offices

The Anti-Corruption and Economic Crimes Division of the High Court in *Moses Kasaine Lenolkulal v Director of Public Prosecutions* [2019] eKLR addressed a similar issue to that of the *Muhammad Swazuri case*. Moses Kasaine Lenolkulal, Governor of Samburu, was charged in *ACC No. 3 of 2019: R vs. Moses Lenolkulal and 13 others* with four counts under the Anti-Corruption and Economic Crimes Act (ACECA): the offence of conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48(1) of ACECA, the offence of abuse of office contrary to section 46 as read with section 48(1) of ACECA, the offence of conflict of interest contrary to section 42(3) as read with section 48(1) of ACECA and the offence of unlawful acquisition of public property contrary to section 45(1) (a) as read with section 48(1) of ACECA.¹³⁹ While he was granted bail, one of the conditions was that he be barred from 'accessing the Samburu County Government Offices without the prior written authorization from the CEO of the Investigative Agency (EACC) who would put measures so as to ensure that there is no contact between him with the prosecution witnesses and preserve the evidence until the Court issued further orders.'¹⁴⁰

He sought to challenge this decision and invoked Section 62 (6) of the ACECA which would protect him from suspension from office by the EACC given there were already conditions outlined in Article 181 and 182 of the Constitution on removal from office.¹⁴¹ He also urged the High Court to be guided by the decision in the *Mohammed Swazuri case*.¹⁴² Judge Mumbi Ngugi instead cited Justice Majanja in *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others (2013) eKLR*, that a purposive approach be employed in interpreting Section 62 (6) and Chapter 6.¹⁴³ The Court noted that the people of Kenya, having promulgated the Constitution of Kenya 2010 containing the National Values and Principles of Governance, could not have intended to pass legislation (in the form of the ACECA) that allowed state officers to ride roughshod over the integrity required of leaders and still continue to enjoy the trappings of their office.¹⁴⁴

¹³⁷ Ibid. paragraph 43.

¹³⁸ Ibid.

¹³⁹ *Moses Kasaine Lenolkulal vs Director of Public Prosecutions* (2019) eKLR, paragraph 1.

¹⁴⁰ Ibid. paragraph 4.

¹⁴¹ Ibid. paragraph 6.

¹⁴² Ibid. paragraph 9.

¹⁴³ Ibid. paragraph 34.

¹⁴⁴ Ibid. paragraph 47.

She was of the view that Section 62 (6) violated the letter and the spirit of the Constitution and if it is to protect the applicant's access to his office, then conditions must be imposed that protect the public interest as done by the trial court in *ACC No. 3 of 2019: R vs. Moses Lenolkulal and 13 others* where the court mandated the the applicant to obtain authorisation from the CEO of EACC before accessing their office. This did not amount to a removal from office as provided in Article 181 or 182 of the Constitution of Kenya, 2010 but merely suspended certain rights pending determination of the trial.¹⁴⁵

This decision was upheld by the Court of Appeal which considered that the entire matter arose from a bail application in the trial court which granted bail conditions under Article 49 (1) (h) of the Constitution.¹⁴⁶ While Section 62 (6) prohibits application of section 62 (1) in the case of a constitutional office holder charged with a corruption offence where the Constitution already provides a method for removal, these provisions, when considered against Article 49 (1) (h) which allows for imposition of reasonable bail terms, clearly address two disparate circumstances.¹⁴⁷ One the removal from office and two, the imposition of bail.¹⁴⁸ Hence the Court of Appeal agreed with the decision in the High Court that limiting the governor's access to the County offices whilst he is facing trial for corruption offences cannot be construed or equated to a removal from office. It instead safeguards public interest which is an essential requirement in such a case.¹⁴⁹

The High Court in *Ferdinand Ndungu Waititu Babayao & 12 others v Republic [2019] eKLR* was guided by the decision *Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR*. Governor Waititu was charged with conflict of interest contrary to Section 42 (3) of the Anti-Corruption and Economic Crimes Act under which an agent of a public body who knowingly acquires a private interest in any contract connected with the public body is guilty of an offence.¹⁵⁰ One of the contested issues regarded the imposition of stringent bail conditions against the Governor of the County Government of Kiambu and further barring him from setting foot into the County offices pending the hearing and determination of the trial.¹⁵¹ The Governor urged the court to depart from the decision *Moses Kasaine Lenolkulal* and to instead adopt the decision in the *Muhammad Swazuri case*.¹⁵² Justice Ngenye in this case, like Justice Mumbi Ngugi, departed from the decision in the *Mohammed Swazuri case* stating that 'the drafters of the Constitution intended to ensure that corruption did not infiltrate public offices; and in there lies an indication that accountability is a key tenet of leadership and integrity. Governor Waititu had

¹⁴⁵ Ibid.

¹⁴⁶ Ibid. para 9.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid. para 11.

¹⁵⁰ *Ferdinand Ndung'u Waititu Babayao & 12 others vs Republic (2019) eKLR*, paragraph 2.

¹⁵¹ Ibid. paragraph 18.

¹⁵² Ibid. paragraph 22.

been charged in court because of the doubt the public has on his integrity. Until such a time that he is vindicated or convicted, he is yet to fulfil his duty to account for the alleged breach of the public trust entrusted in him under Article 73 of the Constitution. Absurdity would reign in if the court allowed him to go back to the office to continue executing his duties.¹⁵³

The Court of Appeal upheld this decision since section 62 (6) of ACECA had no application in the matter that was before her given that their holding did not purport to remove or suspend the appellant from office of Governor, Kiambu County.¹⁵⁴ The Court of Appeal suggested that the appellant had not been suspended from his office, he would still be the Governor of Kiambu County; and he would still be entitled to his full pay, not half.¹⁵⁵

5.6. Supreme Court's missed chance to streamline integrity cases

The Supreme Court has also been called upon to make determinations regarding leadership and integrity. This was the case in *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* [2020] eKLR which concerned civil forfeiture of assets where a public officer cannot account for the assets in their possession or ownership as per section 55 of the ACECA.¹⁵⁶

This case dates back to 9th July 2008 when the Respondent issued a Notice under Section 26 of the ACECA requiring the Applicant to furnish a statement of his property given 'his various assets were disproportionate to his salary (being his only source of income at the time).¹⁵⁷ The Applicant complied with the notice and gave an explanation for his wealth and assets.¹⁵⁸ The Respondent, being dissatisfied with the explanation, filed an application by way of originating summons claiming that the Applicant had unexplained assets liable to forfeiture.¹⁵⁹ A decree was issued in the High Court that the appellant was liable to pay the Government of Kenya the sum of Kshs. 41,208,000/=.¹⁶⁰ The Applicant appealed against this decision and the Court of Appeal upheld the decision of the High Court in its entirety.¹⁶¹ The Applicant then appealed against the decision of the Court of Appeal to the Supreme Court pursuant to Article 163 (4) of the Constitution.¹⁶²

¹⁵³ Ibid. paragraph 37.

¹⁵⁴ Ibid. paragraph 44.

¹⁵⁵ Ibid.

¹⁵⁶ Anti-Corruption and Economic Crimes Act (2003), s. 55 *Laws of Kenya* provides for the civil forfeiture of assets where a public officer cannot explain or account for the assets in possession or ownership.

¹⁵⁷ *Stanley Mombo Amuti vs Kenya Anti-Corruption Commission* (2019) eKLR, paragraph 6.

¹⁵⁸ Ibid. paragraph 9.

¹⁵⁹ Ibid. paragraph 9.

¹⁶⁰ Ibid. paragraph 11.

¹⁶¹ Ibid. paragraph 89.

¹⁶² *Stanley Mombo Amuti vs Kenya Anti-Corruption Commission* (2020) eKLR, paragraph 2.

A preliminary objection was filed seeking an order that the appeal be dismissed on the ground that the Supreme Court lacked the requisite jurisdiction to determine the appeal on merit.¹⁶³ Article 163 (4) (a) allows appeals to the Supreme Court from the Court of Appeal as of right in any case involving the interpretation or application of the Constitution.¹⁶⁴ Hence the Respondent argued that what the High Court and Court of Appeal did was to interrogate the applicability of Sections 26 and 55 of ACECA and their constitutionality in the context of any Article of the Constitution and that was never an issue.¹⁶⁵ The Applicant contended that the Court of Appeal determined, as one of its issues, whether the High Court misdirected itself on Articles 40 and 50 of the Constitution and Section 55 of ACECA as to the threshold on forfeiture of property.¹⁶⁶

Indeed the Court of Appeal found that the provisions of Section 26 and 55(2) of the ACECA did not violate the right to property as enshrined in Article 40 of the Constitution.¹⁶⁷ Yet, the findings of the Court of Appeal were not enough to trigger the Supreme Court's jurisdiction. The Supreme Court stated that where the interpretation or application of the Constitution has only but a limited bearing on the merits of the main cause, then the jurisdiction of this Court may not be properly invoked.¹⁶⁸ Hence, the Court of Appeal rendered itself in passing only and the bulk of its Judgment was saved to an evaluation of the evidence on record in the context of Sections 26 and 55 of ACECA and not the Constitution *per se*.¹⁶⁹

Against the background of these and other cases, the Kenya National Commission on Human Rights (KNCHR) sought an advisory opinion from the Supreme Court pursuant to the provisions of Article 163 (6) of the Constitution of Kenya 2010, which allows for an advisory opinion to be given by the Supreme Court at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.¹⁷⁰ KNCHR grounded its request on the contention that 'there is an apparent contradiction, lack of clarity and/or guidance in High Court and Court of Appeal decisions on the place of Chapter Six of the Constitution, more so with regard to the leadership and integrity qualification of persons offering themselves to be elected or appointed to public service and/or offices in Kenya. This has had the result of creating a confused jurisprudence.'¹⁷¹

The alleged contradicting decisions of the Superior Courts cited by the Applicant include: *International Centre for Policy and Conflict & 5 Others vs. The Hon. AG*

¹⁶³ Ibid. paragraph 3.

¹⁶⁴ Article 163 (4) (a), *Constitution of Kenya* (2010).

¹⁶⁵ Stanley Mombo Amuti vs Kenya Anti-Corruption Commission (2020) eKLR, paragraph 5.

¹⁶⁶ Ibid. paragraph 7.

¹⁶⁷ Ibid. paragraph 11.

¹⁶⁸ Ibid. paragraph 17.

¹⁶⁹ Ibid. paragraph 18.

¹⁷⁰ Article 163 (6), *Constitution of Kenya* (2010).

¹⁷¹ Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (2020) eKLR, paragraph 2.

& 4 others, High Court Petition No. 552 of 2012; *Luka Angaiya Lubwayo & Another vs. Gerald Otieno Kajwang & Another*, High Court Constitutional Petition No. 120 of 2013; *Mumo Matemu vs. Trusted Society of Human Rights Alliance & others*, Civil Appeal No. 290 of 2012; *Marson Integrated Ltd vs. Minister for Public Works & Another*, High Court Petition No. 252 of 2012; *Benson Riitho Mureithi vs. J. W. Wakhungu & 2 others*, Constitutional Petition No. 19 of 2014; and *Commission on Administrative Justice vs. John Ndirangu Kariuki & IEBC*, Constitutional Petition No. 408 of 2013.¹⁷²

However, Okiya Omtatah filed a preliminary objection claiming, the major contention being that the advisory opinion was *sub judice*¹⁷³ (or under judicial consideration in another court) given the following matters were pending in the High Court:

- a) *Constitutional Petition No. 68 of 2017, Okiya Omtatah Okoiti vs. Jubilee Party of Kenya and Others*. The issue in this case was whether the requirement for clearance by state and private bodies, (being the Criminal Investigations Department, Higher Education Loans Board, Ethics and Anti-Corruption Commission, Kenya Revenue Authority and the Credit Reference Bureau), to vie for elective positions as demanded by the respondents therein, was *ultra vires* (or contrary to) the provisions of Chapter Six of the Constitution.¹⁷⁴
- b) *Constitutional Petition No. 142 of 2017, Okiya Omtatah Okoiti vs. Hon. Attorney General and 12 Others*. The issue in this case was whether a working group dubbed the Chapter Six Working Group on Election Preparedness (the Working Group) established by the Attorney General with the mandate to vet all candidates vying for the 8th August, 2017 General Elections was *ultra vires* the Constitution and the Elections Act.¹⁷⁵

The Supreme Court was of the view that for the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it would have to interpret and apply the provisions of Chapter Six of the Constitution on leadership and integrity.¹⁷⁶ While the issues brought before it by KNCHR were already before the aforementioned High Court constitutional petitions¹⁷⁷, the Supreme Court was reluctant to ‘usurp’ the jurisdiction of the High Court as the court of first instance with regard to the

¹⁷² Ibid. paragraph 4.

¹⁷³ A description for in Section 6 of the Civil Procedure Act of 2012 which provides that No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

¹⁷⁴ Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (2020) eKLR, paragraph 61.

¹⁷⁵ Ibid. paragraph 63.

¹⁷⁶ Ibid. paragraph 68.

¹⁷⁷ Ibid. paragraph 72.

interpretation and application of the Constitution.¹⁷⁸ In this regard, it cited its former decision in *the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Advisory Opinion No. 2 of 2012 that when similar questions of constitutional interpretation are brought before the Supreme Court and the High Court, the Supreme Court would in principle commit itself to order and efficacy in the administration of justice and require the process of litigation commence in the High Court and if need be followed by appellate procedures.¹⁷⁹ It therefore declined to exercise its jurisdiction under Article 163 (6).

Justice Lenaola issued a dissenting opinion claiming that the petitions in the High Court in fact dealt with specific issues in dispute between specific parties and the reference made by the KNHCR was not a litigation dispute. This is because it also dealt with issues that were not substantially similar, “who should determine whether a person has met the criteria for an elective position within Chapter Six of the Constitution and specifically in relation to the 2017 General Election (and perhaps in other such elections)”.¹⁸⁰ The broader issue in the application was “what is the criteria to be applied in vetting, appointing or electing persons in relation to the provisions of Chapter Six of the Constitution”.¹⁸¹

Failing this argument, Justice Lenaola invoked public interest in the matter relying on the case of *Re The Matter of the Interim Independent Electoral Commission Constitutional Application Number 2 of 2011*. In that case, the Supreme Court indicated that where a reference has been made to the Supreme Court where the subject matter of which is also pending in a lower Court, the Supreme Court may render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion.¹⁸² He was of the view that the fit and proper criteria set under Chapter Six of the Constitution, has an important application to vet the moral and ethical soundness of persons seeking elective or appointive offices. It is thus central given the issues were of great public importance and that they raised a variety of implementation challenges unbeknown to the traditional integrity and leadership criteria previously in force necessitating the Supreme Court’s guidance.¹⁸³

Did the Supreme Court miss a timely occasion to respond to a compelling need guiding jurisprudence on Chapter 6, or was it wise and justified in its hesitation? Perhaps time will tell, yet its ostensible reluctance in determining issues relating to Chapter 6 of the Constitution is no undeniable fact.

¹⁷⁸ Ibid. paragraph 73.

¹⁷⁹ Ibid. paragraph 55.

¹⁸⁰ Ibid. paragraph 94.

¹⁸¹ Ibid. paragraph 95.

¹⁸² Ibid. paragraph 97.

¹⁸³ Ibid. paragraph 102.

6. Final Nuggets: Lessons learnt in the first ten years of the 2010 Constitution of Kenya

From the analysis of the existing legal framework, there is an apparent duplication and superimposition of statutes with the importation of Public Officer Ethics Act of 2003 into the Leadership and Integrity Act. The legal framework could have been simplified by the enactment of one comprehensive statute. The enforcement agency will have to do the extra work of ensuring that the provisions of the older statutes do not conflict with the new ones.

Although the Anti-Corruption and Economic Crimes Act of 2003 is a more elaborate statute than the Leadership and Integrity Act of 2012, it is also not without a few shortcomings, two of which stand out. Firstly, the appointment of special magistrates is left to the discretion of the Chief Justice. Section 3 of the Act states that the Chief Justice may appoint as many special magistrates as may be necessary. The special magistrates are not a permanent feature and thus it is likely that at some point in time, a class of magistrates with adequate experience to deal with matters of corruption and economic crimes efficiently and expediently would be non-existent. Secondly, the penalties prescribed by the Act are couched as maximums leaving great leeway to the magistrates when it comes to sentencing. It has been argued that the exercise of discretion in sentencing is one of the causes of judicial corruption.¹⁸⁴

In enacting the new laws to implement Chapter 6, Parliament also withheld (whether by design or accident) prosecutorial powers from the EACC. This is despite the fact the 2010 Constitution contains a novel provision which potentially removes the monopoly of prosecutorial powers from the DPP.¹⁸⁵ There is statistical evidence indicating that the number of convictions obtained by the DPP is rather infinitesimal (in the 2014/2015 year it was below 1%) compared to the number of cases forwarded to the DPP for prosecution. It can only be surmised that perhaps the EACC has not done thorough investigations on the files forwarded to the DPP or that the DPP has not prosecuted diligently and tenaciously.

Article 75(2) of the 2010 Constitution also appears to be problematic as it provides for disciplinary measures which may or may not exist. The Article reads as follows: 'A person who contravenes clause (1), or Articles 76, 77 or 78 (2) – shall be subject to the applicable disciplinary procedure for the relevant office;' If the applicable disciplinary procedure referred to is non-existent, then there would be no legal way available to punish State officers who contravene the listed provisions. This is an abeyance that ought to be remedied. The statutes enacted pursuant to the provisions of Chapter 6 do not provide for disciplinary procedure for 'the relevant office'. The Leadership and Integrity Act failed to close this gap as it also made reference to

¹⁸⁴ See for example, William OUKO: *Final Report of the Task Force on Judicial Reforms (Ouko Report)*. Kenya, Republic of Kenya, 2010. 93. The Task Force noted that 'The perception of the public is that the exercise of judicial discretion in sentencing is neither judicious nor fair and just'.

¹⁸⁵ Article 157 (12), *Constitution of Kenya (2010)*.

procedures contained in ‘any other law’ concerning the removal or dismissal of a State officer on the ground of breach of the code.¹⁸⁶

It is also clear that the courts have not determined the standards of integrity with finality. Since it is a matter enshrined in the 2010 Constitution, the citizenry should not be expected to look elsewhere other than the courts for a definitive interpretation. Unfortunately, the *Trusted Society for Human Rights Alliance* case never reached the full bench of the Supreme Court and hence an authoritative definition of the term integrity as used in the Constitution of Kenya 2010 is yet to be laid down. As highlighted, the case reached the Court of Appeal which not only implicitly rejected the jurisprudence laid down by the High Court but also rejected the help of philosophy in defining the term by declaring that the life blood of the concept is not to be found in the abstract philosophy that underlies it. However, in the absence of an alternative affirmative definition, the High Court definition in the *Trusted Society of Alliance for Human Rights* case has been gaining significance as a result of being relied upon in subsequent court cases on the subject of the integrity of appointed or elected state officers. It was, for instance, relied upon in the *International Centre for Policy and Conflict & others -v- The Attorney-General and 4 others*¹⁸⁷. Besides this, the Supreme Court missed other crucial chances to lay down the definitive jurisprudence on the constitutional notion of integrity. Without a clear set of parameters or standards of judging integrity issues, it will be hard, if not impossible, to implement Chapter 6.

Compared with Britain, Kenyan authorities are slow in dealing with corruption cases as indicated by media reports on the so-called Chicken gate Scandal. In this matter, senior officials of the then Interim Independent Electoral Commission (IIEC) and the Kenya National Examination Council (KNEC) received kickbacks from a printing company Smith and Ouzman Limited in order to win tenders for ballot and exam papers respectively.¹⁸⁸ The company was convicted of making corrupt payments and was ordered to pay a total of £2.2 million in a sentencing hearing at Southwark Crown Court in Britain.¹⁸⁹ Nicholas Charles Smith, the sales and marketing director of the company, was in 2015 sentenced to three years’ imprisonment and was released after completing his sentence.¹⁹⁰ Meanwhile, Kenyan authorities are still struggling to pursue criminal charges against the Kenyan individuals alleged to be the recipients of kickbacks from the British company.¹⁹¹ This speaks volumes on the capacity of Kenyan authorities to deal with mega-corruption scams, especially vis-à-vis other jurisdictions.

¹⁸⁶ Leadership and Integrity Act 2012, s. 41(2) *Laws of Kenya*.

¹⁸⁷ (2013) eKLR, Nairobi High Court Petition No. 552. of 2012.

¹⁸⁸ Brian WASUNA: ‘Briton jailed for IEBC ‘Chicken gate’ scandal walks to freedom’ Daily Nation, 18th February 2019 <https://tinyurl.com/4x5d58h8> accessed on 18th August 2020.

¹⁸⁹ Serious Fraud Office (SFO), ‘Convicted printing company sentenced and ordered to pay £2.2 million’ SFO News Releases, 8th January 2016 <https://tinyurl.com/mux9992v/> accessed on 18th August 2020.

¹⁹⁰ Brian WASUNA: ‘Briton jailed for IEBC ‘Chicken gate’ scandal walks to freedom’ Daily Nation, 18th February 2019 <https://tinyurl.com/4x5d58h8> accessed on 18th August 2020.

¹⁹¹ *Ibid.*

There also seems to be a duality of standards of integrity applicable to appointed leaders on one hand and to elected leaders on the other as the Ferdinand Waititu cases depicted. Beyond accessing State office, one is left to surmise whether the same dual standard would be applied in the event of removal from office. Ever since the promulgation of the 2010 Constitution it has not yet happened that an elected State officer is removed from Parliament for want of integrity.

It is clear that the law needs to be streamlined and specified in order to implement the provisions of Chapter 6 of the 2010 Constitution of Kenya more effectively. The penalties and consequences for breach of leadership and integrity provisions should also be couched with a minimum and a maximum so that judicial discretion is limited within a known range. Besides this, the Judiciary could also issue the courts with a sentencing policy to promote fairness in sentencing. The Judiciary should also give the anti-corruption courts more structural stability by establishing them through statute, devolving them and increasing the number of judges and magistrates assigned to them. Finally, the Supreme Court ought to intervene through an advisory opinion in order to set clear jurisprudence on the implementation of Chapter Six of the 2010 Constitution of Kenya: if the chapter is pivotal in realizing the aspirations Kenyans had when the new constitution was promulgated fourteen years ago, a determination of these issues with finality by the apex court is long overdue.