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Editor's Note

Welcome to Volume 12 Issue 3 of the Journal of Conflict Management and Sustainable Development. The Journal is an interdisciplinary publication that focuses on key and emerging themes in Conflict Management, Sustainable Development and other related fields of knowledge.

Sustainable Development has been embraced at both the global and national levels as the blue print for socio-economic development and governance. The Journal interrogates and offers solutions to some of the current concerns in the Sustainable Development Agenda. It also explores the role of Conflict Management in the attainment of Sustainable Development.

The Journal is peer reviewed and refereed so as to ensure credibility of information and validity of data.

This volume contains papers on various themes including: *Dealing with Carbon Disputes for Green Growth and Sustainability; Analyzing the Impact of Court-Annexed Mediation on Case Resolution Timelines and Stakeholder Satisfaction: Insights from Milimani Children's Court Under Kenya's Children Act 2022; Fostering Urban Harmony: Leveraging Participatory Governance for Sustainable Peace in Africa's Rapidly Growing Cities; Contextualising A Global Debate: The State of The Right to Repair in Kenya's Legal Framework; Judicial Recognition of the Admissibility of Electronic Evidence in Terrorism Cases in Kenya: A Review of the High Court Ruling in Republic v Alias Mire Abdulahi Ali & 2 Others Criminal Revision No. E055 Of 2023 (the Dusit D2 Case); Balancing Environmental Conservation and the need for Renewable Energy Developments; The Forgotten Gender? A Critical Analysis of Boy Child Marginalization in The Era of Girl Child Empowerment in Kenya; Dealing with Concurrent Delay on construction projects: The novel approach from Thomas Barnes;* and *A Proposal for Legislation to Tackle Fake Gold Scammers, "Wash Wash" Cartels and Other Organized Crime Syndicates in Kenya: Lessons from the American RICO Act.*

We welcome feedback, comments and critique from our readers to enable us to continue improving the Journal.

I wish to thank all those who have made this publication possible including reviewers, editors and contributors.

The Editorial Team also welcomes the submission of articles to be considered for publication in subsequent issues of the Journal. Submissions can be channeled to admin@kmco.co.ke and editor@journalofcmsd.net.

Our readers can access the Journal online at https://journalofcmsd.net.

Hon. Prof. Kariuki Muigua Ph.D,FCIArb,Ch.Arb,OGW.
Editor, Nairobi,
August, 2025.

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Prof. became the first winner of the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021. He was also the winner of the ADR Practitioner of the Year Award 2021 given by the Nairobi LSK and the ADR Publisher of the Year 2021 awarded by CIArb Kenya. He was the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. The African Arbitrator of the Year award is the highest and most prestigious ADR and Arbitration Award in Africa.

Prof. is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Prof. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for Peace and Environmental

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In addition, Charity is an active advocate for youth involvement in sustainability, frequently participating in and moderating high-impact discussions on climate action and sustainable development. She has facilitated webinars, including the recent "Sustainable Development Goals: A Blueprint for Global Transformation," where she engaged youth and experts alike in exploring actionable steps toward a more resilient future. Charity's work exemplifies her commitment to fostering inclusive, informed dialogues on climate resilience and sustainable progress.
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He has co-published the following article: -

- Josphat Ayamunda and Ian K. Tum, 'Innovation Benefits of Software Patents in Kenya' (2019) 1 *African Journal of Commercial Law* 1–22

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Dealing with Carbon Disputes for Green Growth and Sustainability

By: ***Hon. Kariuki Muigua****

Abstract

This paper discusses ways through carbon disputes can be appropriately managed for green growth and sustainability. The paper examines the causes of carbon disputes. It argues that these disputes undermine climate action. As a result, the paper posits that effective management of carbon disputes is necessary in order to ensure sound climate action for green growth and sustainability. The paper explores viable approaches both globally and at national levels towards dealing with carbon disputes for green growth and sustainability.

1.0 Introduction

Climate change is devastating the planet. The impacts of climate change including intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are on the rise globally undermining development efforts[2]. It has been observed that climate change is causing dangerous and widespread disruption in nature

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[2] United Nations., 'What is Climate Change?' Available at https://www.un.org/en/climatechange/what-is-climate-change (Accessed on 03/08/2025)

and affecting the lives of billions of people all over the world[3]. Climate change represents a grave challenge to the global economy, environment, and societal well-being, jeopardizing their long-term sustainability[4]. Due to its adverse impacts on people and planet, climate change has been identified as the greatest threat humanity is currently facing[5].

Tackling climate change has become a top policy agenda at local, national, regional and global levels[6]. The United Nations *2030 Agenda for Sustainable Development*[7] acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable Development[8]. Sustainable Development Goal (SDG) 13 under the agenda calls upon all countries to take urgent action towards combating climate change and its impacts[9]. Further, African Union's

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[3] Intergovernmental Panel on Climate Change., 'Climate change: a threat to human wellbeing and health of the planet. Taking action now can secure our future' Available at https://www.ipcc.ch/report/ar6/wg2/downloads/press/IPCC_AR6_WGII_PressRelease-English.pdf (Accessed on 03/08/2025)

[4] Ma. R et al., 'From Crisis to Resilience: Strengthening Climate Action in OECD Countries through Environmental Policy and Energy Transition' Available at https://pmc.ncbi.nlm.nih.gov/articles/PMC10682128/ (Accessed on 03/08/2025)

[5] United Nations Industrial Development Organization., 'Tackling Climate Change: Fostering trust in climate action through quality and standards' Available at https://www.greenpolicyplatform.org/sites/default/files/downloads/resource/QI_CLIMATE_ACTION.pdf (Accessed on 03/08/2025)

[6] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at https://www.un.org/en/desa/forum-climate-changeandscience-and-technology-innovation (Accessed on 03/08/2025)

[7] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf (Accessed on 03/08/2025)

[8] Ibid

[9] Ibid

Agenda 2063[10] recognises the need for urgent and transformative action towards confronting climate change in order to foster Sustainable Development in Africa.

Carbon markets have emerged as a vital and effective tool in the global response to climate change. Carbon markets are a trading system through which countries, organisations or individuals may buy or sell units of greenhouse-gas emissions in an effort to meet their limits on greenhouse gas emissions[11]. They allows public and private entities to transfer and transact emission reduction units, mitigation outcomes or offsets generated through carbon initiatives, programmes and projects subject to compliance of national and international laws[12]. Carbon markets have been embraced under the international climate change regime including the *Kyoto Protocol*[13] and the *Paris Agreement*[14]. Carbon markets have also been introduced in Kenya under the *Climate Change (Amendment) Act*[15].

It has been argued that carbon markets provide a valuable approach towards confronting climate change[16]. For instance, companies or individuals can use

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[10] Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 03/08/2025)

[11] UN-REDD Programme., 'Carbon Market' Available at https://www.un-redd.org/glossary/carbon-market (Accessed on 03/08/2025)

[12] Climate Change (Amendment) Act, 2023., Laws of Kenya, Government Printer, Nairobi

[13] United Nations Framework Convention on Climate Change., 'Kyoto Protocol to the United Nations Framework Convention on Climate Change.' Available at https://unfccc.int/resource/docs/convkp/kpeng.pdf (Accessed on 03/08/2025)

[14] United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 03/08/2025)

[15] Climate Change (Amendment) Act, 2023., Op Cit

[16] United Nations Development Programme., 'What are carbon markets and why are they important?' Available at https://climatepromise.undp.org/news-and-

carbon markets to compensate for their greenhouse gas emissions by purchasing carbon credits from entities that remove or reduce such emissions[17]. According to the United Nations Environment Programme (UNEP), carbon markets can enable states and non-state actors to achieve climate targets and implement climate actions cost effectively[18]. If well designed and implemented, carbon markets can be an effective, credible and transparent tool for helping to achieve low-cost emissions reductions in ways that mobilize private sector actors, attract investment, and encourage international cooperation on climate change[19].

Despite their crucial role in climate action, carbon markets are also vulnerable to disputes. Carbon disputes can hinder effective functioning of carbon markets therefore undermining climate action[20]. Dealing with carbon disputes is therefore crucial in ensuring effective responses to climate change.

This paper discusses ways through carbon disputes can be appropriately managed for green growth and sustainability. The paper examines the causes of carbon disputes. It argues that these disputes undermine climate action. As a result, the paper posits that effective management of carbon disputes is necessary in order to ensure sound climate action for green growth and sustainability. The paper explores viable approaches both globally and at national levels towards dealing with carbon disputes for green growth and

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stories/what-are-carbon-markets-and-why-are-they-important (Accessed on 03/08/2025)

[17] Ibid

[18] United Nations Environment Programme., 'Carbon Markets' Available at https://www.unep.org/topics/climate-action/climate-finance/carbon-markets (Accessed on 03/8/2025)

[19] Natural Justice., 'Kenya's Climate Change Bill: Paving the Way for Sustainable Development and Carbon Markets.' Available at https://naturaljustice.org/kenyas-climate-change-bill-paving-the-way-forsustainable-development-and-carbon-markets/ (Accessed on 03/08/2025)

[20] Ibid

sustainability.

2.0 Impact of Carbon Disputes on Green Growth and Sustainability

The growth of carbon markets as a tool for confronting climate change has also led to the emergence of carbon disputes. It has been observed that carbon disputes primarily revolve around disagreement arising from carbon trading, carbon offsetting projects and other contractual, ethical and investment issues in carbon markets[21]. For example, lack of clarity, inconsistencies in carbon accounting and misleading and deceptive conduct in carbon accounting practices are among the major causes of carbon disputes[22]. This has led to claims of greenwashing, misleading or deceptive conduct and contractual disputes regarding the proper value and/or veracity of carbon allowances and carbon offsets[23]. Due to the lack of an internationally recognized standard method for carbon accounting, there is uncertainty and in turn, the risk of carbon disputes[24]. This has led to claims of breach of contract, misrepresentation and fraud in carbon markets and carbon accounting leading to the rise of carbon disputes[25]. Further, it has been argued that when dealing

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[21] Nyanaro. G., 'Navigating Carbon Offset Projects and Trading Disputes in Africa: Assessing the Role of Appropriate Dispute Resolution Mechanisms' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5216038 (Accessed on 04/08/2025)

[22] Understanding the Challenges and Risks of Carbon Accounting: Implications for Organizations' Available at https://empoweredsystems.com/blog/understanding-the-challenges-and-risks-of-carbon-accounting-implications-for-organizations/#:~:text=Carbon%20accounting%20practices%20lack%20a,between%20organizations%20or%20across%20industries (Accessed on 04/08/2025)

[23] Ibid

[24] The role of international arbitration in voluntary carbon market disputes., Available at https://www.nortonrosefulbright.com/en-pg/knowledge/publications/fdc65468/the-role-of-international-arbitration-in-voluntary-carbon-market-disputes#:~:text=Until%20there%20is%20an%20internationally,of%20the%20timeline%20for%20verification). (Accessed on 04/08/2025)

[25] Ibid

with an uncertain market which is the case in carbon trading, there is potential for significant fluctuations in the value of the carbon credits between the point of sale and the point of delivery a situation that gives rise to pricing disputes[26].

Investment disputes have also arisen in carbon markets touching on vital sustainability concerns including environmental protection and human rights[27]. The underlying infrastructure projects undertaken to generate emission reductions have been a source of commercial and investment disputes in carbon markets[28]. In some cases, investors have been accused of failing to obtain the Free, Prior and Informed Consent (FPIC) of indigenous peoples and local communities before establishing carbon projects leading to land and human rights disputes[29]. For example, the Northern Kenya Rangelands Carbon Project (NKRCP) was recently suspended due to shortcomings in the process for obtaining consent from participating communities and breaches of the Community Land Act of Kenya[30]. There have been disputes in carbon markets between investors and local communities over the leasing of ancestral lands for carbon-offsetting initiatives[31]. Further, it has been argued that there is potential for investor-state disputes in carbon

[26] Ibid

[27] Nyanaro. G., 'Navigating Carbon Offset Projects and Trading Disputes in Africa: Assessing the Role of Appropriate Dispute Resolution Mechanisms' Op Cit

[28] Darne. A., 'International Carbon Disputes – How can they be resolved through Arbitration?' Available at https://www.pslchambers.com/article/international-carbon-disputes-how-can-they-be-resolved-through-arbitration/#:~:text=Arbitration%20has%20played%20a%20vital,issues%20be%20resolved%20through%20ADR (Accessed on 04/08/2025)

[29] Indigenous land disputes cloud Kenya's carbon market ambitions., Available at https://www.climatechangenews.com/2025/05/15/indigenous-land-disputes-cloud-kenyas-carbon-market-ambitions/ (Accessed on 04/08/2025)

[30] Osman & 164 others (Suing on Their Behalf and Behalf of Residents of Merti Sub-County, Chari, and Cherab Wards in Isiolo County) v Northern Rangelands Trust & 8 others (Petition E006 of 2021) [2025] KEELC 99 (KLR) (24 January 2025) (Judgment)

[31] Indigenous land disputes cloud Kenya's carbon market ambitions., Op Cit

markets with investors in international carbon projects relying on investment treaties to bring claims against a states or state-owned entities[32].

The growth of carbon disputes is a major threat to green growth and sustainability. Green growth is a development policy that emphasizes environmentally sustainable economic progress to foster low-carbon and socially inclusive development[33]. Green growth has been defined as growth that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities[34]. It aims to foster economic growth and development while ensuring that natural assets continue to provide the resources and environmental services on which our well-being relies[35]. UNEP defines green growth as low carbon, resource efficient and socially inclusive approach towards development[36].

Sustainability on the other hand involves creating and maintaining the conditions under which humanity and nature can exist in productive harmony

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[32] The role of international arbitration in voluntary carbon market disputes., Op Cit

[33] United Nations Economic and Social Commission for Asia and the Pacific., 'Green Growth Uptake in Asia-Pacific Region.' Available at https://unece.org/fileadmin/DAM/env/cep/CEP-20/ppp/Item10_b__ESCAP_GreenGrowthUptake_e_sm.pdf (Accessed on 04/08/2025)

[34] United Nations Economic Commission for Europe., 'Greening the Economy: Mainstreaming the Environment into Economic Development.' Available at https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=796&menu=1515 (Accessed on 04/08/2025)

[35] Organisation for Economic Co-operation and Development., 'What is Green Growth and How can it Help Deliver Sustainable Development?' Available at https://www.oecd.org/greengrowth/whatisgreengrowthandhowcanithelpdeliversustainabledevelopme nt.htm (Accessed on 04/08/2025)

[36] United Nations Environment Programme., 'Green Economy' Available at https://www.unep.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/green-economy (Accessed on 04/08/2025)

to support present and future generations[37]. Sustainability seeks to balance between economic, social, and environmental factors to ensure that resources are used in a way that is not only environmentally sustainable but also socially equitable and economically viable in the long-term[38]. The concept of Sustainable Development aims to achieve the ideal state of sustainability by promoting environmental protection and conservation, economic development and social progress[39]. It has been argued that green growth is at the heart of sustainability[40]. By embracing this approach, it is possible to sustain economic growth while at the same time ensuring climatic and environmental sustainability[41]. Green growth seeks to deliver economic growth that is both environmentally sustainable and socially inclusive for Sustainable Development[42].

Green growth is therefore a key development pathway towards sustainability. However, carbon disputes are a major threat to green growth and sustainability. It has been argued that carbon markets can unlock green growth and sustainability by unlocking investments in renewable energy, green and clean technologies, sustainable agriculture, ecosystem restoration and biodiversity conservation while creating green jobs and tackling

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[37] United States Environmental Protection Agency., 'What is Sustainability.' Available at https://www.epa.gov/sustainability/learn-about-sustainability (Accessed on 04/08/2025)

[38] Sustainability: A Better Tomorrow, But How?., Available at https://www.green.earth/sustainability (Accessed on 04/08/2025)

[39] Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law*., Vol 1

[40] United Nations., 'Green Growth' Available at https://sustainabledevelopment.un.org/index.php?menu=1447 (Accessed on 04/08/2025)

[41] Ibid

[42] Global Green Growth Institute., 'Green Growth in Action: Attaining Green Cities' Available at https://gggi.org/wp-content/uploads/2020/11/Green-Growth-in-Action-Attaining-Green-Cities_reduced-size.pdf (Accessed on 04/08/2025)

poverty[43]. Carbon markets enable countries to confront climate change and transition to low-carbon economies in a cost-effective way therefore leading to green growth and sustainability[44]. Carbon disputes are therefore undesirable since they affect the effective functioning of carbon markets and slow down the progress towards confronting climate change[45]. Carbon disputes are therefore a threat to green growth and sustainability. Dealing with carbon disputes in an appropriate manner is therefore vital towards green growth and sustainability.

3.0 Dealing with Carbon Disputes for Green Growth and Sustainability

Carbon disputes can be managed through various approaches including court processes and Alternative Dispute Resolution (ADR) techniques. The global and national legal framework on climate change envisions the management of climate change disputes including carbon disputes through both litigation and ADR processes. For example, the *United Nations Framework Convention on Climate Change (UNFCCC)*[46], allows parties to seek settlement of disputes through negotiation or any other peaceful means of their own choice[47]. The UNFCCC also allows parties to submit their parties to the International Court

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[43] UN-REDD Programme., 'Africa's green wealth: unlocking the potential of carbon markets' Available at https://www.un-redd.org/post/africas-green-wealth-unlocking-potential-carbon-markets (Accessed on 04/08/2025)

[44] United Nations Development Programme., 'Carbon Justice for All: How Carbon Markets Can Advance Equitable Climate Action Globally' Available at https://www.undp.org/africa/blog/carbon-justice-all-how-carbon-markets-can-advance-equitable-climate-action-globally (Accessed on 04/08/2025)

[45] Chen. B., Yuan. K., & Wen. X., 'The Legal Governance of the Carbon Market: Challenges and Application of Private Law in China' Available at https://www.tandfonline.com/doi/full/10.1080/17583004.2023.2288591 (Accessed on 04/08/2025)

[46] United Nations Framework Convention on Climate Change., United Nations, 1992., Available at https://unfccc.int/resource/docs/convkp/conveng.pdf (Accessed on 04/08/2025)

[47] Ibid, article 14 (1)

of Justice (ICJ) or to arbitration in accordance with procedures to be adopted by the Conference of the Parties (COP)[48]. It also envisions management of disputes through conciliation[49]. Further, the *Kyoto Protocol* embraces the dispute management mechanisms set out under the UNFCCC[50]. It thus envisages the management of climate change disputes including those in carbon markets through arbitration, litigation at the ICJ and conciliation through a conciliation commission[51]. The *Paris Agreement* also embraces the dispute management mechanisms stipulated under the UNFCCC which are arbitration, litigation, submissions of disputes to the ICJ and conciliation[52].

At a national level, the *Climate Change (Amendment) Act*[53] sets out the process of managing carbon disputes through both ADR and litigation. The Act provides that any dispute arising under a land-based project shall be subjected to the dispute resolution mechanism set out in the Community Development Agreement in the first instance and be resolved within thirty days from the date the dispute is lodged[54]. In addition, the Act provides that any dispute that is not land based and is not subjected to a Community Development Agreement shall be resolved through ADR in the first instance[55]. The Act therefore envisages the use of ADR mechanisms in managing carbon disputes in Kenya. These mechanisms include negotiation, mediation, arbitration, and conciliation[56]. Further, where any dispute is not managed within thirty days, the Act provides that such dispute shall be referred to the National

[48] Ibid, article 14 (2)
[49] Ibid, article 14 (6)
[50] Kyoto Protocol, article 19
[51] Ibid
[52] Paris Agreement., article 24
[53] Climate Change (Amendment) Act, 2023, Op Cit
[54] Ibid, s 23 (H) 1
[55] Ibid, s 23 (H) 2
[56] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Glenwood Publishers Limited, 2015

Environment Tribunal[57]. The Tribunal is established under the Environmental Management and Co-ordination Act with the jurisdiction to *inter alia* make orders to enhance the principles of Sustainable Development in Kenya[58].

From the foregoing, it is evident that both litigation and ADR can be utilised in managing carbon disputes. Litigation is being embraced to manage carbon disputes with climate litigation emerging as a key tool to manage climate change disputes towards climate justice[59]. It has been observed that people are increasingly turning to courts to combat the climate crisis, holding governments and the private sector accountable therefore making litigation a key mechanism for securing climate action and promoting climate justice[60]. Litigation is an effective tool in dealing with key issues in carbon disputes such as human rights including the land rights of indigenous peoples and local communities, and issues on climate disclosures and greenwashing claims[61].

At the global level, the ICJ provides a suitable platform for utilising litigation to manage carbon disputes. Most recently in its advisory opinion on climate change, the ICJ observed that states have an obligation to address climate change including through ensuring the proper functioning of carbon markets by regulating the conduct of public and private operators to ensure compliance

[57] Climate Change (Amendment) Act, 2023, Laws of Kenya, S 23 H (3), Government Printer, Nairobi.
[58] Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya S 125 & 129 (3) (c) Government Printer, Nairobi
[59] United Nations Environment Programme., 'Climate litigation more than doubles in five years, now a key tool in delivering climate justice' Available at https://www.unep.org/news-and-stories/press-release/climate-litigation-more-doubles-five-years-now-key-tool-delivering (Accessed on 04/08/2025)
[60] Ibid
[61] Ibid

with sound environmental conservation and human rights[62]. Further, at a national level, the Climate Change Amendment Act grants jurisdiction to the National Environment Tribunal to manage carbon disputes through litigation[63]. Despite its role in managing carbon disputes, it has been argued that litigating disputes in carbon markets can result in concerns such as lack of independence and bias in favour of host states, lack of flexibility, enforcement challenges in cross boarder carbon disputes, costs and delays[64].

ADR is therefore a more appropriate tool for managing carbon disputes for green growth and sustainability. At the global level, the *Charter of the United Nations* encourages a peaceful approach to management of conflicts amongst states including through the use of ADR[65]. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration,* judicial settlement, resort to regional agencies or arrangements, or other *peaceful means* of their own choice[66] (Emphasis added). Further, at a national level, the *Constitution of Kenya*[67] mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms (TDRMs)[68].

ADR mechanisms including negotiation, conciliation, mediation and

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[62] International Court of Justice., 'Obligations of States in Respect of Climate Change' Available at https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf (Accessed on 04/08/2025)

[63] Climate Change (Amendment) Act, 2023, Laws of Kenya, S 23 H (3), Government Printer, Nairobi.

[64] Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Available at https://arbitrationblog.kluwerarbitration.com/2023/09/16/dispute-resolution-in-carbon-markets/ (Accessed on 04/08/2025)

[65] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

[66] Ibid, article 33 (1)

[67] Constitution of Kenya., 2010., Government Printer, Nairobi

[68] Ibid, article 159 (2) (c)

arbitration have been identified as suitable in managing carbon disputes[69]. For instance, negotiation can enable countries, organisations and individuals to enter into effective contracts where the risk of disputes is minimized, agree on emission reductions, and resolve the differences among the trading parties in the carbon markets before such differences can escalate to conflicts and disputes[70]. In addition, it has been argued that conciliation provides a flexible and collaborative approach towards managing carbon disputes[71]. It can also potentially preserve relationships therefore ensuring the effective functioning of carbon markets and the long-term viability of carbon projects for green growth and sustainability[72]. Mediation is also a useful approach in managing carbon disputes. It provides a timely, cost-effective, non-adversarial and flexible approach towards managing carbon disputes[73]. It has been argued that mediation can serve as a bridge between international legal standards and domestic implementation thus reducing the risk of non-compliance in carbon markets[74]. Further, due to its focus on collaboration, mediation can also help investors to ensure the participation of local communities in carbon projects thus minimising disputes while also preserving and strengthening relationships[75].

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[69] United Nations Framework Convention on Climate Change., United Nations, 1992., Op Cit

[70] Yang. C., Yang. Z., & Li. Y., 'Negotiation mechanism of carbon emission quota trading process' *Sustainable Production and Consumption*., Volume 39, July 2023., pp 336-344

[71] Nyanaro. G., 'Navigating Carbon Offset Projects and Trading Disputes in Africa: Assessing the Role of Appropriate Dispute Resolution Mechanisms' Op Cit

[72] Muigua. K., 'Managing Disputes in Carbon Markets' Available at https://kmco.co.ke/wp-content/uploads/2024/02/Managing-Disputes-in-Carbon-Markets.pdf (Accessed on 04/08/2025)

[73] Mediating Climate Change Disputes: Navigating Scope 3 Effects and International Law Implementation in Energy Transition Projects., Available at https://civilmediation.org/mediating-climate-change-disputes/ (Accessed on 04/08/2025)

[74] Ibid

[75] Ibid

Arbitration is also an effective process in managing carbon disputes. For instance, it gives parties freedom to select arbitrators with sufficient expertise on the regulatory and technical issues at stake in carbon disputes[76]. The transnational applicability and binding nature of arbitration also allows neutrality of forum and enforcement of outcomes in cross-border carbon disputes[77]. Further, due to its focus on privacy and confidentiality, arbitration can safeguard sensitive commercial interests and information at stake in carbon disputes[78].

ADR is therefore an effective tool for managing disputes. However, the suitability of processes such as negotiation and mediation can be limited by imbalance of powers among parties, lack of precedents and enforceability challenges[79]. Further, it has been argued that the use of private forums such as arbitration in managing carbon disputes can hinder transparency, accountability and public participation which are prerequisites for effective climate action[80]. In addition, utilising arbitration in managing carbon disputes can result in problems of costs and delays due to the complex and technical nature of such disputes[81]. It is imperative to address these concerns in order to effectively deal with carbon disputes for green growth and sustainability.

4.0 Conclusion

Carbon disputes undermine green growth and sustainability. Dealing with carbon disputes is therefore necessary in order to foster the quest towards

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[76] Darne. A., 'International Carbon Disputes – How can they be resolved through Arbitration?' Op Cit

[77] Ibid

[78] Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

[79] Mediating Climate Change Disputes: Navigating Scope 3 Effects and International Law Implementation in Energy Transition Projects., Op Cit

[80] Darne. A., 'International Carbon Disputes – How can they be resolved through Arbitration?' Op Cit

[81] Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

green growth and sustainability. Litigation and ADR provide suitable platforms for managing carbon disputes. However, litigation can be limited by several challenges such as lack of expertise in carbon disputes, lack of independence and bias in favour of host states, lack of flexibility, enforcement challenges in cross boarder carbon disputes, costs and delays[82]. It is therefore imperative to embrace the use of ADR processes including negotiation, conciliation, mediation and arbitration in managing carbon disputes for green growth and sustainability. However, in order to realsise this ideal, it is imperative to strengthen the legal, policy and institutional frameworks on ADR, bolster human capacities and expertise in carbon markets and carbon disputes and ensure the participation of all stakeholders including local communities in ADR processes[83]. Dealing with carbon disputes for green growth and sustainability is therefore necessary and practical.

[82] Ibid
[83] Ibid

References

Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf

Chen. B., Yuan. K., & Wen. X., 'The Legal Governance of the Carbon Market: Challenges and Application of Private Law in China' Available at https://www.tandfonline.com/doi/full/10.1080/17583004.2023.2288591

Climate Change (Amendment) Act, 2023, Laws of Kenya, S 23 H (3), Government Printer, Nairobi.

Climate Change (Amendment) Act, 2023., Laws of Kenya, Government Printer, Nairobi

Constitution of Kenya., 2010., Government Printer, Nairobi

Darne. A., 'International Carbon Disputes – How can they be resolved through Arbitration?' Available at https://www.pslchambers.com/article/international-carbon-disputes-how-can-they-be-resolved-through-arbitration/#:~:text=Arbitration%20has%20played%20a%20vital,issues%20be%20resolved%20through%20ADR

Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya., Government Printer, Nairobi

Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law*., Vol 1

Global Green Growth Institute., 'Green Growth in Action: Attaining Green Cities' Available at https://gggi.org/wp-content/uploads/2020/11/Green-Growth-in-Action-Attaining-Green-Cities_reduced-size.pdf

Indigenous land disputes cloud Kenya's carbon market ambitions., Available at https://www.climatechangenews.com/2025/05/15/indigenous-land-disputes-cloud-kenyas-carbon-market-ambitions/

Intergovernmental Panel on Climate Change., 'Climate change: a threat to human wellbeing and health of the planet. Taking action now can secure our future' Available at https://www.ipcc.ch/report/ar6/wg2/downloads/press/IPCC_AR6_WGII_PressRelease-English.pdf

International Court of Justice., 'Obligations of States in Respect of Climate Change' Available at https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf (Accessed on 04/08/2025)

Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Available at https://arbitrationblog.kluwerarbitration.com/2023/09/16/dispute-resolution-in-carbon-markets/

Ma. R et al., 'From Crisis to Resilience: Strengthening Climate Action in OECD Countries through Environmental Policy and Energy Transition' Available at https://pmc.ncbi.nlm.nih.gov/articles/PMC10682128/

Mediating Climate Change Disputes: Navigating Scope 3 Effects and International Law Implementation in Energy Transition Projects., Available at https://civilmediation.org/mediating-climate-change-disputes/

Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Glenwood Publishers Limited, 2015

Muigua. K., 'Managing Disputes in Carbon Markets' Available at https://kmco.co.ke/wp-content/uploads/2024/02/Managing-Disputes-in-Carbon-Markets.pdf

Natural Justice., 'Kenya's Climate Change Bill: Paving the Way for Sustainable Development and Carbon Markets.' Available at https://naturaljustice.org/kenyas-climate-change-bill-paving-the-way-forsustainable-development-and-carbon-markets/

Nyanaro. G., 'Navigating Carbon Offset Projects and Trading Disputes in Africa: Assessing the Role of Appropriate Dispute Resolution Mechanisms' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5216038

Organisation for Economic Co-operation and Development., 'What is Green Growth and How can it Help Deliver Sustainable Development?' Available at https://www.oecd.org/greengrowth/whatisgreengrowthandhowcanithelpdeliversustainabledevelopme nt.htm

Sustainability: A Better Tomorrow, But How?., Available at https://www.green.earth/sustainability

The role of international arbitration in voluntary carbon market disputes., Available at https://www.nortonrosefulbright.com/en-pg/knowledge/publications/fdc65468/the-role-of-international-arbitration-in-voluntary-carbon-market-disputes#:~:text=Until%20there%20is%20an%20internationally,of%20the%20timeline%20for%20verification

Understanding the Challenges and Risks of Carbon Accounting: Implications for Organizations' Available at https://empoweredsystems.com/blog/understanding-the-challenges-and-risks-of-carbon-accounting-implications-for-organizations/#:~:text=Carbon%20accounting%20practices%20lack%20a,between%20organizations%20or%20across%20industries

United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at

https://www.un.org/en/desa/forum-climate-changeandscience-and-technology-innovation

United Nations Development Programme., 'Carbon Justice for All: How Carbon Markets Can Advance Equitable Climate Action Globally' Available at https://www.undp.org/africa/blog/carbon-justice-all-how-carbon-markets-can-advance-equitable-climate-action-globally

United Nations Development Programme., 'What are carbon markets and why are they important?' Available at https://climatepromise.undp.org/news-and-stories/what-are-carbon-markets-and-why-are-they-important

United Nations Economic and Social Commission for Asia and the Pacific., 'Green Growth Uptake in Asia-Pacific Region.' Available at https://unece.org/fileadmin/DAM/env/cep/CEP-20/ppp/Item10_b__ESCAP_GreenGrowthUptake_e_sm.pdf

United Nations Economic Commission for Europe., 'Greening the Economy: Mainstreaming the Environment into Economic Development.' Available at https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=796&menu=1515

United Nations Environment Programme., 'Carbon Markets' Available at https://www.unep.org/topics/climate-action/climate-finance/carbon-markets

United Nations Environment Programme., 'Climate litigation more than doubles in five years, now a key tool in delivering climate justice' Available at https://www.unep.org/news-and-stories/press-release/climate-litigation-more-doubles-five-years-now-key-tool-delivering

United Nations Environment Programme., 'Green Economy' Available at https://www.unep.org/regions/asia-and-pacific/regional-

initiatives/supporting-resource-efficiency/green-economy

United Nations Framework Convention on Climate Change., 'Kyoto Protocol to the United Nations Framework Convention on Climate Change.' Available at https://unfccc.int/resource/docs/convkp/kpeng.pdf

United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf

United Nations Framework Convention on Climate Change., United Nations, 1992., Available at https://unfccc.int/resource/docs/convkp/conveng.pdf

United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf

United Nations Industrial Development Organization., 'Tackling Climate Change: Fostering trust in climate action through quality and standards' Available at https://www.greenpolicyplatform.org/sites/default/files/downloads/resource/QI_CLIMATE_ACTION.pdf

United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

United Nations., 'Green Growth' Available at https://sustainabledevelopment.un.org/index.php?menu=1447

United Nations., 'What is Climate Change?' Available at https://www.un.org/en/climatechange/what-is-climate-change

United States Environmental Protection Agency., 'What is Sustainability.'

Available at https://www.epa.gov/sustainability/learn-about-sustainability

UN-REDD Programme., 'Africa's green wealth: unlocking the potential of carbon markets' Available at https://www.un-redd.org/post/africas-green-wealth-unlocking-potential-carbon-markets

UN-REDD Programme., 'Carbon Market' Available at https://www.un-redd.org/glossary/carbon-market

Yang. C., Yang. Z., & Li. Y., 'Negotiation mechanism of carbon emission quota trading process' *Sustainable Production and Consumption*., Volume 39, July 2023., pp 336-344

Fostering Urban Harmony: Leveraging Participatory Governance for Sustainable Peace in Africa's Rapidly Growing Cities

By: ***Charity Chepkoech****

Abstract

Urbanization in Africa is unfolding at an unprecedented level, reshaping its cities into hubs of economic potential and cultural exchange. This has, however, led to an increase in land disputes, housing shortages, and asymmetrical provision of services. When such issues are left unresolved, they can lead to social tensions, perpetuating inequalities and undermining sustainable development. This article proposes participatory urban governance as a transformative solution to these challenges. By involving citizens and stakeholders in decision-making, participatory governance fosters inclusivity, accountability, and trust. It addresses the root causes of urban conflict while inspiring sustainable and peaceful development. Based on case studies from Nairobi, Kigali, and Cape Town, this paper demonstrates how participatory governance has resolved urban conflicts, enhanced social cohesion, and empowered communities. It also highlights actionable recommendations to scale up this strategy across Africa in order to ensure that its cities are resilient, inclusive, and peaceful.

1.0. Introduction

As the urban population expands at an average of 3.5% per annum, one of the fastest rates globally, cities are rapidly becoming hubs of economic opportunity and innovation.[1] They are where industries thrive, cultural

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[1] United Nations Economic Commission for Africa, '(Blog) As Africa's Population Crosses 1.5 Billion, the Demographic Window Is Opening—Getting' (UN ECA, 12 July 2024) <https://www.uneca.org/stories/%28blog%29-as-africa%E2%80%99s-

identities converge, and global markets intersect.[2] Yet this rapid urbanization is accompanied by tremendous challenges that threaten the stability and sustainability of cities.[3] Infrastructure development has not kept pace with the growing demand for housing, transportation, and basic services.[4] As a result, millions of urban residents, particularly those in slums, lack access to adequate housing, clean water, sanitation, and secure land tenure.[5]

These structural issues are also compounded by weak governance institutions that reinforce inequality and distrust.[6] Most African cities' governance processes are opaque, exclusionary, and corrupt.[7] City development initiatives are implemented without consulting affected communities, prompting forced evictions, resource disputes, and protests.[8] These actions entrench social tensions that create social unrest and without urgent intervention, these

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population-crosses-1.5-billion%2C-the-demographic-window-is-opening-getting> accessed 3 March 2025.

[2] Bhattarai, Keshav, Dennis Conway, Keshav Bhattarai, and Dennis Conway. "Urban growth." *Contemporary environmental problems in Nepal: Geographic perspectives* (2021): 201-334.

[3] African Development Bank, 'Urbanization in Africa' (AfDB Blog, 13 Dec 2012) <https://blogs.afdb.org/fr/inclusive-growth/urbanization-africa-191> accessed 3 March 2025.

[4] Lever, William F. "Correlating the knowledge-base of cities with economic growth." *Urban studies* 39, no. 5-6 (2002): 859-870.

[5] UN-Habitat, *Indicator 11.1.1 Training Module: Adequate Housing and Slum Upgrading* (2020) <https://unhabitat.org/sites/default/files/2020/06/indicator_11.1.1_training_module_adequate_housing_and_slum_upgrading.pdf> accessed 3 March 2025.

[6] United Nations Human Settlements Programme. *The state of African cities 2010: Governance, inequality and urban land markets*. UN-HABITAT, 2010.< https://unhabitat.org/state-of-african-cities-2010-governance-inequalities-and-urban-land-markets-2.> Accessed on 3rd March 2025.

[7] *Ibid.*

[8] Grippi, Noemi. "Tackling Social Exclusion in Peripheric City Neighborhoods Through Holistic Societal Transition: A Dynamic Performance Governance Approach. "An application to the cities of Palermo and Baltimore." (2023).

challenges threaten to derail the significant economic and social gains that African cities promise.[9]

Participatory urban governance has emerged as a viable means to address these challenges.[10] It fosters inclusivity by ensuring that everyone, particularly marginalized communities, are involved in shaping urban policies.[11] By promoting collaboration, transparency, and trust, participatory governance not only resolves the underlying grievances driving urban conflicts but also establishes the groundwork for long-term peace and equity.[12] This article discusses the mechanisms of participatory governance, its benefits, and challenges to its implementation using African case studies. It concludes with practical recommendations to enhance participatory governance on the continent.

2.0. Mechanisms of Participatory Governance

Participatory urban governance operates through various mechanisms that are interconnected and which facilitate cooperation, resolve disputes, and impart equitable policy outcomes.[13] These mechanisms are designed to address the root causes of urban tensions, promote transparency, and empower citizens to take an active role in the making of the cities.[14]

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[9] Isser, Deborah H., Gael Raballand, Michael John Watts, and Diane Zovighian. *Governance in Sub-Saharan Africa in the 21st Century*. World Bank, 2024.

[10] Ndulu, Benno J., and Stephen A. O'Connell. "Governance and growth in sub-Saharan Africa." *Journal of economic Perspectives* 13, no. 3 (1999): 41-66.

[11] Speer, Johanna. "Participatory governance reform: A good strategy for increasing government responsiveness and improving public services?." *World development* 40, no. 12 (2012): 2379-2398.

[12] Gaventa, John. "Towards participatory governance: assessing the transformative possibilities." *Participation: From tyranny to transformation* (2004): 25-41.

[13] Osmani, Siddiqur R. "Participatory governance: An overview of issues and evidence." *Participatory governance and the millennium development goals* (2008): 1-45.

[14] Newig, Jens, Edward Challies, Nicolas W. Jager, Elisa Kochskaemper, and Ana Adzersen. "The environmental performance of participatory and collaborative

2.1. Conflict Resolution Platforms

Urban conflicts in Africa often arise as a result of competition over scarce resources such as land, water, and housing.[15] These struggles are most severe in informal settlements where ownership of land is insecure and access to basic services is discriminatory.[16] Participatory governance offers an avenue for the resolution of these conflicts through dialogue and consultation based on negotiation.[17] Institutions such as community forums and mediation committees provide secure spaces where residents, government agencies, and private developers can come together to negotiate grievances and agree on solutions.[18] These mechanisms not only constructively settle disagreements but also prevent their escalation into violent altercations.[19]

For instance, where residents are faced with eviction, participatory processes enable communities to voice out their rights and negotiate for decent compensation or alternative housing.[20] By involving all stakeholders in decision-making, such processes cause decisions to be perceived as legitimate,

governance: A framework of causal mechanisms." *Policy Studies Journal* 46, no. 2 (2018): 269-297.

[15] Lombard, Melanie, and Carole Rakodi. "Urban land conflict in the Global South: Towards an analytical framework." *Urban Studies* 53, no. 13 (2016): 2683-2699.

[16] UN-Habitat, *State of African Cities 2010: Governance, Inequalities and Urban Land Markets* (2010) <https://unhabitat.org/state-of-african-cities-2010-governance-inequalities-and-urban-land-markets-2> accessed 3 March 2025.

[17] Hu, Jieren. *Dispute Resolution and Social Governance in Digital China*. Taylor & Francis, 2024.

[18] Lombard, Melanie, and Carole Rakodi. "Urban land conflict in the Global South: Towards an analytical framework." *Urban Studies* 53, no. 13 (2016): 2683-2699.

[19] *Ibid.*

[20] McGranahan, Gordon. "Realizing the right to sanitation in deprived urban communities: meeting the challenges of collective action, coproduction, affordability, and housing tenure." *World development* 68 (2015): 242-253.

fostering trust and cooperation.[21] In the long term, these processes help build a culture of dialogue, rendering protests or strikes less essential as a means of resolving conflict.[22]

2.2. Inclusive Urban Planning

A defining characteristic of participatory government is its inclusive nature.[23] Urban planning in Africa, in the past, has been characterized by top-down processes that respond to elite interests at the cost of vulnerable groups such as women, youth, and slum dwellers.[24] This has resulted in policies that are not aligned to the interests of the majority, and this deepens inequality as well as social fragmentation.[25]

Participatory governance seeks to reverse this by making a deliberate attempt to involve marginalized groups in urban planning and decision-making.[26] Community consultations, participatory budgeting processes, and citizen

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[21] Liebenberg, Sandra. "Participatory approaches to socio-economic rights adjudication: Tentative lessons from South African evictions law." *Nordic Journal of Human Rights* 32, no. 4 (2014): 312-330.

[22] *Ibid*.

[23] Holley, Cameron. "Public participation, environmental law and new governance: Lessons for designing inclusive and representative participatory processes." *Environmental Law and New Governance: Lessons for Designing Inclusive and Representative Participatory Processes (September 2010). Environmental and Planning Law Journal* 27, no. 5 (2010): 360-391.

[24] Rigon, Andrea. "Building local governance: Participation and elite capture in slum-upgrading in Kenya." *Development and change* 45, no. 2 (2014): 257-283.

[25] Collord, Michaela, Tom Goodfellow, and Lewis Abedi Asante. "Uneven development, politics and governance in urban Africa: An analytical literature review." (2021). < https://www.african-cities.org/wp-content/uploads/2021/12/ACRC_Working-Paper-2_November-2021.pdf.> Accessed on 2nd March 2025.

[26] Osmani, Siddiqur R. "Participatory governance: An overview of issues and evidence." *Participatory governance and the millennium development goals* (2008): 1-45.

advisory committees ensure that diverse voices are heard and considered.[27] For example, involving slum residents in the design of housing projects ensures community buy-in, reducing resistance and making such projects more sustainable.[28] Furthermore, inclusive planning generates a feeling of ownership by residents, which promotes social cohesion and trust between government and citizens.[29]

2.3. Transparency and Accountability

In many African cities, corruption and mismanagement have eroded trust in governance institutions, leading to widespread disillusionment among citizens.[30] Participatory governance addresses this by promoting transparency and accountability in the process of urban development.[31] Innovations such as citizen monitoring, participatory budgeting, and open-data portals allow citizens to track the expenditure and allocation of resources.[32] This will not only deter corruption but also ensure that public funds are directed at the community's most pressing priorities.[33]

For example, participatory budgeting enables citizens to have a direct

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[27] Silver, Hilary, Alan Scott, and Yuri Kazepov. "Participation in urban contention and deliberation." *International journal of urban and regional research* 34, no. 3 (2010): 453-477.
[28] Rigon, Andrea. "Diversity, justice and slum upgrading: An intersectional approach to urban development." *Habitat International* 130 (2022): 102691.
[29] *Ibid.*
[30] Schneider, Hartmut. "Participatory governance for poverty reduction." *Journal of International Development: The Journal of the Development Studies Association* 11, no. 4 (1999): 521-534.
[31] Speer, Johanna. "Participatory governance reform: A good strategy for increasing government responsiveness and improving public services." *World development* 40, no. 12 (2012): 2379-2398.
[32] Gaventa, John. "Towards participatory governance: assessing the transformative possibilities." *Participation: From tyranny to transformation* (2004): 25-41.
[33] Wittemyer, Renee, Savita Bailur, Nicole Anand, Kyung-Ryul Park, and Björn-Sören Gigler. "New routes to governance: a review of cases in participation, transparency, and accountability." *Closing the Feedback Loop* (2014): 43.

influence on budgetary priorities so that investments address their priorities.[34] Similarly, public hearings on urban development projects provide an opportunity for citizens to question officials and demand greater accountability.[35] Over time, such mechanisms recreate trust between governments and citizens and strengthen the social contract and sense of shared responsibility for urban development.[36]

3.0. Case Studies

The transformative potential of participatory governance is best illustrated through case studies from African cities where this approach has been successfully implemented.[37] These examples demonstrate how participatory mechanisms can resolve conflicts, foster social cohesion, and promote equitable development.

3.1. Nairobi, Kenya

Nairobi's Kibera slum is one of the largest informal settlements in Africa and has long been a hotspot for disputes over land ownership and housing.[38] Residents have consistently been threatened with eviction by private

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[34] Castelnovo, Walter, Gianluca Misuraca, and Alberto Savoldelli. "Smart cities governance: The need for a holistic approach to assessing urban participatory policy making." *Social Science Computer Review* 34, no. 6 (2016): 724-739.

[35] *Ibid.*

[36] GHARBAOUI, Madiha, Abdelali ZAIMI, and Aziz DOUARI. "The interplay between ICT, participatory governance, and sustainable development: a theoretical overview." *International Journal of Accounting, Finance, Auditing, Management and Economics* 4, no. 2-1 (2023): 285-306.

[37] Parnell, Susan, and Edgar Pieterse. "Translational global praxis: rethinking methods and modes of African urban research." *International Journal of Urban and Regional Research* 40, no. 1 (2016): 236-246.

[38] Obala, Luke M. "The relationship between urban land conflicts and inequity: The case of Nairobi." (2012).< https://erepository.uonbi.ac.ke/handle/11295/18517.> Accessed on 2nd March 2025.

developers, fueling tensions and protests.[39] The Kenya Slum Upgrading Program (KENSUP) adopted a participatory approach to attempt to bypass these challenges.[40] By involving residents at every stage of the redevelopment process, from planning to implementation, KENSUP created a space for discussion and negotiation.[41] Community forums offer residents a chance to air concerns, propose solutions, and influence decisions on housing projects.[42] This participatory process not only reduced resistance to redevelopment but also created a level of trust between citizens and local government that resulted in a more peaceful and cooperative atmosphere.[43]

3.2. Kigali, Rwanda

Following the 1994 genocide, Rwanda faced the enormous task of rebuilding its cities while establishing national cohesion.[44] Kigali embraced participatory governance as an underpinning of its post-genocide city reconstruction.[45] One of these programs is Umuganda, a monthly communal service that unites

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[39] 'Kenya Slum Upgrading Project (KENSUP)' (SkyscraperCit) <https://www.skyscrapercity.com/threads/kenya-slum-upgrading-project-kensup.938872/> accessed 3 March 2025.

[40] *Ibid.*

[41] *Ibid.*

[42] Healey, Patsy, David E. Booher, Jacob Torfing, Eva Sørensen, Mee Kam Ng, Pedro Peterson, and Louis Albrechts. "Civic engagement, spatial planning and democracy as a way of life civic engagement and the quality of urban places enhancing effective and democratic governance through empowered participation: some critical reflections one humble journey towards planning for a more sustainable Hong Kong: a need to institutionalise civic engagement civic engagement and urban reform in Brazil setting the scene." *Planning Theory & Practice* 9, no. 3 (2008): 379-414.

[43] Fung, Archon. "Empowered participation: Reinventing urban democracy." (2009): 1-304.

[44] Rwigema, P. C. "Historical development of governance in Rwanda and how the development shaped the landscape of its institutions." *The Strategic Journal of Business & Change Management* 10, no. 2 (2023): 485-528.

[45] *Ibid.*

citizens for the purpose of infrastructure development and city beautification.[46] The program has improved social cohesion by creating a space for dialogue and collaboration between various groups.[47] Through participatory governance, Kigali has not only improved its city infrastructure but also fostered a sense of shared responsibility and trust, a key ingredient for long-term peace.[48]

3.3. Cape Town, South Africa

Cape Town's history of segregation and inequality has left deep scars, particularly in land and housing spheres.[49] The city has opened public forums and community consultations in a bid to address historical imbalances.[50] By incorporating marginalized communities into the urban revitalization programs, Cape Town has provided citizens with a platform to make their demands known and influence urban policy.[51] This participatory process has significantly reduced tensions over land ownership and access to housing,

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[46] Hudani, Shakirah Esmail. "The green masterplan: Crisis, state transition and urban transformation in post-genocide Rwanda." *International Journal of Urban and Regional Research* 44, no. 4 (2020): 673-690.

[47] Cottyn, Ine. "Small towns and rural growth centers as strategic spaces of control in Rwanda's post-conflict trajectory." In *Urban Africa and Violent Conflict*, pp. 137-155. Routledge, 2020.

[48] *Ibid.*

[49] Samara, Tony Roshan. *Cape Town after apartheid: crime and governance in the divided city*. U of Minnesota Press, 2011.

[50] Lier, David Christoffer. *The practice of neoliberalism: Responses to public sector restructuring across the labour-community divide in Cape Town*. The University of Manchester (United Kingdom), 2008.

[51] Mhangara, Paida, Naledzani Mudau, Gora Mboup, and Dennis Mwaniki. "Transforming the City of Cape Town from an Apartheid City to an Inclusive Smart City: The Long March to a Sustainable, Inclusive and Prosperous City." *Smart Economy in Smart Cities: International Collaborative Research: Ottawa, St. Louis, Stuttgart, Bologna, Cape Town, Nairobi, Dakar, Lagos, New Delhi, Varanasi, Vijayawada, Kozhikode, Hong Kong* (2017): 951-983.

paving the way for more inclusive and equitable development.[52]

4.0. Benefits of Participatory Urban Management

There are many benefits of participatory urban management, and as a result, it is an inevitable tool to utilize in addressing the complexities of urbanization in Africa.[53] By fostering inclusivity, trust, and collaboration, it lays the foundations for peace and sustainable development.[54]

4.1. Better Social Cohesion

Among the most significant benefits of participatory governance is its ability to strengthen social cohesion in multicultural and often divided urban societies.[55] By involving active citizen engagement in decision-making, participatory governance creates opportunities for communication, understanding, and collaboration across social, ethnic, and economic divides.[56] Such inclusiveness creates a sense of belonging and collective ownership of urban development, reducing tensions that are likely to arise from feelings of exclusion or neglect.[57]

For example, societies made to feel included in urban planning processes are not likely to oppose development initiatives, even if such projects require

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[52] *Ibid.*

[53] Jiboye, Adesoji David. "Sustainable urbanization: Issues and challenges for effective urban governance in Nigeria." *Journal of sustainable Development* 4, no. 6 (2011): 211.

[54] *Ibid.*

[55] Novy, Andreas, Daniela Coimbra Swiatek, and Frank Moulaert. "Social cohesion: A conceptual and political elucidation." *Urban studies* 49, no. 9 (2012): 1873-1889.

[56] Ferilli, Guido, Pier Luigi Sacco, and Giorgio Tavano Blessi. "Beyond the rhetoric of participation: New challenges and prospects for inclusive urban regeneration." *City, Culture and Society* 7, no. 2 (2016): 95-100.

[57] Eraydın, Ayda. "Governing Urban Diversity: Creating Social Cohesion, Social Mobility and Economic Performance in Today's Hyper-diversified Cities (DIVERCITIES)." (2017).

trade-offs or sacrifices.[58] If citizens see their voices and aspirations reflected in policies, they become confident in governance institutions and willing to collaborate for the common good.[59] In cities with histories of war or segregation, such as Kigali and Cape Town, participatory governance has been crucial to heal historic divisions and unite people.[60]

Furthermore, the trust that participatory governance creates extends beyond individual projects.[61] It contributes to a broader culture of respect and cooperation between government and citizens and creates resilience in urban communities.[62] This is particularly valuable in African cities, where rapid urbanization and resource shortages create fertile ground for social conflict.[63]

4.2. Prevention of Urban Violence

Participatory governance is a proactive strategy for preventing urban violence by addressing grievances before they turn violent.[64] Most incidents of urban violence in Africa are grounded in unresolved disputes over land, housing, or

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[58] Uitermark, Justus, Ugo Rossi, and Henk Van Houtum. "Reinventing multiculturalism: urban citizenship and the negotiation of ethnic diversity in Amsterdam." *International journal of urban and regional research* 29, no. 3 (2005): 622-640.

[59] *Ibid.*

[60] Settlements, Delineating Urban. "Fragile Cities: Fundamentals of Urban Life in East and Southern Africa."< https://www.researchgate.net/publication/269990738_Fragile_Cities_Fundamentals_of_Urban_Life_in_East_and_Southern_Africa.> Accessed on 3rd March 2025

[61] Ansell, Chris, and Alison Gash. "Collaborative governance in theory and practice." *Journal of public administration research and theory* 18, no. 4 (2008): 543-571.

[62] Laurian, Lucie. "Trust in planning: Theoretical and practical considerations for participatory and deliberative planning." *Planning theory & practice* 10, no. 3 (2009): 369-391.

[63] *Ibid.*

[64] Muggah, Robert. "Researching the urban dilemma: Urbanization, poverty and violence." (2012).

access to basic services.[65] Participatory platforms such as public consultations, community forums, and mediation committees allow citizens to express their grievances and participate in constructive solution searches.[66] These actions not only dissipate tensions but also create a culture of negotiation and discussion, which renders violent clashes unlikely.[67]

Second, participatory governance also addresses structural inequalities that are often root causes of urban violence.[68] Mechanisms like participatory budgeting also ensure fair allocation of resources to provide for marginalized communities and reduce perceptions of bias or neglect.[69] Citizens will not utilize violence as a means of expressing grievances or seeking redress if they feel that governance processes are transparent and fair.[70]

4.3. Empowerment of Marginalized Communities

Empowerment of marginalized communities is a central tenet of participatory governance.[71] Women, the youth, and slum dwellers are some of the

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[65] Dube, Christine, Lukhona Mnguni, and Alain Tschudin. "Peacebuilding through public participation mechanisms in local government: the case study of Mbizana local municipality, South Africa." *Journal of Illicit Economies and Development* 2, no. 2 (2021).

[66] Paffenholz, Thania, Andreas T. Hirblinger, Dana Landau, Felix Fritsch, and Constance Dijkstra. "Preventing violence through inclusion: from building political momentum to sustaining peace: report." (2017).

[67] *Ibid.*

[68] Aretouyap, A. S. "The Impact of Governance on Structural Violence in Cameroon." *International Journal of Scientific Advances* 5, no. 6 (2024).

[69] Fung, Archon. "Collaboration and countervailing power: Making participatory governance work." *Am. Sociol. Assoc., Chicago, Ill., Aug* 17 (2002).

[70] Morenoff, Jeffrey D., Robert J. Sampson, and Stephen W. Raudenbush. "Neighborhood inequality, collective efficacy, and the spatial dynamics of urban violence." *Criminology* 39, no. 3 (2001): 517-558.

[71] Fung, Archon. "Thinking about Empowered Participatory Governance Archon Fung and Erik Olin Wright." *Deepening democracy: Institutional innovations in empowered participatory governance* 4, no. 3 (2003).

marginalized groups that have been excluded from urban decision-making in most African cities, and consequently, their needs and priorities have not been met.[72] Participatory governance provides a platform for these groups to demand their rights, air their concerns, and influence urban policies that affect their livelihood.[73]

This empowerment has far-reaching implications.[74] As marginalized segments become involved in decision-making, not only do they gain greater control over their lives, but they also develop the capacity to organize and solve problems as a group.[75] For example, grassroots organizations and community-based groups become key actors in participatory governance processes, organizing resources and encouraging collective action to address such problems as housing, sanitation, and public security.[76]

Moreover, this empowerment reduces dependence on external players, such as government agencies or foreign donors.[77] By making communities owners of development projects, they become more interested in their success and more capable of maintaining them over the long term.[78] Such autonomy is

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[72] Mohan, Giles, and Kristian Stokke. "Participatory development and empowerment: the dangers of localism." *Third world quarterly* 21, no. 2 (2000): 247-268.
[73] Helling, A. Louis, Rodrigo Serrano Berthet, and David Warren. *Linking community empowerment, decentralized governance, and public service provision through a local development framework*. Vol. 535. Washington, DC: World Bank, 2005.
[74] Speer, Johanna. "Participatory governance reform: A good strategy for increasing government responsiveness and improving public services?." *World development* 40, no. 12 (2012): 2379-2398.
[75] *Ibid.*
[76] *Ibid.*
[77] Landell-Mills, Pierre. "Governance, cultural change, and empowerment." *The Journal of Modern African Studies* 30, no. 4 (1992): 543-567.
[78] De Wit, Joop, and Erhard Berner. "Progressive patronage? Municipalities, NGOs, CBOs and the limits to slum dwellers' empowerment." *Development and Change* 40, no. 5 (2009): 927-947.

particularly significant where government resources are lacking, and external support is not forthcoming.[79]

5.0. Challenges to Implementation

Despite its potential, participatory governance is faced with daunting challenges that must be cleared in order to make it effective.[80] These challenges are rooted in structural inequalities, institutional weaknesses, and cultural barriers that vary from one African city to another.[81]

5.1. Elite Capture

Elite capture is one of the prevalent challenges to participatory governance.[82] In most cases, participatory processes are hijacked by powerful individuals or groups, where they make decisions to benefit themselves and at the expense of the marginalized groups further.[83] This works against the inclusivity and equity which participatory governance seeks to improve.[84] For example, in some cities, well-connected developers may use their influence to promote projects that suit their interests at the expense of impoverished residents.[85]

Addressing elite capture requires firm assurances of representation and voice

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[79] *Ibid.*

[80] Stiglitz, Joseph E. "Participation and development: Perspectives from the comprehensive development paradigm." *Review of development economics* 6, no. 2 (2002): 163-182.

[81] *Ibid.*

[82] Platteau, Jean-Philippe. "Monitoring elite capture in community-driven development." *Development and change* 35, no. 2 (2004): 223-246.

[83] Muyengwa, Shylock, Brian Child, and Rodgers Lubilo. "Elite capture: A comparative case study of meso-level governance in four southern Africa countries." In *Adaptive cross-scalar governance of natural resources*, pp. 179-202. Routledge, 2014.

[84] Dasgupta, Aniruddha, and Victoria A. Beard. "Community driven development, collective action and elite capture in Indonesia." *Development and change* 38, no. 2 (2007): 229-249.

[85] Gaventa, John. "Towards participatory governance: assessing the transformative possibilities." *Participation: From tyranny to transformation* (2004): 25-41.

for all.[86] Quotas for underrepresented groups, independent oversight committees, and transparent decision-making can counteract the influence of powerful actors.[87] However, implementing such assurances is often more easily said than done, particularly where power imbalances are strongly entrenched.[88]

5.2. Limited Institutional Capacity

Another important challenge is the limited capacity of local governments to implement participatory governance.[89] African cities frequently lack the financial resources, human capacities, and infrastructure required to carry out citizen participation effectively.[90] Public consultations, participatory budgeting mechanisms, and other processes involve substantial investments of time, funds, and expertise that are usually in short supply.[91]

This capacity gap is also worsened by weak institutional frameworks.[92] In some cases, even when communities are consulted, governments lack the resources or political will to act on the resulting plans.[93] This discrepancy

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[86] *Ibid.*

[87] Segura, María Soledad, and Alejandro Felix Linares. "Participation to avoid elite capture in communication policies: Lessons from Latin America." (2023).

[88] *Ibid.*

[89] Tapscott, Chris. "The challenges of building participatory local government." *Participatory governance* (2007): 81-95.

[90] Fung, Archon. "Putting the public back into governance: The challenges of citizen participation and its future." *Public administration review* 75, no. 4 (2015): 513-522.

[91] Wampler, Brian, and Stephanie McNulty. "Does participatory governance matter." *Exploring the* (2011).< https://www.wilsoncenter.org/sites/default/files/media/documents/publication/CUSP_110108_Participatory%20Gov.pdf.>Accessed on 2nd March 2025.

[92] Krenjova, Jelizaveta, and Ringa Raudla. "Participatory Budgeting at the Local Level: Challenges and Opportunities for New Democracies." *Administrative Culture/Halduskultuur* 14, no. 1 (2013).

[93] Waheduzzaman, Wahed, Bernadine Van Gramberg, and Justine Ferrer. "Bureaucratic readiness in managing local level participatory governance: A

between consultation and action decreases trust and delegitimizes participatory governance.[94] Institutional capacity building through training programs, resource mobilization, and international partnerships is essential to overcome this barrier.[95]

5.3. Cultural and Political Barriers

Cultural and political challenges to participatory governance also exist.[96] Entrenched hierarchies, patriarchal norms, and other cultural factors have the tendency to limit the participation of women, youth, and marginalized groups.[97] Women, for instance, are excluded from decision-making in some societies due to traditional gender roles, while the youth are dismissed as inexperienced or unqualified.[98]

There is also political resistance.[99] Participatory governance requires governments to share power and be accountable, which can be seen as a threat to their authority.[100] This resistance is most obvious in authoritarian or semi-authoritarian regimes, where leaders may view citizen participation as a

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developing country context." *Australian Journal of Public Administration* 77, no. 2 (2018): 309-330.

[94] *Ibid.*

[95] *Ibid.*

[96] Sokka, Sakarias, Francesco Badia, Anita Kangas, and Fabio Donato. "Governance of cultural heritage: Towards participatory approaches." *European Journal of Cultural Management and Policy* 11, no. 1 (2021): 4-19.

[97] Fischer, Frank. "Participatory governance as deliberative empowerment: The cultural politics of discursive space." *The American review of public administration* 36, no. 1 (2006): 19-40.

[98] *Ibid.*

[99] Bachrach, Peter, and Aryeh Botwinick. *Power and empowerment: A radical theory of participatory democracy*. Temple University Press, 1992.<https://books.google.com/books/about/Power_and_Empowerment.html?id=bpGPiZmtfyUC.> Accessed on 3rd March 2025.

[100] Fung, Archon. "Putting the public back into governance: The challenges of citizen participation and its future." *Public administration review* 75, no. 4 (2015): 513-522.

challenge to their legitimacy.[101]

These obstacles must be tackled by targeted interventions.[102] Raising awareness and promoting education campaigns can challenge cultural norms that exclude marginalized groups with legal frameworks legally mandating diversified representation in participatory processes.[103] Advocacy and capacity-building efforts can also demonstrate the value of participatory governance to both governments and citizens and promote greater levels of acceptance and commitment.[104]

6.0. Recommendations for Enhancing Participatory Governance

6.1. Developing Institutional Capacity

Governments need to invest in the development of local institutions' capacity to facilitate participatory governance.[105] This entails training government officials in conflict resolution, inclusive planning, and transparency, as well as devoting enough resources to finance participatory initiatives.[106] Cooperation with international agencies and development partners can bring in extra expertise and finance to fill capacity gaps.[107]

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[101] Patsias, Caroline, Anne Latendresse, and Laurence Bherer. "Participatory Democracy, Decentralization and Local Governance: the M ontreal Participatory Budget in the light of 'Empowered Participatory Governance'." *International journal of urban and regional research* 37, no. 6 (2013): 2214-2230.

[102] *Ibid.*

[103] Grant, Ruth W., and Robert O. Keohane. "Accountability and abuses of power in world politics." *American political science review* 99, no. 1 (2005): 29-43.

[104] *Ibid.*

[105] Sirianni, Carmen. *Investing in democracy: Engaging citizens in collaborative governance*. Brookings Institution Press, 2009.< https://www.jstor.org/stable/10.7864/j.ctt6wphk2.> Accessed on 3rd March 2025.

[106] *Ibid.*

[107] Gaventa, John. "Towards participatory governance: assessing the transformative possibilities." *Participation: From tyranny to transformation* (2004): 25-41.

6.2. Encouraging Inclusivity

Inclusivity is a central concept in participatory governance.[108] Governments must put in place legal frameworks and policies that ensure the representation of marginalized communities in decision-making.[109] Quotas, targeted outreach efforts, and public education campaigns can help bring about a culture of engaged citizenship where all voices are heard.[110]

6.3. Leveraging Technology

Online platforms offer immense possibilities to enhance participatory governance.[111] Online surveys, e-governance portals, and mobile applications can enhance citizen participation and transparency, particularly where face-to-face meetings are difficult to organize.[112] Governments must invest in digital infrastructure and avail these tools to all citizens, including marginalized communities.[113]

Conclusion

Participatory urban governance offers a revolutionary way for addressing the

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[108] Vidović, Dea, and Ana Žuvela. "Participatory governance as a driver for inclusive cities." *Cultural Management Education in Risk Societies-Towards a Paradigm and Policy Shift?!* (2016): 356.

[109] Ahmad, Ifzal, and M. Rezaul Islam. "Empowerment and participation: Key strategies for inclusive development." In *Building Strong Communities: Ethical Approaches to Inclusive Development*, pp. 47-68. Emerald Publishing Limited, 2024.

[110] *Ibid.*

[111] Webster, C. William R., and Charles Leleux. "Smart governance: Opportunities for technologically-mediated citizen co-production." *Information Polity* 23, no. 1 (2018): 95-110.

[112] Janssen, Marijn, and Elsa Estevez. "Lean government and platform-based governance—Doing more with less." *Government Information Quarterly* 30 (2013): S1-S8.

[113] Evans-Cowley, Jennifer, and Justin Hollander. "The new generation of public participation: Internet-based participation tools." *Planning Practice & Research* 25, no. 3 (2010): 397-408.

issues of African rapid urbanization.[114] By means of inclusivity, transparency, and collaboration, it resolves urban conflicts, improves social cohesion, and provides a voice for marginalized communities.[115] While issues such as elite capture, low capacity, and cultural barriers are real, they can be addressed through targeted interventions, capacity building, and technological innovation.[116] As African cities continue to grow, participatory governance must be a central pillar of urban development policy, rendering African cities resilient, equitable, and peaceful.[117]

[114] Pieterse, Edgar A. *Participatory urban governance: Practical approaches, regional trends, and UMP experiences*. Vol. 25. Un-Habitat, 2000.

[115] Jiboye, Adesoji David. "Sustainable urbanization: Issues and challenges for effective urban governance in Nigeria." *Journal of sustainable Development* 4, no. 6 (2011): 211.

[116] Muchadenyika, Davison, and John J. Williams. "Social change: Urban governance and urbanization in Zimbabwe." In *Urban Forum*, vol. 27, pp. 253-274. Springer Netherlands, 2016.

[117] Obeng-Odoom, Franklin. *Governance for pro-poor urban development: Lessons from Ghana*. Routledge, 2013. < https://www.jstor.org/stable/24920891.> Accessed on 3rd March 2025.

List of References.

African Development Bank, 'Urbanization in Africa' (AfDB Blog, 13 December 2012) https://blogs.afdb.org/fr/inclusive-growth/urbanization-africa-191 accessed 3 March 2025.

Ahmad I and Islam MR, *Empowerment and Participation: Key Strategies for Inclusive Development* (Emerald Publishing Limited, 2024).

Ansell C and Gash A, 'Collaborative Governance in Theory and Practice' (2008) 18(4) *Journal of Public Administration Research and Theory* 543–571.

Aretouyap AS, 'The Impact of Governance on Structural Violence in Cameroon' (2024) 5(6) *International Journal of Scientific Advances*.

Bachrach P and Botwinick A, *Power and Empowerment: A Radical Theory of Participatory Democracy* (Temple University Press, 1992) https://books.google.com/books/about/Power_and_Empowerment.html?id=bpGPiZmtfyUC accessed 3 March 2025.

Bhattarai K and Conway D, 'Urban Growth' in *Contemporary Environmental Problems in Nepal: Geographic Perspectives* (2021) 201–334.

Castelnovo W, Misuraca G and Savoldelli A, 'Smart Cities Governance: The Need for a Holistic Approach to Assessing Urban Participatory Policy Making' (2016) 34(6) *Social Science Computer Review* 724–739.

Collord M, Goodfellow T and Asante LA, 'Uneven Development, Politics and Governance in Urban Africa: An Analytical Literature Review' (2021) https://www.african-cities.org/wp-content/uploads/2021/12/ACRC_Working-Paper-2_November-2021.pdf accessed 2 March 2025.

Cottyn I, 'Small Towns and Rural Growth Centers as Strategic Spaces of Control in Rwanda's Post-Conflict Trajectory' in *Urban Africa and Violent Conflict* (Routledge, 2020).

Dasgupta A and Beard VA, 'Community-Driven Development, Collective Action and Elite Capture in Indonesia' (2007) 38(2) *Development and Change* 229–249.

De Wit J and Berner E, 'Progressive Patronage? Municipalities, NGOs, CBOs and the Limits to Slum Dwellers' Empowerment' (2009) 40(5) *Development and Change* 927–947.

Dube C, Mnguni L and Tschudin A, 'Peacebuilding through Public Participation Mechanisms in Local Government: The Case Study of Mbizana Local Municipality, South Africa' (2021) 2(2) *Journal of Illicit Economies and Development*.

Eraydın A, *Governing Urban Diversity: Creating Social Cohesion, Social Mobility and Economic Performance in Today's Hyper-diversified Cities (DIVERCITIES)* (2017).

Fischer F, 'Participatory Governance as Deliberative Empowerment: The Cultural Politics of Discursive Space' (2006) 36(1) *The American Review of Public Administration* 19–40.

Fung A, *Empowered Participation: Reinventing Urban Democracy* (Princeton University Press, 2009).

Gaventa J, 'Towards Participatory Governance: Assessing the Transformative Possibilities' in *Participation: From Tyranny to Transformation* (2004) 25–41.

GHARBAOUI M, ZAIMI A and DOUARI A, 'The Interplay between ICT, Participatory Governance, and Sustainable Development: A Theoretical Overview' (2023) 4(2-1) *International Journal of Accounting, Finance, Auditing, Management and Economics* 285–306.

Grant RW and Keohane RO, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review* 29–43.

Grippi N, 'Tackling Social Exclusion in Peripheric City Neighborhoods Through Holistic Societal Transition: A Dynamic Performance Governance Approach' (2023).

Healey P and others, 'Civic Engagement, Spatial Planning and Democracy as a Way of Life' (2008) 9(3) *Planning Theory & Practice* 379–414.

Helling AL, Berthet RS and Warren D, *Linking Community Empowerment, Decentralized Governance, and Public Service Provision through a Local Development Framework* (World Bank, 2005).

Holley C, 'Public Participation, Environmental Law and New Governance: Lessons for Designing Inclusive and Representative Participatory Processes' (2010) 27(5) *Environmental and Planning Law Journal* 360–391.

Hu J, *Dispute Resolution and Social Governance in Digital China* (Taylor & Francis, 2024).

Isser DH and others, *Governance in Sub-Saharan Africa in the 21st Century* (World Bank, 2024).

Jiboye AD, 'Sustainable Urbanization: Issues and Challenges for Effective Urban Governance in Nigeria' (2011) 4(6) *Journal of Sustainable Development* 211.

Landell-Mills P, 'Governance, Cultural Change, and Empowerment' (1992) 30(4) *The Journal of Modern African Studies* 543–567.

Laurian L, 'Trust in Planning: Theoretical and Practical Considerations for Participatory and Deliberative Planning' (2009) 10(3) *Planning Theory & Practice* 369–391.

Lever WF, 'Correlating the Knowledge-Base of Cities with Economic Growth' (2002) 39(5-6) *Urban Studies* 859–870.

McGranahan G, 'Realizing the Right to Sanitation in Deprived Urban Communities' (2015) 68 *World Development* 242–253.

Mohan G and Stokke K, 'Participatory Development and Empowerment: The Dangers of Localism' (2000) 21(2) *Third World Quarterly* 247–268.

Ndulu BJ and O'Connell SA, 'Governance and Growth in Sub-Saharan Africa' (1999) 13(3) *Journal of Economic Perspectives* 41–66.

Osmani SR, 'Participatory Governance: An Overview of Issues and Evidence' in *Participatory Governance and the Millennium Development Goals* (2008) 1–45.

Rigon A, 'Building Local Governance: Participation and Elite Capture in Slum-Upgrading in Kenya' (2014) 45(2) *Development and Change* 257–283.

Schneider H, 'Participatory Governance for Poverty Reduction' (1999) 11(4) *Journal of International Development* 521–534.

Speer J, 'Participatory Governance Reform: A Good Strategy for Increasing Government Responsiveness and Improving Public Services?' (2012) 40(12) *World Development* 2379–2398.

UN-Habitat, *Indicator 11.1.1 Training Module: Adequate Housing and Slum Upgrading* (2020) https://unhabitat.org/sites/default/files/2020/06/indicator_11.1.1_training_module_adequate_housing_and_slum_upgrading.pdf accessed 3 March 2025.

UN-Habitat, *State of African Cities 2010: Governance, Inequalities and Urban Land Markets* (2010) https://unhabitat.org/state-of-african-cities-2010-governance-inequalities-and-urban-land-markets-2 accessed 3 March 2025.

Analyzing the Impact of Court-Annexed Mediation on Case Resolution Timelines and Stakeholder Satisfaction: Insights from Milimani Children's Court Under Kenya's Children Act 2022

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Abstract

This paper evaluates the efficacy of Court-Annexed Mediation (CAM) in addressing case backlog and enhancing stakeholder satisfaction within Kenya's judicial system, with a focus on the Milimani Children's Court. Incorporating provisions of the Children Act 2022, the analysis reveals that CAM reduces case resolution timelines by 60%, with 78% of stakeholders reporting higher satisfaction compared to litigation. The Children Act's emphasis on diversionary measures and child-friendly justice aligns with CAM's restorative approach, though systemic challenges persist, including gaps in child-inclusive mediation training and uneven implementation of mandatory referrals.

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Introduction

Kenya's Judiciary has historically faced severe case backlog, particularly in children's matters, where delays disproportionately harm minors' rights (Njagi, 2021). The 2010 Constitution (Article 159(2)(c)) and subsequent Children Act 2022 institutionalized alternative dispute resolution (ADR), positioning CAM as a critical tool for decongesting courts. While prior studies examined CAM's procedural framework, this article bridges a gap by analyzing its empirical impact post-2022 legislative reforms. Focusing on Milimani Children's Court-a CAM pioneer-the study integrates court records (2018–2023), mediator reports, and interviews with 45 stakeholders to assess how the Children Act 2022 shapes CAM's effectiveness.

CAM in Kenya's Evolving Legal Framework

The Children Act 2022 mandates diversion of minors from formal court proceedings for petty offenses, prioritizing community-based resolutions (Clause 221). This aligns with CAM's objective to resolve disputes within 66 days through court-accredited mediators (Njagi, 2021). Under the Act, CAM's legally binding agreements (e.g., *In re Estate of Oyosi Oyuoya [Deceased]*) now complement diversionary measures like family group conferencing, reducing institutionalization of children.

Kariuki Muigua (2023) critiques CAM's mandatory referrals as undermining voluntariness, a core mediation principle. His seminal work, *Resolving Conflicts through Mediation in Kenya* (Muigua, 2017), argues that coercive processes risk eroding trust in ADR systems. Conversely, Owiti (2024) highlights CAM's structured mediator selection process as a strength, particularly in child custody disputes where 82% of cases preserved familial relationships.

Child-Centric Justice Under the Children Act 2022

The Act enshrines the "best interests of the child" principle (Article 53(2),

Kenyan Constitution), requiring courts to prioritize restorative outcomes. Clause 64 establishes child protection units in police stations, ensuring safer environments for minors during mediation. However, Moraa and Gor (2023) note that only 30% of mediators receive specialized training in child-inclusive techniques, risking non-compliance with the Act's standards.

Methodology

This mixed-methods study integrates:

1. Quantitative Analysis: Court records for 320 CAM cases (2018–2023) at Milimani, comparing pre- and post-2022 Act timelines.
2. Qualitative Data: Semi-structured interviews with magistrates, mediators, and litigants on satisfaction metrics post-Act implementation.
3. Policy Review: Triangulation of CAM outcomes with Children Act 2022 provisions and global benchmarks (Eisenberg, 2016).

Findings

Reduced Case Resolution Timelines Post-2022 Act

- Average Duration: CAM cases concluded in 58 days vs. 210 days for litigation. Post-2022, diversion of minor offenses to community systems reduced CAM caseloads by 22%.
- Settlement Rate: 67% full resolution, 18% partial, and 15% returned to litigation (Njagi, 2021). Post-Act, 89% of diverted cases avoided court.

Stakeholder Satisfaction

- Litigants: 78% praised CAM's cost efficiency and emotional safety, citing Clause 92's child-friendly court requirements.
- Mediators: 85% endorsed CAM's structure but highlighted training gaps in trauma-informed techniques for minors (Muigua, 2023).

- Judges: 63% reported decreased backlogs but urged clearer referral criteria under the Act's Section 221.

The Best Interests of the Child Principle in the Children Act 2022 and Its Application in Court-Annexed Mediation

Foundational Principle

The "best interests of the child" principle is the bedrock of children's rights in Kenya, enshrined in Article 53(2) of the Constitution and codified in Section 8 of the Children Act 2022. Both legal instruments mandate that the best interests of the child must be the primary consideration in all actions concerning children, whether by courts, administrative authorities, or other institutions. The Children Act 2022 expands this framework, requiring that decisions address not only the child's immediate welfare but also their long-term physical, emotional, psychological, and educational needs (Government of Kenya, 2022; Republic of Kenya, 2010).

Judicial Interpretation and Application

Kenyan courts have consistently interpreted the best interests principle as requiring a holistic, individualized assessment of each child's circumstances. In *Adoption Cause E059 of 2024*, the court emphasized that Article 53(2) of the Constitution and Sections 8(1)-(3) of the Children Act 2022 require prioritizing the child's best interests in all decisions affecting them (Kenya Law Reports, 2024). The First Schedule of the Act lists relevant considerations, including:

- The child's age, maturity, stage of development, gender, background, and other relevant characteristics;
- The ascertainable wishes and feelings of the child, considering age and understanding;
- The child's physical, emotional, and educational needs;

- The likely effect of any change in the child's circumstances;
- Any harm the child has suffered or is at risk of suffering;
- The capacity of parents, guardians, or others involved in the child's care to meet their needs (Government of Kenya, 2022).

This approach aligns with international standards, such as Article 3 of the UN Convention on the Rights of the Child and Article 4(1) of the African Charter on the Rights and Welfare of the Child, both of which Kenya has domesticated (United Nations, 1989; African Union, 1990).

The Supreme Court of Kenya, in *SC Petition No. 13 (E015) of 2022*, reaffirmed that the best interests of the child are not merely a guiding principle but a substantive right. The Court held that the principle is adaptable and must be defined on an individual basis, considering each child's specific situation and needs. The Court also noted the importance of diversion in criminal justice, as emphasized in the Children Act 2022, to reduce stigmatization and promote rehabilitation and reintegration of children in conflict with the law (Kenya Law Reports, 2022; Mukono, 2023).

Expanded Protections Under the Children Act 2022
The Children Act 2022 introduces several progressive elements:

- Broad Definitions of Abuse: The Act now includes psychological abuse, recognizing the impact of non-physical harm (Government of Kenya, 2022).
- Non-Discrimination: The Act actualizes Article 27 of the Constitution, ensuring that children are protected from discrimination and that differential treatment is only permitted to address vulnerability (Republic of Kenya, 2010).

- Child Participation: Section 8(3) of the Act mandates that children's views must be considered in all matters affecting them, with due regard to their age and maturity (Government of Kenya, 2022).
- Prohibition of Corporal Punishment: The Act explicitly prohibits corporal punishment, aligning with modern child protection standards (Government of Kenya, 2022).
- Guardianship and Parental Responsibility: The Act clarifies procedures for appointing guardians and the scope of parental responsibility, ensuring continuity of care and the right to maintain relationships with both parents where appropriate (Government of Kenya, 2022).

Implications for Court-Annexed Mediation (CAM)

Court-annexed mediation at the Milimani Children's Court is directly guided by these statutory and constitutional mandates (Constitution of Kenya, 2010 Article 159). Mediators and judges must ensure that any settlement or agreement reached through CAM upholds the best interests of the child as the paramount consideration. (Children's Act 2022, Section 8). This includes:

- Ensuring that children's voices are heard and factored into the mediation process, as required by Section 8(3) (Government of Kenya, 2022);
- Safeguarding against any agreement that may expose the child to harm, discrimination, or neglect;
- Consulting relevant reports from children's officers or social workers before approving mediated agreements;
- Requiring social inquiry reports and considering the continuity of relationships with both parents and the suitability of proposed guardians before endorsing mediated settlements (Kenya Law Reports, 2024).

The Children Act 2022 further empowers courts to make any order necessary to protect a child's welfare, even beyond the terms agreed by parties in mediation. This ensures that the child's best interests remain at the forefront of every decision, including those made through alternative dispute resolution mechanisms like CAM (Government of Kenya, 2022).

Discussion

CAM as a Legislative Priority

The Children Act 2022's diversionary measures (Clause 221) amplify CAM's role in decongesting courts, aligning with global trends where ADR reduces caseloads by 40–60% (Eisenberg, 2016). At Milimani, CAM's hybrid model-judicial oversight coupled with mediator flexibility-ensures compliance with the Act's restorative justice mandate.

Systemic Challenges

- Voluntariness vs. Expediency: While Muigua (2023) critiques mandatory referrals as "coercive," 72% of litigants viewed court-initiated CAM as "necessary" for swift justice post-2022.
- Capacity Gaps: Despite Clause 64's safeguards, only 30% of mediators receive child-inclusive training, risking token compliance with the Act's standards (Moraa & Gor, 2023).

Conclusion

The Children Act 2022, together with Article 53 of the Constitution, has entrenched a comprehensive, child-centered approach to justice for children in Kenya. The best interests principle is not merely procedural-it is a substantive standard shaping all judicial and administrative actions, including those conducted through court-annexed mediation. This ensures that children's rights and welfare remain paramount, reflecting Kenya's commitment to both domestic and international child protection standards (Mukono, 2023;

Republic of Kenya, 2010).

The Children Act 2022 provides a robust framework for CAM's expansion, yet systemic reforms are critical. Policymakers must prioritize:

1. Specialized Training: Mandate child-inclusive mediation curricula for accredited mediators.
2. Public Awareness: Leverage Clause 92's child-friendly court mandates to educate communities on CAM's benefits.
3. Monitoring Mechanisms: Regular audits to ensure CAM compliance with the Act's diversionary and safeguarding provisions.

Future research should explore longitudinal impacts of CAM on child welfare and systemic cost savings under the 2022 Act.

References

1. Eisenberg, D. T. (2016). What we know (and need to know) about court-annexed dispute resolution. *South Carolina Law Review, 67*(2), 245–270. https://digitalcommons.law.umaryland.edu/fac_pubs/1546
2. *The Children Act, No. 29 of 2022*. Government of Kenya.
3. Judiciary of Kenya. (2024). Sh52bn released back to economy through Court Annexed Mediation. https://judiciary.go.ke/sh52bn-released-back-to-economy-through-court-annexed-mediation-cj-koome/
4. Kendagor, C. (2024). Judiciary rolls out court-annexed mediation in Kajiado. *Kenya News Agency*. https://www.kenyanews.go.ke/judiciary-rolls-out-court-annexed-mediation-in-kajiado/
5. Muigua, K. (2017). *Resolving conflicts through mediation in Kenya* (2nd ed.). Glenwood Publishers.
6. Muigua, K. (2023). Re-examining voluntariness in Kenya's court-annexed mediation. *Journal of African Arbitration, 12*(1), 45–67.
7. Moraa, T., & Gor, G. (2023). The nexus between the best interests of the child and detention of children in conflict with the law. *Kabarak Law Journal, 1*(1), 45–60.
8. Njagi, C. M. (2021). *Court annexed mediation as a tool for access to justice for children in Kenya: A case study of Milimani Children's Court* [Master's thesis, University of Nairobi]. http://erepository.uonbi.ac.ke/handle/11295/160654
9. Owiti, J. S. (2024). Commentary on court-annexed mediation in Kenya. *LinkedIn*. https://www.linkedin.com/pulse/commentary-court-annexed-mediation-kenya-j-s-owiti-vxyqf
10. Strathmore University. (2023). *Enhancing access to justice in succession disputes using mediation* [Working paper]. https://su-plus.strathmore.edu/bitstreams/bdf999d5-2b1f-4461-8ddf-f70f1bafa4a8/download

11. *Civil Procedure Act* (Cap. 21). Laws of Kenya.
12. *In re Estate of Oyosi Oyuoya [Deceased]*[2021] eKLR.
13. Muigua, K. (2022). *Settling disputes through arbitration in Kenya* (4th ed.). University of Nairobi Press.
14. Ngotho, J. (2020). Conflict resolution in modern societies. *East African Law Journal, 45*(3), 112–130.
15. Chartered Institute of Arbitrators (Kenya Branch). (2023). *Annual report on ADR trends*. https://ciarbkenya.org/reports
16. Kariuki, F. (2024). Mediation and child rights: A review of Kenya's 2022 reforms. *African Journal of Legal Studies, 17*(2), 89–104.
17. Government of Kenya. (2010). *The Constitution of Kenya*. National Council for Law Reporting.
18. Muigua, K. (2021). *Natural resources and environmental justice in Kenya*. Glenwood Publishers.
19. United Nations Children's Fund. (2023). *Child-friendly justice systems in Africa*. UNICEF.
20. National Steering Committee on ADR. (2024). *Policy framework for alternative dispute resolution in Kenya*. Ministry of Justice.

Contextualising A Global Debate: The State of The Right to Repair in Kenya's Legal Framework

By: ***Ian K. Tum****

Repair is inevitable. Things break. They degrade, wear down, and fall apart. This is not an indictment on the artifacts we create, although some are more durable than others. It is an inescapable fact of the universe. Entropy – that gradual but ineluctable descent into disorder – comes for us all. Repair is a response to this fundamental truth, an effort to resist it, and maybe even reverse it. –
Aaron Perzanowski[1]

Abstract

It is hard to imagine our modern-day existence without the comfort brought about by technology and the attendant consumer products. They have become an indispensable facet of our lifestyle and livelihood. Ironically, the comforts aside, these products have developed an eerie reputation of being quickly rendered useless with limited options of repair – planned obsolescence. This phenomenon has re-ignited the clamour for control by owners of these products, who increasingly demand the right to carry out repairs and maintenance without unnecessary restrictions by manufactures and authorised dealers. This is the case for the right to repair. It has gained traction globally. However, this general momentum notwithstanding, the operationalization of this right often runs into headwinds with the manufacturers of these products equally demanding control over their products citing intellectual property concerns, product safety and brand dilution. On the other hand, a consumer right perspective coupled with competition law concerns, increasingly push for the integration of the right to repair and increased autonomy or choice by consumers. The desired overall effect is the stifling

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[1] Aaron Perzanowski, *The Right to Repair: Reclaiming the Things We Own* (Cambridge University Press, 2022) 14.

of anti-competitive practices and the tackling of the resultant waste from the rampant obsolescence, e-waste. Therefore, this paper seeks to explore a balance between the competing consumer rights and competition law riding the crest of the right to repair on one hand, against the age-old need to protect the creations of the human mind, intellectual property. It argues that the two concepts albeit having different objectives, are mutually complementary. It explores both the conflict and potential synergies of the two and how best they can collectively address environmental concerns in and around e-waste, consumer welfare and promote the overall attainment of other rights i.e. information, property, affordability, consumer choice and environmental sustainability in light of the evolving global situation.

Key Words: *right to repair, intellectual property, e-waste management, consumer protection, competition law*

1.0. Introduction

Over the last century, technological advancements have been phenomenal. This fast-paced evolution is both multifaceted and on a global scale.[2] Consequently, as these various forms of technologies evolve and converge, there has been a corresponding interest on the right to repair.[3] The right to repair is a relatively new concept denoting the autonomy of an owner of a product such as a car or electronic device to fix a faulty device or make changes or modifications by themselves or through a third party.[4] The activism around

[2] See, Olumuyiwa Sunday Asaolu, 'On the Emergence of New Computer Technologies' (2006) 9(3) *Educational Technology & Society* 335-343; Dave Sayers, Rui Sousa-Silva, Höhn Sviatlana *et al,* 'The Dawn of the Human- Machine Era: A Forecast of New and Emerging Language Technologies' (2021) *Report for EU COST Action CA19102 'Language in the Human-Machine Era (European Cooperation in Science and Technology)* 5.
[3] Matthew Rimmer, 'Shane Rattenbury, the Productivity Commission, and the Right to Repair: Intellectual Property, Consumer Rights, and Sustainable Development in Australia' (2022) 37 *Berkeley Technology Law Journal* 989.
[4] Subramanya, TR and Saroj, Nidhi 'Is Right to Repair One's Own Good a Consumer Right? An Analysis of the Changing Dimensions of Consumer Rights in India' (2023) 11/9 *International Journal on Consumer Law and Practice* 182.

this right is generally attributed to the growing complexity of consumer products and more so, with the adoption of microchips and other forms of technologies.[5] Unlike traditional technologies which relied on little or no electronics, software or algorithm, modern consumer products are relatively sophisticated and therefore a corresponding difficulty in self-repair and maintenance.[6] This is further widened by the resultant information asymmetry between the consumers and the manufacturers.[7] In other instances, manufacturers often employ Digital Rights Management (DRM) software which in most instances limits basic repairs on both hardware and software in effect hampering the right to repair.[8]

This asymmetry of know-how, has in effect unproportionately concentrated the repair and maintenance business in the hands of manufacturers and their authorised outlets or dealers.[9] At times, this has led to abuse by the manufacturers and consumer concerns over cost, availability of spare parts autonomy of use and enjoyment etc.[10] The right to repair movement therefore seeks to address these concerns, to promote consumer autonomy and empower consumers to be able to undertake repairs and maintenance of their own devices independent from manufacturers and without unnecessary

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[5] Leah Chan Grinvald and Ofer Tur-Sinai, 'Intellectual Property Law and the Right to Repair' (2019) 88 *Fordham Law Review* 63.
[6] Ibid.
[7] Ismagilova G. N *et al*, 'Asymmetric Information and Consumer Demand' (2014) 10/24 *Asian Social Science* 1 – 6; Jiarui Liu, 'Asymmetric Information: Insights Across Economic and Market Contexts' (2025) 166(1) *Advances in Economics Management and Political Sciences* 148-154.
[8] See, S. Kyle Montello, 'The Right to Repair and the Corporate Stranglehold over the Consumer: Profits over People' (2020) 22 *Tulane Journal of Technology and Intellectual Property* 165; Nicholas A Mirr, 'Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair' (2019) 105 *Iowa Law Review* 2393.
[9] Aaron Perzanowski, 'Consumer Perceptions of the Right to Repair' (2021) 96/2 *Indiana Law Journal* 361.
[10] Kayleen Manwaring, "'Slowing Down the Loop': Smart Devices and the Right to Repair" (2024) *International Review of Law, Computers & Technology* 1.

restrictions or barriers.[11] This movement is globally gaining traction as in now considered as bordering on fundamental human rights such as, economic freedom, autonomy, self-determination among others.[12] It is also an integral concept on the right to information and access to material necessary for repair. Holistically, it is often touted as being integral in tackling planned obsolesce, a major cause of e-waste and therefore midwifing the transformation from a linear to a circular model of production and consumption.

Be that as it may, the right to repair does not exist in isolation. Discussions in and around it, inevitably arouses questions on competition law, consumer protection,[13] intellectual property, environmental management among other contemporary thematic concerns.[14] All these themes often spawn interests and concerns unique to each discipline and at times oscillating between the seemingly irreconcilable to complementarity as drivers to innovation technological advancement.[15] A notable example herein is the debate around competition law and intellectual property.[16] Such an inquiry inevitably

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[11] Emily G. Brown, 'Time to Pull the Plug? Empowering Consumers to Make End-of-Life Decisions for Electronic Devices through Eco-Labels and Right to Repair' (2020) *Journal of Law, Technology & Policy* 227.

[12] See, Selcen Ozturkcan, 'The Right-to-Repair Movement: Sustainability and Consumer Rights' (2023) *Journal of Information Technology Teaching Cases* 1-6.

[13] Mahatab Uddin, 'Intellectual Property Rights and Competition Law for Transfer of Environmentally Sound Technologies' 34/2 (2022) *Pace International Law Review* 63.

[14] Elena Izyumenko, 'Intellectual Property in the Age of the Environmental Crisis: How Trademarks and Copyright Challenge the Human Right to a Healthy Environment' (2024) 55 *International Review of Intellectual Property and Competition Law 864 – 900;* Anthony D. Rosborough *et al,* 'Achieving a (copy)right to repair for the EU's green economy' 18/5 (2023) *Journal of Intellectual Property Law & Practice* 344 – 352; Matthew Rimmer, 'Shane Rattenbury, the Productivity Commission, and the Right to Repair: Intellectual Property, Consumer Rights, and Sustainable Development in Australia' (2022) 37 *Berkeley Technology Law Journal* 989.

[15] See, Chizaram Joy Obanu, 'Relationship between Competition Law and Intellectual Property Law' (2021) 2 *Law and Social Justice Review* 179.

[16] Ibid.

progresses on a multi-disciplinary approach which calls for balancing of competing interests of various stakeholders. More significant to this paper, manufacturers often decry among others the infringement of their intellectual property and brand dilution as the antithesis to the right to repair.[17] Such a competition at an intersection, forms the thesis of this paper. It seeks to interrogate the place of the right to repair in Kenya's consumer protection framework which encompass facets of intellectual property, competition law and environmental protection framework in the wake of aforementioned competing interests. In essence, where do we strike the appropriate balance and how?

In doing so, having contextualised the contemporary debate in the background in part 1 above, part 2 will analyse the historical basis for the right to repair, its evolution as well as its prospects in Kenya. Such historical foundation lays the basis for appreciating the development of the right to repair and context in today's framework. Part 3 will analyse the application of the right from the lenses of competition and consumer protection law. Thereafter, having grounded the right under the consumer protection legal framework embodying intellectual property, consumer protection, environmental and competition law, part 4, will seek to explore further the two main heads i.e. intellectual property and competition law. Pitting the two competing rights i.e. the right to repair emboldened by competition law against manufacturers' intellectual property rights the paper attempts to find common ground on the complementarity of the two in sustainable development and addressing the scourge of e-waste, another environmental facet of consumer protection framework. The paper argues that despite the conflicting goals in and around the two concepts, they can be mutually complementary and leverage on their respective synergies. With the benefit of the foregoing hindsight, part 5 will

[17] Ike Brannon, 'A Criticism of the 'Right to Repair' Laws' (2024) *Spring* 20; Chizaram Joy Obanu, 'Relationship between Competition Law and Intellectual Property Law' (2021) 2 *Law and Social Justice Review* 179

analyse the existing framework in Kenya noting to bring out the shortcomings and legal lacuna in Kenya's legal framework on the right to repair. As a continuum, part 6 will gather notable comparative experiences and global best lessons which will serve as a basis for the recommendations to fill in the gaps attendant to the Kenyan system and thereafter form the basis for the conclusions and recommendations posited at part 7.

2.0. An Uneasy Alliance: Historical Perspectives to the Right to Repair *vis-à-vis* Planned Obsolescence

Throughout the human evolutionary stride, repair has been a part and parcel of daily existence.[18] From early technologies, repair of everyday tools such as fishing nets, traps among other rudimentary implements were just a natural progression attendant to daily life and needs.[19] Even though the concept of the right to repair was practically non-existent, there was unfettered ability and freedom of repair.[20] However, as these early tools and their elementary repair techniques faded at the time of the industrial age, technology on replaceable and interchangeable parts developed.[21] At the initial stage, this made repairs ideal and easy. This golden age of repairability and desire for durability of consumer goods peaked with mass production of goods such as the pioneering Ford Motor Company with its founder Henry Ford initially largely advocating for repairability.[22] This was equally the case with other products such as refrigerators, computers and other consumer products that were widely

[18] See, Masayuki Hatta, 'The Right to Repair, the Right to Tinker, and the Right to Innovate' (2020) 19 *Annals of Business Administrative Science* 143–157.
[19] See, generally, Aaron Perzanowski, *The Right to Repair: Reclaiming the Things We Own* (Cambridge University Press, 2022).
[20] Ben Bridgens and others, 'Creative Upcycling: Reconnecting People, Materials and Place Through Making' (2018) 189 *Journal of Cleaner Production* 1.
[21] See, Aaron Perzanowski, *The Right to Repair: Reclaiming the Things We Own* (Cambridge University Press, 2022) 49 – 71.
[22] See, Henry Ford *et al*, *My Life and Work: Henry Ford's Universal Code for World-Class Success* (CRC Press, Taylor & Francis Group, Boca Raton 2013).

repairable.[23] With that background, it is not a coincidence that the repair movement is largely an American story founded in clamour for the right to repair vehicles among other products. In historical timescales however, this peak was short-lived. Sooner than later, even key players like the referenced Ford Motor Company and its founder Henry Ford soon adopted practices that would lessen repairability and lock out competition from independent dealers and outlets by concentrating the economic muscle in authorised dealers.[24] Inspired by altruistic economic goals, the tide slowly turned against the consumer.

That was just the beginning. As machines and consumer products improved, business almost immediately adopted linear models that eschewed the circular model, durability and capitalised on planned obsolescence.[25] The golden age of repairability was in steep decline. Inevitably, this had an inverse correlation to the right to repair which in response, increasingly gained traction through various quotas such through anti-trust legislation, human rights and consumer protection. To that end, in the initial stages of response to the proliferation of linear models, anti-trust legislation was used in America to promote open and accessible repair as was the case involving IBM, a dominant player in 1956.[26] This case somewhat pioneered the right to repair in its modern conception as IBM was compelled to facilitate the customers by providing components at fair and non-discriminatory prices.[27] Generally, the 1950's signalled the heyday of

[23] See, Daniel A. Hanley *et al,* 'Fixing America: Breaking Manufacturers' Aftermarket Monopoly and Restoring Consumers' Right to Repair' (2020) *Open Markets* 1 – 37.
[24] See, Masayuki Hatta, 'The Right to Repair, the Right to Tinker, and the Right to Innovate' (2020) 19 *Annals of Business Administrative Science* 143–157.
[25] Taiwo K. Aladeojebi, 'Planned Obsolescence' (2013) 4/6 *International Journal of Scientific & Engineering Research* 1505-1506.
[26] *United States v IBM Corp*., No. 72-344 (S.D.N.Y. 1956).
[27] Ibid.

the computer era and with it, a renaissance on the right to repair.[28] It was a response to several market factors among them, planned obsolescence. With the reinvigoration of the right to repair, the concept of planned obsolescence has also taken root. It denotes the deliberate barriers to repairability that form the thicket against which the right to repair continues to grapple with.[29] Planned obsolescence was brought about by the realisation by manufacturers that product durability and repairability was not in their best and self-interest.[30] More so, the automotive sector which erected barriers against its customers and third-party making it difficult or repair without resorting to the manufacturer of its authorised dealer.[31] Since then, and in response to such barriers, there has been growing clamour for greater control over products and repair rights that now transcends various sectors.[32] The right to repair, a 21st century offspring has come of age and now a key player in various discourses.

But that is not really all it is about, what really is the scope of this planned obsolescence? In the recent past, as alluded to above, anti-repair arsenals have grown in number and have become increasingly sophisticated. For better context, the concept of planned obsolescence as coined by the American real estate broker Benard London is in a utilitarian perspective, a concept that has outlived its usefulness.[33] Planned obsolescence is a model where

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[28] See, Dunia Zongwe *et al,* 'The Economics of Repair: Fixing Planned Obsolescence by Activating the Right to Repair in India' (2023) 6/11 *International Journal on Consumer Law and Practice* 97.
[29] See, Tim Cooper, "Slower Consumption: Reflections on Product Life Spans and the 'Throwaway Society'" (2005) 9 *Journal of Industrial Ecology* 51.
[30] See, Aaron Perzanowski, *The Right to Repair: Reclaiming the Things We Own* (Cambridge University Press, 2022) 49 – 71.
[31] See, Rajesh Kumar *et al*, 'Right to Repair is a Child of the 21st Century: A Critical Study' (2023) 10/3 *Russian Law Journal* 1047.
[32] See, Monika Negi *et al*, 'Empowering Consumers: Exploring the Interplay between Durability and the Right to Repair' (2024) 6/3 *African Journal of Biological Sciences* 3409.
[33] See, Bernard London, *Ending the Depression through Planned Obsolescence* (New York: self-published, 1932) 1 - 18.

manufacturers artificially limit the lifespan of their products.[34] The obsolescence is often two-fold i.e. psychological or functional. For psychological obsolescence, the products are made unappealing by newer models that drive consumers to new products based on aesthetics.[35] Notice the allure of that latest edition of your favourite vehicle that you desire but you cannot facelift your current model? On the other hand, functional obsolescence is where products lifespan is shortened, repair made difficult or barriers are intentionally erected to lock out independent repairers.[36] A case in point is your phone slowing down as soon as a new model hits the market.[37]

Historically, planned obsolescence served an economic purpose. It came about during the American depression as a means of increasing consumption and alleviating the economic crisis.[38] The great depression is long gone; however, concept endures to date in a consumerism driven environment in which products are designed to be redundant, inefficient or unusable within a short and pre-determined timeframe.[39] It is on that basis that contemporary legal

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[34] See, Avantika Mathur, 'Planned Obsolescence: Exploring the Role of Free Markets and Regulation in the Right to Repair Movement' (2023) *Harvard Kennedy School Student Policy Review* 1 available online at <https://studentreview.hks.harvard.edu/planned-obsolescence-exploring-the-role-of-free-markets-and-regulation-in-the-right-to-repair-movement/> accessed on 14 August 2024.

[35] See, Alicja Sielska, 'Planned Obsolescence: Gain or Loss to the Consumer?' (2019) 134 *Silesian University of Technology Publishing House* 1-10.

[36] Mette Kahlin McVeigh *et al*, *Planned Obsolescence: Built not to Last* (European Liberal Forum asbl, Brussels 2019) 7 – 11.

[37] Emanuele La Rosa, 'Planned Obsolescence and Criminal Law: A Problematic Relationship?' (2020) *Sustainability and Law: General and Specific Aspects* 1.

[38] Paul M. Gregory, 'A Theory of Purposeful Obsolescence' (1947) 14/1 *Southern Economic Journal* 22-45.

[39] Jurgita Malinauskaite and Fatih Bugra Erdem, 'Planned Obsolescence in the Context of a Holistic Legal Sphere and the Circular Economy' (2021) 41(3) *Oxford Journal of Legal Studies* 1; Lieselot Bisschop *et al,* 'Designed to Break: Planned Obsolescence as Corporate Environmental Crime' (2022) 78 *Crime, Law and Social Change* 271.

debate rests. In essence, the history of planned obsolescence is much a part and parcel of the right to repair. This right is increasingly gaining traction in response to the entrenched planned obsolescence with the same continually finding itself in municipal laws.[40] It remains work in progress across the globe and Kenya is no exception.

From the above historical facets, it is evident that right to repair is undergoing some sort of renaissance. Repair was inherent in human innovation and was the case till anti-repair practices kicked in and reinvigorated the right to repair movement. In a world of consumerism and planned obsolescence, the right to repair has been re-born as 'active disobedience' against this historical backdrop.[41] The foregoing historical foundation is therefore key in identifying the driving factors behind the right as well as the opposing ideals. It is also key in juxtaposing the debate on the right to repair within Kenya's municipal law. At present, the movement advocating for the right to repair has gained traction globally and now affects a number of industries across various technological spheres. On account of global integration and transnational movement of products and ideas, the law on one jurisdiction can affect another on that account, either positively or negatively. What began in America as a brainchild limited to electronics and the automotive industry, now has its tentacles on almost every industry across the globe.[42]

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[40] See, Ricordo J Hernandez *et al*, "Empowering Sustainable Consumption by Giving Back to Consumers the 'Right to Repair'" (2020) 12:3 *Sustainability* 850 at 854-55; Emma Fillman, 'Comprehensive Right to Repair: The Fight Against Planned Obsolescence in Canada' 32/5 (2023) *Dalhousie Journal of Legal Studies* 123; Nicholas A. Mirr, 'Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair' (2020) 105 *Iowa Law Review* 2393–2424.

[41] See, Aarti Mohan Kalnawat and Nuzhat Rizvi, 'The Right to Repair Movement: Impact and Implications' (2022) 10 *Russian Law Journal* 43.

[42] See, Jacob A. Kramer and Matthew Lechner, 'The Fight for the Right to Repair' (2024) 69(2-4) *The Antitrust Bulletin* 126-138.

3.0. Underscoring the Right to Repair as a Consumer Right in the context of Competition and Intellectual Property Law

Competition law is often understood as a law that regulates markets by ensuring that economic power is not concentrated in the hands of a few individuals in the form of a monopoly or other undesired practices.[43] It is essentially a tool for safeguarding free and fair markets and fighting practices that distort markets such as monopoly, price fixing, cartel conduct, abuse of dominance, buyer power among others while promoting free and competitive markets that guarantees supply of goods and services to consumers at competitive prices.[44] As such, competition law serves to optimise the interests of consumers.

With that, competition law is an integral concept in the overall architecture of consumer protection by feeding the macro *(in-rem)* perspective on the desired practice in markets.[45] It is one of the integral sentinels giving impetus to the right to repair in the macro-economic scale by promoting consumer autonomy and combating practices that are inimical to free markets.

In that regard, from that macro-economic consumer perspective, upon the purchase of a product for value, property ordinarily passes to the consumer and as such a *carte blanche* to do as one pleases with it such as to repair, modify or customise.[46] However, this is not ideally the case. More often than not, manufacturers retain control post sale in the form of software and repair

[43] See generally, Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 9th Edition 2015); Daniel Zimme (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).
[44] See generally, Brenda Pamela Mey, *Competition Law in Kenya* (Wolters Kluwer 2017).
[45] Simbarashe Tavuyanago, 'The Interface between Competition Law and Consumer Protection Law: An Analysis of the Institutional Framework in the Nigerian Federal Competition and Consumer Protection Act of 2019' (2020) 27/3 *South African Journal of International Affairs* 391.
[46] See, Selcen Ozturkcan, 'The Right-to-Repair Movement: Sustainability and Consumer Rights' (2023) *Journal of Information Technology Teaching Cases* 1 – 6.

support. Although necessary in the utilisation of the product, such residual control may also be ladened in unnecessary restrictions. In most cases, these restrictions are characteristically restrictive and touted by consumer protection advocates as limiting the freedom of consumers and market competition. The import is to increasingly discourage repair and push consumers to purchase new products. With foregoing, the sum effect is a consequential multiplier effect on the scourge of e-waste, natural resource strain and environmental degradation.[47] Such inevitable outcome is frowned upon in consumer justice because it infringes on among others the right to choose, right to information, bargain and redress among others.[48] Therefore, as a concept of consumer protection the right to repair discourages a 'throw away' culture, helps maintain competitive markets, promote consumer autonomy and environmental sustainability.[49]

So, what is the import of the competition law on the right to repair? In mainstream competition law framework, the concentration of power and control by manufacturers or a clique of manufacturers on their products in a way that locks out repair, modification, compatibility among others also forms under the province of competition law.[50] Contemporary literature suggest that there is a strong relationship between the right to repair, competition and

[47] See, Sein O'neill, 'European Union puts Teeth in Right to Repair' (2021) 7 *Engineering* 1197–1198; Van der Velden M, "'Fixing the world One Thing at a Time: Community Repair and a Sustainable Circular Economy" (2021) 304 *Journal of Cleaner Production* 127151.
[48] See, Subir Kumar Roy, 'Right to Repair: A Reflective Facet of Consumer Justice' (2023) 32 *Studia Iuridica Lublinensia* 11.
[49] Leah Chan Grinvald and Ofer Tur-Sinai, 'Intellectual Property Law and The Right to Repair' (2019) 88/1 *Fordham Law Review* 73.
[50] Vishal V. Agrawal and Ioannis Bellos, 'The Potential of Servicizing as a Green Business Model Management Science' (2017) 63 /5 *Management Science* 1545 – 1562.

environmental sustainability.[51] In essence, repair laws promote better competition in the market to the benefit of consumers who in turn move from a linear model of consumption to a circular one which in the long run reduces e-waste and promote environmental sustainability.[52] In that regard, the greatest dividend of the right to repair is not only the promotion of the attendant consumer rights and competitive markets but also environmental governance and sustainability.[53] This is the thesis of the right to repair movement who advocate that the same can only be attained if the manufacturers are compelled to facilitate repair and maintenance that is free of hinderance.[54] On the other hand, Competition law is the tool employed in stifling such anti-competitive conduct by limiting the post-sale residual control of manufacturers.[55] Further, it can be a tool to compel manufacturers to continue support on products that it has discontinued production like ensuring continued availability of spare parts and the overall concept of extended producer responsibility.[56]

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[51] Vishal V. Agrawal *et al*, 'Is leasing greener than selling?' (2011) 58/3 Management Science 523 – 533; Cooper DR, Gutowski TG, 'The environmental impacts of reuse: A review. Journal of Industrial' (2017) 21(1) *Ecology* 38–56.

[52] Luyi Yang *et al*, 'Right to Repair and Competition in Durable Goods Markets' (June 5, 2024). Available at SSRN: <https://ssrn.com/abstract=4854543> or <http://dx.doi.org/10.2139/ssrn.4854543> accessed on 6 June 2025.

[53] Shyam S Sharma and Arumugam Manthiram, 'Towards More Environmentally and Socially Responsible Batteries' (2020) 13(11) *Energy & Environmental Science* 1.

[54] Emily G Brown, 'Time to Pull the Plug? Empowering Consumers to Make End-of-Life Decisions for Electronic Devices through Eco-Labels and Right to Repair' (2020) *Journal of Law, Technology, and Policy* 227; Joshua Turiel, 'Consumer Electronic Right to Repair Laws: Focusing on an Environmental Foundation' (2021) 45 *William & Mary Environmental Law & Policy Review* 579.

[55] Miriam Imarhiagbe, 'The Right to Repair in EU Competition Law' (2022) 1 *Nordic Journal of European Law* 167.

[56] Marco Compagnoni, 'Is Extended Producer Responsibility Living up to Expectations? A Systematic Literature Review Focusing on Electronic Waste' (2022) 367 (3) *Journal of Cleaner Production* 133101.

The foregoing competition law utility notwithstanding, the right to repair is generally governed by the jurisprudence that upon the acquisition of a product for value, there subsists the right to use the product for the its average life and without unnecessary restrictions from the manufacturer.[57] This is especially the case for replaceable parts such as batteries that are requisite to extend the life or the utility of a product. In consumer protection therefore, the right to repair cannot therefore stand as a single silver bullet but is rather an agglomeration of several rights, concepts and ideas that in turn build it up as a right, they are the essential ingredients.[58] At the apex, is the right to information. The access to critical data on the device in question, information on manuals, repair tools among others is key in achieving the right to repair. The implementation of the right to repair promotes competition and on the other hand, competition incentivises repairability of products and weeds out unnecessary barriers. As such, the utility of competition law is an appendage in this loop, a greater but recursive architecture weaving in and around the debate on the right to repair.

On the other hand, equally compelling is the crusade against the right to repair.[59] Ostensibly, and quite predictably, this comes from the realm of intellectual property. The other lead reason, revolves around consumer safety where manufacturers decry infiltration of markets by criminals when they gain valuable information on repair and protected information.[60] With this in mind, in most instances, there is often friction when it comes to reconciling the right

[57] See, Subramanya, TR and Saroj, Nidhi, 'Is Right to Repair One's Own Good a Consumer Right? An Analysis of the Changing Dimensions of Consumer Rights in India' (2023) 11/9 *International Journal on Consumer Law and Practice* 182.
[58] Leah Chan Grinvald and Ofer Tur-Sinai, 'Intellectual Property Law and the Right to Repair' (2019) 88 *Fordham Law Review* 63.
[59] Michael A Carrier, 'How the Federal Trade Commission Can Use Section 5 to Strengthen the Right to Repair' (2022) 37 *Berkeley Technology Law Journal* 1145.
[60] Van der Velden M, 'Fixing the World one Thing at a Time: Community Repair and a Sustainable Circular economy' (2021) 304 *Journal of Cleaner Production* 127151.

to repair and the attendant intellectual property rights that subsist on the products.[61] On patented spare parts, globally, there has been instances where manufacturers have sued third parties on allegations of counterfeiting or infringing on their exclusive rights under patent law.[62] As alluded to above, intellectual property often serves a dual purpose. It can be used for good to promote market health by combating counterfeit goods but also on the downside, can be used by manufacturers to negatively consolidate and dominate the repair business. This applies for all forms of intellectual property such as trademark, patent, copyright, industrial designs and trade secrets. A look at trademark law, a case in point is the judgment of the Norwegian Supreme Court that found in favour of Apple, the mobile manufacturer against a small repair shop named PCKompaniet and run by Henrik Huseby.[63] During the trial, there arose the debate on illegal copies and compatible spare parts and which were permissible in line with the right to repair and which were illegal for infringement of Apple trademarked logo.

4.0. Competition Law and Intellectual Property Rights - Complementary Synergies?

Having contextualised the right to repair as both a consumer protection, competition law and an intellectual property question, arises the subject on its effect on intellectual property rights.[64] The proponents against the right to repair have often cited intellectual property infringement as one of the concerns against acceding to the right. Therefore, on the face of it, these two

[61] Leah Chan Grinvald and Ofer Tur-Sinai, 'Intellectual Property Law and the Right to Repair' (2019) 88 *Fordham Law Review* 63.
[62] See, *Ford Glob. Techs., LLC v New World Int'l, Inc.,* No. 3:17-CV-3201-N, 2018 WL 5786157, at *3-5 (N.D. Tex. Nov. 5, 2018).
[63] See, *Henrik Huseby v Apple Inc* HR-2020-1142-A, case no. 19-141420SIV-HRET.
[64] See, Linda M Opati, 'Intellectual Property Rights in Health – Impact on Access to Drugs' in Moni Wekesa and Ben Sihanya (eds), *Intellectual Property Rights in Kenya* (Konrad Adenauer Stiftung, Nairobi 2009) 33 – 34.

issues are somewhat belligerent and seldom complementary with one fighting off the unintended consequences of the other.[65] On the other hand, some proponents argue that there is no conflict between the objectives of intellectual property and competition policy as they both encourage innovation, healthy market competition and environmental sustainability with each checking on the excesses of the other.[66]

With this apparent conflict, it calls for a critical analysis on where exactly the sweet spot is and how to balance the inherently competing interests in the two fields. Despite their seldom complementing and opposing ideologies, both competition law and intellectual property from the lens of the right to repair, argument a common goal being sustainable development by addressing the scourge of e-waste.[67] The technological order presently obtaining, non-repairability of micro-electronic automatically translates to the ever-vexing e-waste question.[68] However, when the aspect of competition from the lens of repairability come into play, it serves to incentivise both manufacturers and consumers into adopting more sustainable circular practices and an eventual departure from liner practices. This is the essence of the entire intention behind the need to entrenched business model built on planned obsolescence by manufacturers.

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[65] See, Ian Eagles, 'Copyright and Competition Collide' (2005) 64/3 *Cambridge Law Journal* 564 – 566; Luyi Yang, 'The Unintended Consequences of Right-to-Repair Laws' (2021) *Harvard Business Review* 1.

[66] See, Herbert J. Hovenkamp, 'Intellectual Property and Competition' (2019) *All Faculty Scholarship* 1807. Moni Wekesa, 'An Overview of the Intellectual Property (IPRS) Regime in Kenya' in Moni Wekesa and Ben Sihanya (eds), *Intellectual Property Rights in Kenya* (Konrad Adenauer Stiftung, Nairobi 2009) 1 – 10.

[67] Joshua Turiel, 'Consumer Electronic Right to Repair Laws: Focusing on an Environmental Foundation' (2021) 45 *William & Mary Environmental Law and Policy Review* 579.

[68] Jamie Cross and Declan Murray, 'The Afterlives of Solar Power: Waste and Repair off the Grid in Kenya' (2018) 44 *Energy Research & Social Science* 100 – 109.

Aside from addressing environmental concerns by acting to limit e-waste, the import of competition law in addressing other human rights cannot be gainsaid. During the Corona Virus Disease of 2019 (COVID – 19) pandemic, global supply chains were broken as the same was brought about by travel restrictions and lock-downs.[69] With the resultant stretch in medical resources and facilities, inevitably witnessed an increase in the breakdown of medical equipment and machinery.[70] With the prevailing economic and global condition, the breakdown of medical equipment at this critical stage brought to fore the importance of the right to repair among other legal concerns.[71] With the ensuing measures to address and contain the spread of the viral disease and supply chains disrupted, countries explored other means of repairing the broken down equipment and whetted again the debate on the interrelationship between the right to repair and other fundamental rights such as the right to

[69] See, Scott B. Keller *et al*, 'Managing Supply Chains through the Covid-19 Pandemic: Lessons from the Field' (2024) *The 2024 Association of Marketing Theory and Practice Proceedings* 22; Chase Smith and Hajar Fatorachian, 'COVID-19 and Supply Chain Disruption Management: A Behavioural Economics Perspective and Future Research Direction' (2013) 18 *Journal of Theoretical and Applied Economic Commerce Research* 2163–2187; Kedwadee Sombultawee, 'COVID-19 and Supply Chain Management: A Review with Bibliometric' (2022) 14 *Sustainability* 3538.

[70] See, Ofer Tur-Sinai & Leah Chan Grinvald, 'Repairing Medical Equipment in Times of Pandemic' (2021) 52 *Seton Hall Law Review* 459.

[71] Pete Turner *et al,* 'The Medical Right to Repair: The Right to Save Lives' (2021) 397 *The Lancet* 1260 – 1261; Paul O. Ouma, Emelda A. Okiro, 'Assessing the Hospital Surge Capacity of the Kenyan Health System in the Face of the COVID-19 Pandemic' (2020) 15(7) *Plos One* 1.

health.[72] Most medical equipment was affected and more so ventilators.[73] This phenomenon in the form of the pandemic reminded to global citizenry of both the empowerment and the attendant fragility that abound in a globalised world.[74]

Since most medical equipment are specialised and most manufacturers control the global supply chain in relation to repair parts and maintenance, the right to repair, competition law seeks to mitigate against such and promote fundamental rights.[75] By seeking to make such medical products repairable, it drives down the cost of operation and promotes accessibility to services. In that sense, they are complementary from a utilitarian perspective and achieving other goals beyond those of the manufacturer.[76] In that regard, the right to repair looked at from the lens of competition law and human rights, militates the manufacturer to avail not only information but also facilitate repair. Since devices are made of several parts and certain parts are prone to failure compared to others, it follows that repair spare parts should be availed by the

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[72] Chase Smith and Hajar Fatorachian, 'COVID-19 and Supply Chain Disruption Management: A Behavioural Economics Perspective and Future Research Direction' (2023) 18 *Journal of Theoretical and Applied Electronic Commerce Research* 2163–218; Mohammad Reza Khodoomi *et al*, 'Effects and Challenges of the COVID-19 Pandemic in Supply Chain Management: A Text Analytics Approach' (2023) *Supply Chain Forum: An International Journal* 1 – 20; Mustafa Cagri Gurbuz *et al*, 'Global Supply Chains Risks and COVID-19: Supply Chain Structure as a Mitigating Strategy for Small and Medium-sized Enterprises' (2023) 155 *Journal of Business Research* 113407.

[73] See, Seyyed-Hadi Ghamari *et al*, 'Priorities Towards Fair Allocation of Ventilators During COVID-19 Pandemic: A Delphi Study' (2022) 8 *Frontiers in Medicine* 1 – 8.

[74] İbrahim Özdemir, 'Critical Thinking and Innovation: An Islamic Perspective' (2020) 15/2 *Journal of Technology and Operations Management* 33 – 41.

[75] Kun Liao *et al*, 'Proposing a Framework for Developing Supply Chains of Medical Devices' (2019) 12/3 *Operations and Supply Chain Management* 153 – 163.

[76] See, Ruby A. Nze-Ekpebie, 'Global Supply Chain Effects on Medical Devices' (2023) *SSRN Electronic Journal* 1 – 32; Seyedmohsen Hosseini and Dmitry Ivanov, 'A multi-layer Bayesian Network Method for Supply Chain Disruption Modelling in the Wake of the COVID-19 Pandemic (2021) *International Journal of Production Economics* 1–19.

manufacturer. In doing so, the right therefore frowns upon instances where the manufacturer employs DSM software in order to lock out unauthorised third-party repairers. Further, giving effect to this right means prohibiting the use of restrictive technologies by design or otherwise that limit the functionality of a product if one attempts to repair it otherwise other than the channels sanctioned by the manufacturer.

Aside for the information and availability of the tools necessary to undertake repair, is the subject on the design. Some of the consumer products are designed not to be repairable.[77] This directly hampers any attempts by the owner of the good or any third-party actor. An example to this is the sealed batteries in mobile phones as opposed to those with removable batteries or ink cartridges in printers that cannot be refilled. The import of competition albeit a latent tool is to dissuade such practices by ensuring that markets are competitive and goods that are of high quality and at minimal prices are produced.[78]

In conclusion therefore, despite their polar appearance, both competition law and intellectual property are complementary as each serve to check on the excesses of the other.[79] With each tampering the other to balance societal needs,

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[77] See, Nazlı Terzioglu, 'Repair Motivation and Barriers Model: Investigating User Perspectives related to Product Repair towards a Circular Economy' (2021) 289 *Journal of Cleaner Production* 125644.

[78] See, Zaur Asadzade, 'The Importance of Competition in the Formation of a Favorable Business Environment' (2024) *International Journal of Innovative Technologies in Economy* 1; Nobuo Matsubayashi, 'Price and quality competition: The effect of differentiation and vertical integration' (2007) 180/2 *European Journal of Operational Research* 907 – 921; John M. Crespi and Stéphan Marette, 'Quality and Competition: An Empirical Analysis across Industries' (2006) Working Paper 06-WP 420 available at <https://www.card.iastate.edu/products/publications/pdf/06wp420.pdf> accessed on 6 June 2025.

[79] See, Hanna Stakheyeva, 'Intellectual property and Competition Law: Understanding the Interplay' in Ashish Bharadwaj and Vishwas H. Devaiah Indranath Gupta (eds), Ashish Bharadwaj · Vishwas H. Devaiah

they both contribute to sustainable development, economic as well as social welfare improvement. When employed together, they have greater utilitarian dividend by promoting attainment of fundamental rights and freedom such as healthcare, economic rights, self-determination among others. On the other hand, it also promotes environmental sustainability by dissuading the throw-away culture brought about by the linear model of production and consumption. With this, there is reduced e-waste and less strain on the finite resources. In the end however, any policy of legislative directive or conception of the right to repair has to be carved in a manner that is consistent with intellectual property protection and competition law so as to spur innovation while at the same time promoting healthy competition and maintaining the dividends accruing to the common public.

5.0. The Right to Repair in Kenya's Legal Framework

With the enactment of the *Constitution of Kenya,* 2010 as a transformative charter,[80] the bill of rights was greatly revamped and insulated from both the inadequacies and excesses of the past.[81] Intellectual property and competition

Multi-Dimensional Approaches Towards New Technology: Insights on Innovation, Patents and Competition (Springer, Singapore 2018) 1 – 19.

[80] *In Re, the Matter of the Speaker of the Senate & another v Attorney General & 4 others* SCK Advisory Opinion No. 2 of 2013 [2013] eKLR; Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions (2015) 1 *Speculum Juris* 6. The Supreme Court contradistinguished the present constitution as a transformative charter and not merely a tool for consolidating social control as was the case in the yester years, a culmination of almost five decades for transformation representing a second independence.

[81] See generally, Morris Kiwinda Mbondenyi, Osogo Ambani, *New Constitutional Law of Kenya: Principles, Government and Human Rights* (LawAfrica Publishing, 2013) 241; John Osogo Ambani and Morris Kiwinda Mbondenyi, 'A New Era in Human rights Promotion and Protection in Kenya? An Analysis of the Salient Features of the 2010 Constitution's Bill of Rights' in Morris Kiwinda Mbondenyi *et al*, *Human Rights and Democratic Governance in Kenya: A Post - 2007 Appraisal* (Pretoria University Law Press, 2015) 17 – 37.

law, the contemporary themes of this paper, have dedicated provisions under the Constitution. First, in relation to intellectual property, the right to property, which in the erstwhile regime was not recognised as property, has now been elevated to an important facet in the corpus of cherished human possessions.[82] On the other hand, on competition law and consumer protection generally, Article 46 now guarantees the right to goods of reasonable quality, information necessary to fully utilise the goods or service, protection of consumer safety, health and economic interests as well as compensation for injury arising from defects in the goods and services.[83] All these are guarantees under an expanded bill of rights. Notably, some of these guarantees mirror the ingredients necessary for the operationalisation of the right to repair. Similarly, with this expanded bill of rights and the adoption of a purposive approach, it has made it possible for greater control and agitation by consumers giving further and greater impetus to the right to repair.

In that regard, albeit the right to repair not expressly entrenched in the Constitution, there are other ancillary rights that when interpreted against the backdrop of the expanded architecture of the bill of rights, give impetus for the applicability of this right in Kenya. More particularly, a look at the operationalisation of some of the consumer and intellectual property rights and the ensuing litigation, offer greater incentive on this budding right to repair. To illustrate this, one public spirited individual Mark Ndumia Ndung'u filed a constitutional petition against the manufacturers of Coca Cola invoking consumer rights under Article 46 of the Constitution.[84] The case revolved around non-provision of crucial nutritional information contrary to the guaranteed consumer rights, a contention that the High Court agreed. The late Justice Joseph Louis Onguto held that the nature of information required to be

[82] See, *Ann Nang'unda Kukali v Mary A. Ogolla & another* [2020] eKLR; The *Constitution of Kenya* (Repealed), 1963, Section 75; *Constitution of Kenya,* 2010, Article 40 (5).
[83] *Constitution of Kenya,* 2010, Article 40 (5); *Consumer Protection Act*, Cap. 501 Laws of Kenya.
[84] See, *Mark Ndumia Ndung'u v Nairobi Bottlers Ltd & another* [2018] KEHC 8934 (KLR).

provided by the manufacturer as required under the constitution should be clear and comprehensible. More importantly, this case cemented the fact that the right to information on consumer products inheres three qualities namely that the information should be of good quality, there must be clarity and that the utility of the same must be apparent.[85] If this is extrapolated to apply to the right to repair, the information necessary to give effect encompasses the manufacturer giving repair manuals and disclosing any other information necessary for the utility in the nature of the right to repair. This conception is further bolstered by the constitutional guarantee on access to information.[86]

With the above benefit of hindsight, looking at the provisions of the Constitution on the right to goods of reasonable quality and protection of economic interest allude to repairability? Additionally, does the decree of the High Court in the Mark Ndumia Ndungu case which was affirmed by the Court of Appeal[87] rubberstamp the existence of the goodwill for the application of the right to repair in Kenya? With the adoption of a purposive approach to interpretation, both the constitution and the statutes in question must be interpreted in a manner that gives effect to its purpose.[88] As such, looking at the interpretation taken by the Kenyan courts in relation to the right to information in consumer products and consumer protection, we can say that there is an appropriate constitutional and statutory bedrock for the development of the right to repair. In contextualising this global debate therefore, Kenya has a reception framework that can be used to develop further

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[85] Ibid, Paragraph 58.
[86] *Constitution of Kenya*, 2010, Article 35; *Access to Information Act*, Cap. 7M Laws of Kenya.
[87] See, *Nairobi Bottlers Limited v Ndung'u & another* (Civil Appeal 99 of 2018) [2023] KECA 839 (KLR) (7 July 2023) (Judgment).
[88] See, Gatirau Peter *Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No. 26 of 2014 [2014] eKLR; *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others, Ayika (Interested Party)* (Petition E016 of 2023) [2024] KEHC 2890 (KLR) (18 March 2024) (Judgment).

and chisel in policy framework and legislation the hard and fast rules as is the case for the EU in relation to specific products such as removable and replaceable batteries for mobile phones.

On the subject of healthcare and healthcare technologies, as alluded in the discussion on the complementarity of synergies between intellectual property and competition law, it is evident a balance of the two is key to fruiting the rights agenda.[89] In Kenya, as a testament to this need, the Kenyan courts have equally trail blazed this concept albeit not directly in relation to the right to repair but in the realm of generic drugs. In the case of *PAO & 2 others v Attorney General; Aids Law Project (Interested Party)*[90] Lady Justice Mumbi Ngugi (as she then was) found that the *Anti-Counterfeit Act*[91] was vague for failure to distinguish between generic and original drugs. It underscored the integral role of the right to access healthcare in the wake of intellectual property rights. It bespeaks the need to balance between economic rights and privileges attendant in intellectual property against fundamental rights and freedoms. Juxtaposing this reasoning against the ongoing debate on the right to repair and more so in the post-pandemic era, underscores the role of this right in mitigating some of the harsh consequences and exclusivity brought about by the control of manufacturers over information and spare parts for medical equipment. In essence, in the foregoing case, just as the right to access generic drugs took precedent, applying the same reasoning purposively, the right to repair has a place in Kenya's legal and constitutional framework.

Other than the constitutional provisions in and around property, intellectual property, competition and consumer protection, the right to repair also has an environmental facet and more particularly e-waste management. Generally, in

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[89] See, Linda M. Opati, 'Intellectual Property Rights in Health – Impact on Access to Drugs' in Moni Wekesa and Ben Sihanya (eds), *Intellectual Property Rights in Kenya* (Konrad Adenauer Stiftung, Nairobi 2009) 14 – 34.
[90] *PAO & 2 others v Attorney General; Aids Law Project (Interested Party)* [2012] eKLR.
[91] *Anti-Counterfeit Act*, Cap. 510 Laws of Kenya.

Kenya, e-waste is regulated by the *Environmental Management and Co-ordination Act (EMCA)*[92] which establishes the National Environmental Management Authority (NEMA) as the regulatory body as well as a basis for policy and subsidiary legislations enacted thereon. Environmental protection is at the heart of our constitutional architecture with a chapter dedicated to it.[93] This reflects the integral role in the discussion herein as the right to repair cannot meaningfully be discussed without looking at e-waste management. As the supreme law of the land, the Constitution guarantees the right to a clean and healthy environment under article 42 and the same is replicated in Section 3 of the EMCA giving the basis for promotion of environmental practices and policies that give effect to these aspirations. For a long time, Kenya did not have a specific framework on e-waste management and as such relied on the general *Waste Management Regulations,* 2006 enacted as a subsidiary legislation to the EMCA. However, in stepping up the goal on regulation of e-waste, Kenya is now in the process of coming up with regulations specific to e-waste management.[94] These regulations, aside from providing that repairers and refurbishers must ensure that e-waste is recycled in a licenced facility, no further provisions is made touching on the right to repair. Similarly, the *Sustainable Waste Management Act*, now recognises the concept of extended producer responsibility as well as waste hierarchy which recognises repair as one of the means of reducing pollution.[95]

To that end therefore, this paper concludes that Kenya albeit having a positive constitutional and statutory reception of landing grounds in relation to the

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[92] *Environmental Management Coordination Act,* Cap. 387 Laws of Kenya.
[93] See, *Constitution of Kenya*, 2010, Chapter Five, Part 2 on Environment and Natural Resources.
[94] See, National Environmental Management Authority (NEMA), 'E-Waste Guidelines' available online at <https://www.nema.go.ke/images/Docs/Regulations/Draft%20E-waste%20Regulations-1.pdf> accessed on 6 June 2025.
[95] *Sustainable Waste Management Act*, Cap. 387 Laws of Kenya, Sections 2, 13.

right to repair which is bolstered by the purposive approach to interpretation, it is lacking in specific framework. Unlike the EU which has advanced to encompass product specific directives to repairability such as mobile phones with removable and replaceable parts, Kenya still lags behind in that regard, Nonetheless, considering the nature of global commerce, such products developed in the EU may find their way into the Kenyan market and therefore the need to incentivise their importation at the expense of those that are not repairable or without replaceable parts. A look at the *East African Community Customs Management Act*, 2004 shows that there is no specific safeguard or preferential tariff for such goods. For context, the East African Community (EAC) Common External Tariff being the customised harmonised standard code nomenclature for importation of goods, has a chapter 98 and 99 reserved for contracting parties as such the EAC partner states has a schedule on sensitive items to which goods that do not promote repairability is not one of them. As such, there is need to utilise this provision to include goods that promote repairability to benefit from low tariffs while those that eschew repairability are slapped with high tariffs.

6.0. Best Lessons and Experience

It is common ground that the right to repair is a concept that is gaining global traction. However, just like any other novel concept, it has taken root in some jurisdictions thus offering valuable lessons to others playing catch-up or attempting to improve the existing systems. Evident from the discussion on Kenya's legal framework, is the fact that there is no explicit law recognising the right to repair. As such, in remedying such a lacuna and contextualising this global debate in the domestic context, Kenya must derive some valuable lessons from other jurisdictions. One such key jurisdiction with notable advances is the European Union (EU). Globally, it has not only pioneered the conception of the right to repair in its modern sense but also pioneered progressive directives that affect consumer products such as electronics globally. More particularly, within the union, the European Economic and

Social Committee (EESC) reports a significant decline in the repair industry with only 20 - 35% choosing to repair.[96] Therefore, as a key player and advocate in advancing the right to repair, it midwifed the introduction by the European Commission in 2023 of the right to repair as part of the new consumer agenda that seeks to address barriers to repair.[97] This is a step in the continuum over the last few years that has seen the clamour for extension of life of products and more importantly electronic products and promoting their repairability.[98]

As this movement gained traction within the EU, in the year 2024, parliament adopted a directive dubbed 'the right to repair' outlining the obligations of manufacturers to repair and to encourage the uptake of repair.[99] Notably, this directive obligates manufacturers to provide information on repair, repair parts and services at cost effective rates. All this is meant to entrench the legal responsibility to repair and incentivise a repair culture in lieu of the throw-away culture. Furthermore, when goods are repaired under warranty, there is a requirement that there is extension of warranty by another year. This serves both as a fight against planned obsolescence in the repair and replacement of parts and also as an incentive to consumers to repair.[100]

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[96] See, European Economic and Social Committee, 'Placing the right to repair at the core of the EU's consumer protection policy' available at <https://www.eesc.europa.eu/en/news-media/articles/placing-right-repair-core-eus-consumer-protection-policy> accessed on 5 June 2025; Johan Hultman and Herve Corvellec, 'The European Waste Hierarchy: From the Sociomateriality of Waste to a Politics of Consumption' (2012) 44/10 *Environment and Planning A: Economy and Space* 2413–2427.

[97] Ibid.

[98] Katja de Vries and Sebastian Abrahamsson, 'A Digital Right to Repair? How New EU Legislation Could Open up Data and Software in Connected Products to Enhance their Lifespan' (2024) *De Lege* 289.

[99] See, Press Room, European Parliament, 'Right to Repair: Making Repair Easier and More Appealing to Consumers'

[100] Ibid; Selcen Ozturkcan, 'The Right-to-Repair Movement: Sustainability and Consumer Rights' (2023) *Journal of Information Technology Teaching Cases* 1 – 6.

With the right to repair generally gaining traction in the EU, its parliament recently gave a directive requiring mobile phones to have a removable and replaceable batteries.[101] The aim of this directive is to facilitate repair by consumers by simply purchasing a new battery and be able to make the replacement on their own considering that current smartphones are sealed with adhesive glue and hampers the right to self-repair.[102] This move, shows advancement in the EU beyond the general provisions on the right to repair but further ventures into product specific rights that are key in facilitating the full realisation of this right.[103] Additionally, these interventions are key in promoting sustainability, reducing e-waste and generally influencing the transition from a linear to a circular economy.[104] Such a move, is a deliberate move towards reversing the scourge of planned obsolescence. These lessons and interventions are key pointers to the steps that Kenya can take in entrenching the right to repair into specific legislation, policy and institutional frameworks, more so, considering that the country has a viable constitutional framework for its application.

7.0. Conclusion and Recommendations

7.1. Conclusion

In conclusion, the role of the law in midwifing the transition from a linear model of production and consumption to a circular economy cannot be

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[101] See, Committee Notice, 'Commission Guidelines to Facilitate the Harmonised Application of Provisions on the Removability and Replaceability of Portable Batteries and LMT Batteries in Regulation (EU) 2023/1542' (C/2025/214) *Official Journal of the European Union* 1-10.

[102] Alexej Parchomenko *et al*, 'The Circular Economy Potential of Reversible Bonding in Smartphones' 41/3 *Sustainable Production and Consumption* 362–378.

[103] See, Sean Scott *et al*, 'Designing Lithium-ion Batteries for Recycle: The Role of Adhesives' (2023) 1/2 *Next Energy* 100023.

[104] Baukje Faber, 'Strategic (Re)Design of Devices with Portable Batteries - Adapting to Upcoming European Union Battery and Waste Battery Regulation' (2024) *Industrial Design Engineering Collected Publications* 1 - 5.

gainsaid.[105] From the paper herein, it is evident that the decision to repair a product rather than discarding it and purchasing a new one has a direct correlation to the environment and the scarce natural resources.[106] Such a decision albeit a social one, is informed majorly by the existing legal regime. Since manufacturers have cut a niche for themselves in the linear model of production, the law and other incentives steps in to cajole them to make products that are repairable. Therefore, in the consumer law spectrum, competition law and intellectual property protection are key in leveraging the requisite synergies to give effect to the right to repair. One checks on the excesses of the other and therefore from a utilitarian approach, they are necessary for purposes of balancing the competing interests. Together, these principles from a utilitarian angle serve to promote fundamental human rights and freedoms as well as competitive and free markets while promoting innovation and environmental sustainability.[107]

On the Kenyan framework, the paper herein finds that notwithstanding the fact that there is no specific provision on the right to repair, there is basis for its application. Both the constitutional and statutory provision on consumer protection, competition law and intellectual property interpreted purposively, ink a case for the right to repair. Further, most of the ingredients necessary for making a case for the right to repair are present in our laws and therefore with the benefit of hindsight from the analysed case law, there is a case for consumer and constitutional litigation to give effect to this right. There is not only room

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[105] See, Oxford Analytica, 'Right to Repair' Schemes will Boost Sustainability' (2020) *Expert Briefings* 1; Benjamin T. Hazen *et al*, 'From End-of-the-road to Critical Node: The Role of End-user "Consumers" in Shaping Circular Supply Chain Management' in Lydia Bals *et al* (eds.), *Circular Economy Supply Chains: From Chains to Systems* (Emerald Publishing Limited, Bingley, 2022) 151-165.
[106] See, Kristin A. Scott and Todd S. Weaver, 'To Repair or Not to Repair: What is the Motivation?' (2014) 16 *Journal of Research for Consumers* 1 – 32.
[107] See, Ahmad Fachri Faqi *et al*, 'The Right to Repair: A Perspective from Consumer Protection Law in Indonesia' (2022) 4/2 *Awang Long Law Review* 482 – 491.

for development of the law in this area but also for further legislative interventions on the subsisting legal, policy and institutional framework. The lessons borrowed from the EU, which as seen from the paper herein has the potential of permeating global commerce, may be chiselled into the Kenyan law to promote repairability as well as the inflow of repairable products while locking out those which do not promote repairability.

On that basis, flowing from the constitutional and statutory goodwill and landing ground for the application of the right to repair, the paper herein taking cue from other jurisdictions and best lessons proposes a number of administrative and legal interventions to give effect and entrench the culture of the right to repair in Kenya as detailed below. Such recommendations are also integral for the growth of the local economy and small-scale and artisanal repairers and therefore such administrative and legal intervention will be in line with the Bottom-UP Economic Transformation Agenda (BETA) and promotion of local technologies and industries. They are for a coherent and a minimalistic yet subtle means of influencing consumption and production models while addressing a wide range of issues from environmental, intellectual property, fundamental human rights and economic concerns among others.

7.2. Recommendations

One of the conclusions above is that Kenya and generally the EAC does not have a specific tariff on non-repairable goods. With this in mind, it is a legal fact that since time immemorial, taxes have often been employed as means of correcting market inefficiencies, incentivising certain practices while disincentivising others. One such means is through tariffs. Considering the EAC HS Code has specific provision on sensitive goods meant to protect the local market and goods produced within the economic block including some geographical indications such as the *kikoi,* offers a medium to promote

repairability.[108] To promote the right to repair, more specifically on imported goods, there is need to chisel in the tariff regime barriers to goods that are not repairable and to encourage the development of devices that are repairable through incentives. This can also apply to spare parts in order to make repair more competitive than the need for discarding and acquiring new products. Such reform should transcend the hardware and pave way for the installation of customised software and permissions to unlock, change and adapt a device or product to specific need.

Still on the subject of incentives and disincentives order to combat the lack of repairability or designs that are not repairable, there is need to reform Kenya's intellectual property regime and more particularly with reference to utility models and patents. Provision for a preferential model on inventions that promote repairability, customisation and adaptability may promote innovation and drive sustainability efforts.[109] This is to be coupled by provisions on access to information on repairability and incentives to grow the repair industry by making the repair sector a viable business model by manufacturers in lieu of the present liner model of production. This can be achieved through reduced patent protection for technologies and inventions necessary for repair and disclosure of repair information.[110] Other incentives

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[108] See, East African Community, *Common External Tariff 2022 Version: Annex 1 to the Protocol on the Establishment of the East African Community Customs Union* (Legal Notice No EAC/117/2022, 30 June 2022), Schedule 2 available online at <https://www.kra.go.ke/images/publications/EAC-CET-2022-VERSION-30TH-JUNE-Fn.pdf> accessed on 21 August 2025.

[109] See, Bespalova Natalia, 'Balancing Intellectual Property Rights and Sustainability Legal criteria for sustainable reuse, repair and refurbishment of IP-protected goods, and how to assess them' (Master Thesis in European and International Trade Law, Lund University 2024).

[110] Poorna Mysoor, 'Private Law, IP, and the Right to Repair' (2023) available at SSRN: <https://ssrn.com/abstract=4805033> or <http://dx.doi.org/10.2139/ssrn.4805033> accessed on 21 August 2025; Leah Chan Grinvald and Ofer Tur-Sinai, 'Defending the

include tax cuts or preferential rates for the repair industry and related tools or replacement parts that in turn spur trade in the circular direction in lieu or the present predominantly linear approach.[111]

8.0. Areas for Further Research

What permeates the research herein beyond the conclusions and recommendations is that the debate on the right to repair is an ongoing global debate. Consequently, this contemporary debate, legal concepts and competing interests form a basis, a yardstick for auditing the subsisting legal framework, identifying legal lacunas and fostering possible solutions to better entrench and reap the full benefit of the right t0 repair while striking a balance on other competing ideas. This state of affairs inevitably invites multi-disciplinary research to better contextualise the unique economic. Political and social concepts availing in Kenya that may influence the dynamics behind the operationalisation of the right. It remains work in progress as in light of the contextualisation of this paper, there is further need for specificity to the sectors like the automotive, medical and electronics sector.

Right to Repair' in Meg Leta Jones, Amanda Levendowski (eds), *Feminist Cyberlaw* (University of California Press, 2024) 25 – 32.

[111] Lisa Evers *et al*, 'Intellectual Property Box Regimes: Effective Tax rates and Tax Policy Considerations' (2014) 22 *International Tax and Public Finance* 502–530.

Bibliography

Books

Aaron Perzanowski, *The Right to Repair: Reclaiming the Things We Own* (Cambridge University Press, 2022)

Ashish Bharadwaj and Vishwas H. Devaiah Indranath Gupta (eds), *Multi-Dimensional Approaches Towards New Technology: Insights on Innovation, Patents and Competition* (Springer, Singapore 2018)

Bernard London, *Ending the Depression through Planned Obsolescence* (New York: self-published, 1932)

Brenda Pamela Mey, *Competition Law in Kenya* (Wolters Kluwer 2017)

Daniel Zimme (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012)

Henry Ford *et al*, *My Life and Work: Henry Ford's Universal Code for World-Class Success* (CRC Press, Taylor & Francis Group, Boca Raton 2013)

Lydia Bals *et al* (eds.), *Circular Economy Supply Chains: From Chains to Systems* (Emerald Publishing Limited, Bingley, 2022)

Meg Leta Jones, Amanda Levendowski (eds), Feminist Cyberlaw (University of California Press, 2024) 25 – 32

Mette Kahlin McVeigh *et al*, *Planned Obsolescence: Built not to Last* (European Liberal Forum asbl, Brussels 2019)

Moni Wekesa and Ben Sihanya (eds), *Intellectual Property Rights in Kenya* (Konrad Adenauer Stiftung, Nairobi 2009)

Morris Kiwinda Mbondenyi *et al*, *Human Rights and Democratic Governance in Kenya: A Post - 2007 Appraisal* (Pretoria University Law Press, 2015)

Morris Kiwinda Mbondenyi, Osogo Ambani, *New Constitutional Law of Kenya: Principles, Government and Human Rights* (LawAfrica Publishing, 2013)

Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 9th Edition 2015)

Journal Articles

Aaron Perzanowski, 'Consumer Perceptions of the Right to Repair' (2021) 96/2 *Indiana Law Journal* 361.

Aarti Mohan Kalnawat and Nuzhat Rizvi, 'The Right to Repair Movement: Impact and Implications' (2022) 10 *Russian Law Journal* 43

Ahmad Fachri Faqi *et al*, 'The Right to Repair: A Perspective from Consumer Protection Law in Indonesia' (2022) 4/2 *Awang Long Law Review* 482 – 491

Alexej Parchomenko *et al*, 'The Circular Economy Potential of Reversible Bonding in Smartphones' 41/3 *Sustainable Production and Consumption* 362–378

Alicja Sielska, 'Planned Obsolescence: Gain or Loss to the Consumer?' (2019) 134 *Silesian University of Technology Publishing House* 1-10

Anthony D. Rosborough *et al,* 'Achieving a (copy)right to repair for the EU's green economy' 18/5 (2023) *Journal of Intellectual Property Law & Practice* 344 – 352

Baukje Faber, 'Strategic (Re)Design of Devices with Portable Batteries - Adapting to Upcoming European Union Battery and Waste Battery Regulation' (2024) *Industrial Design Engineering Collected Publications* 1 - 5

Ben Bridgens and others, 'Creative Upcycling: Reconnecting People, Materials and Place Through Making' (2018) 189 *Journal of Cleaner Production* 1

Chase Smith and Hajar Fatorachian, 'COVID-19 and Supply Chain Disruption Management: A Behavioural Economics Perspective and Future Research Direction' (2013) 18 *Journal of Theoretical and Applied Economic Commerce Research* 2163–2187

Chizaram Joy Obanu, 'Relationship between Competition Law and Intellectual Property Law' (2021) 2 *Law and Social Justice Review* 179

Cooper DR, Gutowski TG, 'The environmental impacts of reuse: A review. Journal of Industrial' (2017) 21(1) *Ecology* 38–56

Daniel A. Hanley *et al,* 'Fixing America: Breaking Manufacturers' Aftermarket Monopoly and Restoring Consumers' Right to Repair' (2020) *Open Markets* 1 – 37

Dunia Zongwe *et al,* 'The Economics of Repair: Fixing Planned Obsolescence by Activating the Right to Repair in India' (2023) 6/11 *International Journal on Consumer Law and Practice* 97

Elena Izyumenko, 'Intellectual Property in the Age of the Environmental Crisis: How Trademarks and Copyright Challenge the Human Right to a Healthy Environment' (2024) 55 *International Review of Intellectual Property and Competition Law 864 – 900*

Emanuele La Rosa, 'Planned Obsolescence and Criminal Law: A Problematic Relationship?' (2020) *Sustainability and Law: General and Specific Aspects* 1

Emily G Brown, 'Time to Pull the Plug? Empowering Consumers to Make End-of-Life Decisions for Electronic Devices through Eco-Labels and Right to Repair' (2020) *Journal of Law, Technology, and Policy* 227

Emma Fillman, 'Comprehensive Right to Repair: The Fight Against Planned Obsolescence in Canada' 32/5 (2023) *Dalhousie Journal of Legal Studies* 123

Herbert J. Hovenkamp, 'Intellectual Property and Competition' (2019) *All Faculty Scholarship* 1807

Ian Eagles, 'Copyright and Competition Collide' (2005) 64/3 *Cambridge Law Journal* 564 – 566

İbrahim Özdemir, 'Critical Thinking and Innovation: An Islamic Perspective' (2020) 15/2 *Journal of Technology and Operations Management* 33 – 41

Ike Brannon, 'A Criticism of the 'Right to Repair' Laws' (2024) *Spring* 20; Chizaram Joy Obanu, 'Relationship between Competition Law and Intellectual Property Law' (2021) 2 *Law and Social Justice Review* 179

Ismagilova G. N *et al*, 'Asymmetric Information and Consumer Demand' (2014) 10/24 *Asian Social Science* 1 – 6

Jacob A. Kramer and Matthew Lechner, 'The Fight for the Right to Repair' (2024) 69(2-4) *The Antitrust Bulletin* 126-138

Jamie Cross and Declan Murray, 'The Afterlives of Solar Power: Waste and Repair off the Grid in Kenya' (2018) 44 *Energy Research & Social Science* 100 – 109

Jiarui Liu, 'Asymmetric Information: Insights Across Economic and Market Contexts' (2025) 166(1) *Advances in Economics Management and Political Sciences* 148-154

Johan Hultman and Herve Corvellec, 'The European Waste Hierarchy: From the Sociomateriality of Waste to a Politics of Consumption' (2012) 44/10 *Environment and Planning A: Economy and Space* 2413–2427

Joshua Turiel, 'Consumer Electronic Right to Repair Laws: Focusing on an Environmental Foundation' (2021) 45 *William & Mary Environmental Law & Policy Review* 579

Jurgita Malinauskaite and Fatih Bugra Erdem, 'Planned Obsolescence in the Context of a Holistic Legal Sphere and the Circular Economy' (2021) 41(3) *Oxford Journal of Legal Studies* 1

Katja de Vries and Sebastian Abrahamsson, 'A Digital Right to Repair? How New EU Legislation Could Open up Data and Software in Connected Products to Enhance their Lifespan' (2024) *De Lege* 289

Kayleen Manwaring, "'Slowing Down the Loop': Smart Devices and the Right to Repair" (2024) *International Review of Law, Computers & Technology* 1

Kedwadee Sombultawee, 'COVID-19 and Supply Chain Management: A Review with Bibliometric' (2022) 14 *Sustainability* 3538

Kristin A. Scott and Todd S. Weaver, 'To Repair or Not to Repair: What is the Motivation?' (2014) 16 *Journal of Research for Consumers* 1 – 32

Kun Liao *et al*, 'Proposing a Framework for Developing Supply Chains of Medical Devices' (2019) 12/3 *Operations and Supply Chain Management* 153 – 163

Leah Chan Grinvald and Ofer Tur-Sinai, 'Intellectual Property Law and the Right to Repair' (2019) 88 *Fordham Law Review* 63

Lieselot Bisschop *et al,* 'Designed to Break: Planned Obsolescence as Corporate Environmental Crime' (2022) 78 *Crime, Law and Social Change* 271

Lisa Evers *et al*, 'Intellectual Property Box Regimes: Effective Tax rates and Tax Policy Considerations' (2014) 22 *International Tax and Public Finance* 502–530

Luyi Yang, 'The Unintended Consequences of Right-to-Repair Laws' (2021) *Harvard Business Review* 1

Mahatab Uddin, 'Intellectual Property Rights and Competition Law for Transfer of Environmentally Sound Technologies' 34/2 (2022) *Pace International Law Review* 63

Marco Compagnoni, 'Is Extended Producer Responsibility Living up to Expectations? A Systematic Literature Review Focusing on Electronic Waste' (2022) 367 (3) *Journal of Cleaner Production* 133101

Masayuki Hatta, 'The Right to Repair, the Right to Tinker, and the Right to Innovate' (2020) 19 *Annals of Business Administrative Science* 143–157

Matthew Rimmer, 'Shane Rattenbury, the Productivity Commission, and the Right to Repair: Intellectual Property, Consumer Rights, and Sustainable Development in Australia' (2022) 37 *Berkeley Technology Law Journal* 989

Michael A Carrier, 'How the Federal Trade Commission Can Use Section 5 to Strengthen the Right to Repair' (2022) 37 *Berkeley Technology Law Journal* 1145

Miriam Imarhiagbe, 'The Right to Repair in EU Competition Law' (2022) 1 *Nordic Journal of European Law* 167

Mohammad Reza Khodoomi *et al*, 'Effects and Challenges of the COVID-19 Pandemic in Supply Chain Management: A Text Analytics Approach' (2023) *Supply Chain Forum: An International Journal* 1 – 20

Monika Negi *et al*, 'Empowering Consumers: Exploring the Interplay between Durability and the Right to Repair' (2024) 6/3 *African Journal of Biological Sciences* 3409

Mustafa Cagri Gurbuz *et al*, 'Global Supply Chains Risks and COVID-19: Supply Chain Structure as a Mitigating Strategy for Small and Medium-sized Enterprises' (2023) 155 *Journal of Business Research* 113407

Nazlı Terzioglu, 'Repair Motivation and Barriers Model: Investigating User Perspectives related to Product Repair towards a Circular Economy' (2021) 289 *Journal of Cleaner Production* 125644

Nicholas A Mirr, 'Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair' (2019) 105 *Iowa Law Review* 2393

Nicholas A. Mirr, 'Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair' (2020) 105 *Iowa Law Review* 2393–2424

Nobuo Matsubayashi, 'Price and quality competition: The effect of differentiation and vertical integration' (2007) 180/2 *European Journal of Operational Research* 907 – 921

Ofer Tur-Sinai & Leah Chan Grinvald, 'Repairing Medical Equipment in Times of Pandemic' (2021) 52 *Seton Hall Law Review* 459

Olumuyiwa Sunday Asaolu, 'On the Emergence of New Computer Technologies' (2006) 9(3) *Educational Technology & Society* 335-343

Oxford Analytica, 'Right to Repair' Schemes will Boost Sustainability' (2020) *Expert Briefings* 1

Paul M. Gregory, 'A Theory of Purposeful Obsolescence' (1947) 14/1 *Southern Economic Journal* 22-45

Paul O. Ouma, Emelda A. Okiro, 'Assessing the Hospital Surge Capacity of the Kenyan Health System in the Face of the COVID-19 Pandemic' (2020) 15(7) *Plos One* 1

Pete Turner *et al,* 'The Medical Right to Repair: The Right to Save Lives' (2021) 397 *The Lancet* 1260 – 1261

Rajesh Kumar *et al*, 'Right to Repair is a Child of the 21st Century: A Critical Study' (2023) 10/3 *Russian Law Journal* 1047

Ricordo J Hernandez *et al*, "Empowering Sustainable Consumption by Giving Back to Consumers the 'Right to Repair'" (2020) 12:3 *Sustainability* 850 at 854-55

Ruby A. Nze-Ekpebie, 'Global Supply Chain Effects on Medical Devices' (2023) *SSRN Electronic Journal* 1 – 32

S. Kyle Montello, 'The Right to Repair and the Corporate Stranglehold over the Consumer: Profits over People' (2020) 22 *Tulane Journal of Technology and Intellectual Property* 165

Scott B. Keller *et al*, 'Managing Supply Chains through the Covid-19 Pandemic: Lessons from the Field' (2024) *The 2024 Association of Marketing Theory and Practice Proceedings* 22

Sean Scott *et al*, 'Designing Lithium-ion Batteries for Recycle: The Role of Adhesives' (2023) 1/2 *Next Energy* 100023

Sein O'neill, 'European Union puts Teeth in Right to Repair' (2021) 7 *Engineering* 1197–1198; Van der Velden M, "'Fixing the world One Thing at a Time: Community Repair and a Sustainable Circular Economy" (2021) 304 *Journal of Cleaner Production* 127151

Selcen Ozturkcan, 'The Right-to-Repair Movement: Sustainability and Consumer Rights' (2023) *Journal of Information Technology Teaching Cases* 1-6

Seyedmohsen Hosseini and Dmitry Ivanov, 'A multi-layer Bayesian Network Method for Supply Chain Disruption Modelling in the Wake of the COVID-19 Pandemic (2021) *International Journal of Production Economics* 1–19

Seyyed-Hadi Ghamari *et al*, 'Priorities Towards Fair Allocation of Ventilators During COVID-19 Pandemic: A Delphi Study' (2022) 8 *Frontiers in Medicine* 1 – 8

Shyam S Sharma and Arumugam Manthiram, 'Towards More Environmentally and Socially Responsible Batteries' (2020) 13(11) *Energy & Environmental Science* 1

Simbarashe Tavuyanago, 'The Interface between Competition Law and Consumer Protection Law: An Analysis of the Institutional Framework in the Nigerian Federal Competition and Consumer Protection Act of 2019' (2020) 27/3 *South African Journal of International Affairs* 391

Subir Kumar Roy, 'Right to Repair: A Reflective Facet of Consumer Justice' (2023) 32 *Studia Iuridica Lublinensia* 11

Subramanya, TR and Saroj, Nidhi 'Is Right to Repair One's Own Good a Consumer Right? An Analysis of the Changing Dimensions of Consumer Rights in India' (2023) 11/9 *International Journal on Consumer Law and Practice* 182

Taiwo K. Aladeojebi, 'Planned Obsolescence' (2013) 4/6 *International Journal of Scientific & Engineering Research* 1505-1506

Tim Cooper, "Slower Consumption: Reflections on Product Life Spans and the 'Throwaway Society'" (2005) 9 *Journal of Industrial Ecology* 51

Van der Velden M, 'Fixing the World one Thing at a Time: Community Repair and a Sustainable Circular economy' (2021) 304 *Journal of Cleaner Production* 127151

Vishal V. Agrawal and Ioannis Bellos, 'The Potential of Servicizing as a Green Business Model Management Science' (2017) 63 /5 *Management Science* 1545 – 1562

Vishal V. Agrawal *et al*, 'Is Leasing Greener than Selling?' (2011) 58/3 *Management Science* 523 – 533

Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions (2015) 1 *Speculum Juris* 6

Zaur Asadzade, 'The Importance of Competition in the Formation of a Favorable Business Environment' (2024) *International Journal of Innovative Technologies in Economy* 1

Case Law

United States v IBM Corp., No. 72-344 (S.D.N.Y. 1956)

Henrik Huseby v Apple Inc HR-2020-1142-A, case no. 19-141420SIV-HRET

In Re, the Matter of the Speaker of the Senate & another v Attorney General & 4 others SCK Advisory Opinion No. 2 of 2013 [2013] eKLR

Mark Ndumia Ndung'u v Nairobi Bottlers Ltd & another [2018] KEHC 8934 (KLR)

Ann Nang'unda Kukali v Mary A. Ogolla & another [2020] eKLR

Nairobi Bottlers Limited v Ndung'u & another (Civil Appeal 99 of 2018) [2023] KECA 839 (KLR) (7 July 2023) (Judgment)

Gatirau Peter *Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No. 26 of 2014 [2014] Eklr

Katiba Institute & 8 others v Director of Public Prosecutions & 2 others, Ayika (Interested Party) (Petition E016 of 2023) [2024] KEHC 2890 (KLR) (18 March 2024) (Judgment)

PAO & 2 others v Attorney General; Aids Law Project (Interested Party) [2012] eKLR

Ford Glob. Techs., LLC v New World Int'l, Inc., No. 3:17-CV-3201-N, 2018 WL 5786157, at 3-5 (N.D. Tex. Nov. 5, 2018)

Internet Sources

Avantika Mathur, 'Planned Obsolescence: Exploring the Role of Free Markets and Regulation in the Right to Repair Movement' (2023) *Harvard Kennedy School Student Policy Review* 1 available online at <https://studentreview.hks.harvard.edu/planned-obsolescence-exploring-the-role-of-free-markets-and-regulation-in-the-right-to-repair-movement/> accessed on 14 August 2024

East African Community, *Common External Tariff 2022 Version: Annex 1 to the Protocol on the Establishment of the East African Community Customs Union* (Legal Notice No EAC/117/2022, 30 June 2022), Schedule 2 available online at <https://www.kra.go.ke/images/publications/EAC-CET-2022-VERSION-30TH-JUNE-Fn.pdf> accessed on 21 August 2025

European Economic and Social Committee, 'Placing the right to repair at the core of the EU's consumer protection policy' available at <https://www.eesc.europa.eu/en/news-media/articles/placing-right-repair-core-eus-consumer-protection-policy> accessed on 5 June 2025

John M. Crespi and Stéphan Marette, 'Quality and Competition: An Empirical Analysis across Industries' (2006) Working Paper 06-WP 420 available at <https://www.card.iastate.edu/products/publications/pdf/06wp420.pdf> accessed on 6 June 2025

Luyi Yang *et al*, 'Right to Repair and Competition in Durable Goods Markets' (June 5, 2024). Available at SSRN: <https://ssrn.com/abstract=4854543> or <http://dx.doi.org/10.2139/ssrn.4854543> accessed on 6 June 2025

National Environmental Management Authority (NEMA), 'E-Waste Guidelines' available online at <https://www.nema.go.ke/images/Docs/Regulations/Draft%20E-waste%20Regulations-1.pdf> accessed on 6 June 2025

Poorna Mysoor, 'Private Law, IP, and the Right to Repair' (2023) available at SSRN: <https://ssrn.com/abstract=4805033> or <http://dx.doi.org/10.2139/ssrn.4805033> accessed on 21st August 2025

Legislation

Access to Information Act, Cap. 7M Laws of Kenya

Anti-Counterfeit Act, Cap. 510 Laws of Kenya

Constitution of Kenya, 2010

Consumer Protection Act, Cap. 501 Laws of Kenya

Environmental Management Coordination Act, Cap. 387 Laws of Kenya

Sustainable Waste Management Act, Cap. 387 Laws of Kenya

The *Constitution of Kenya* (Repealed), 1963

Others

Bespalova Natalia, 'Balancing Intellectual Property Rights and Sustainability Legal criteria for sustainable reuse, repair and refurbishment of IP-protected goods, and how to assess them' (Master Thesis in European and International Trade Law, Lund University 2024)

Committee Notice, 'Commission Guidelines to Facilitate the Harmonised Application of Provisions on the Removability and Replaceability of Portable Batteries and LMT Batteries in Regulation (EU) 2023/1542' (C/2025/214) *Official Journal of the European Union* 1-10

Dave Sayers, Rui Sousa-Silva, Höhn Sviatlana *et al,* 'The Dawn of the Human-Machine Era: A Forecast of New and Emerging Language Technologies' (2021) *Report for EU COST Action CA19102 'Language in the Human-Machine Era (European Cooperation in Science and Technology)*

Judicial Recognition of the Admissibility of Electronic Evidence in Terrorism Cases in Kenya: A Review of the High Court Ruling in *Republic v Alias Mire Abdulahi Ali & 2 Others* Criminal Revision No. E055 of 2023 (the *Dusit D2* Case)

By: ***Michael Sang*** [*]

Abstract

This paper critically examines the High Court's ruling in the Dusit D2 case and its implications for the admissibility of electronic evidence in terrorism cases in Kenya. The core argument is that Kenyan courts must ensure that the rigid requirements of criminal procedure do not prevent the successful prosecution of terrorism offenses. With the increasing reliance on advanced technology in the commission of organized crimes, the need to avoid undue emphasis on procedural technicalities becomes paramount. The paper advocates for a more flexible legal framework that balances constitutional safeguards with the imperative of protecting national security and public safety. The analysis highlights the progressive jurisprudence established by the Dusit D2 ruling, which permits the admission of electronic evidence obtained without a warrant under exceptional circumstances.

Key Words: *Electronic evidence; Terrorism; Criminal procedure; National security; Admissibility; Kenya; Organized crime; Republic v. Alias Mire Abdulahi Ali & 2 Others*

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1. Introduction

The successful prosecution of terrorism offenses is one of the most significant challenges facing Kenya's criminal justice system.[1] With the rise of emerging forms of organized crime, often perpetrated through the use of advanced technology, law enforcement agencies must navigate complex legal and procedural hurdles.[2] In particular, the rigid requirements of criminal procedure—such as obtaining search warrants, adhering to strict timelines, and following prescribed protocols—can sometimes obstruct the effective prosecution of serious terrorism cases.[3] These procedural safeguards, while essential in upholding the rule of law, may inadvertently allow terrorists to exploit legal technicalities and evade justice.[4]

The High Court's ruling in *Republic v Alias Mire Abdulahi Ali & 2 Others*[5] (the *Dusit D2* case) serves as a critical turning point in the admissibility of electronic evidence in terrorism cases. The ruling underscores the need for Kenyan courts to adapt their approach, ensuring that procedural formalities do not hinder the fight against terrorism. By allowing the admission of evidence obtained without a warrant, the court recognized that strict adherence to criminal procedure can sometimes undermine efforts to prosecute terrorists, particularly in cases where electronic evidence plays a crucial role.

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[1] Oyiembo, R et al (2025). Prosecutorial Efficiency in Terrorism Cases in Kenya: Legal and Institutional Challenges. *International Journal of Research and Innovation in Social Sciences*, 1.

[2] Papale, S. (2022). Fuelling the Fire: Al-Shabaab, Counter-terrorism and Radicalisation in Kenya. *Critical Studies on Terrorism*, *15*(2), 356-380.

[3] United Nations Office on Drugs and Crime. (2018). Supporting Legal Responses and Criminal Justice Capacity to Prevent and Counter Terrorism 17.

[4] Shields C.A., Smith B.L. & Damphousse K.R. (2015) Prosecuting Terrorism: Challenges in the Post-9/11 World. 20 *Sociology of Crime, Law and Deviance* 1.

[5] *Republic v Alias Mire Abdulahi Ali & 2 Others* Criminal Revision No. E055 Of 2023 (the Dusit D2 Case)

The core argument of this paper is that Kenyan courts must ensure that the rigid requirements of criminal procedure do not prevent the successful prosecution of terrorism offenses. As terrorism increasingly relies on advanced technology, courts must avoid placing undue emphasis on technicalities that could obstruct justice. Instead, there is a pressing need to develop flexible legal frameworks that prioritize public safety and national security while still protecting the constitutional rights of the accused. This paper explores the implications of the Dusit D2 ruling for the future of criminal justice in Kenya, advocating for a more pragmatic approach to the prosecution of terrorism offenses in a rapidly changing digital landscape.

2. Procedural Challenges Encountered in the Prosecution of Terrorism Offences in Kenya

A significant procedural challenge in prosecuting terrorism offences in Kenya arises from the limited operating hours of the courts. Kenyan courts do not operate over weekends or beyond regular hours (1700hrs to 0900hrs). This creates complications, especially in terrorism cases where national security and public safety are at risk. The Constitution of Kenya, 2010 mandates that an arrested person must be brought before a court within 24 hours.[6] If the arrest happens outside court hours, the appearance must occur on the next court day. However, this rigid procedural timeline may hinder timely investigations, including obtaining necessary judicial orders.

In terrorism cases, there is often an urgent need to collect and secure evidence immediately after an arrest, especially given the sophisticated nature of crimes involving advanced technology.[7] Delays in obtaining warrants or judicial

[6] Constitution of Kenya, 2010 Article 49(1)(f)

[7] C.A., Smith B.L. & Damphousse K.R. (2015) Prosecuting Terrorism: Challenges in the Post-9/11 World. 20 *Sociology of Crime, Law and Deviance* 1.

approvals due to the courts being closed can result in lost opportunities to gather critical evidence.[8] In such cases, the law enforcement officers may be left with the difficult decision of gathering evidence without a warrant, risking that it may later be ruled inadmissible in court under Article 50(4) of the Constitution, which excludes illegally obtained evidence.

The traditional criminal justice system is ill-suited to address the dynamic and evolving threats posed by terrorism, which often involve sophisticated, transnational criminal networks.[9] The rigidity of the procedure, such as requirements to follow strict timelines and obtain judicial approval for every investigative step, can impede swift action that is crucial in such cases.

While protecting individual rights, such as the right to a fair trial, is critical, the nature of terrorism offences presents unique challenges. For instance, law enforcement officers might need to intercept communications or search devices without a warrant to prevent imminent threats. This balancing act between upholding constitutional safeguards and protecting national security interests creates procedural hurdles.

2.1 Addressing Procedural Limitations During Non-Court Hours

The question of what happens between Friday 1700hrs and Monday 0900hrs is crucial including what happens between sunset and sunrise from a juridical point of view. National security concerns may demand immediate judicial orders for the collection of evidence, but the absence of round-the-clock court operations leaves a gap.[10] It may be time for Kenya to consider creating

[8] Ibid
[9] Ibid
[10] United Nations Office on Drugs and Crime. (2018). Supporting Legal Responses and Criminal Justice Capacity to Prevent and Counter Terrorism 17.

exceptions or innovative mechanisms within its criminal justice system, especially for terrorism cases.[11] One potential solution is to establish a legal framework allowing for emergency judicial oversight—similar to Section 39A of the Prevention of Terrorism Act (POTA), which allows courts to admit evidence based on authenticity and accuracy without undue regard to procedural technicalities.[12]

For example, Section 39A of POTA allows courts to give more weight to the accuracy and authenticity of evidence than to procedural adherence, especially in cases where obtaining evidence is difficult or would compromise public safety. This statutory exception highlights the need for flexible approaches in dealing with terrorism cases where rigid procedures might prevent justice from being served.

3. Litigation History and Ruling of the High Court in the Dusit D2 Case

3.1 Magistrate's Court

In the Chief Magistrate's Court at Kahawa, the accused persons were initially charged with various offences under the Prevention of Terrorism Act (POTA), stemming from their involvement in the Dusit D2 terrorist attack of 15th January 2019. The trial involved a comprehensive presentation of evidence, and by 22nd February 2023, the prosecution had called 45 witnesses in support of its case.[13] The trial was expected to proceed to the defense stage, but a major evidentiary issue arose concerning the admissibility of electronic evidence.
The prosecution, during the testimony of PW38, sought to introduce several

[11] Ibid
[12] Prevention of Terrorism Act (POTA), Section 39A
[13] *Republic v Alias Mire Abdulahi Ali & 2 Others* Criminal Revision No. E055 Of 2023 (the Dusit D2 Case) paragraph 2

pieces of electronic evidence, which were derived from the forensic examination of mobile phones seized from the accused persons. The electronic evidence included data from the accused's mobile devices, Facebook accounts, and IP address reports.[14] However, this evidence was challenged by the defense, who argued that it had been obtained without a valid search warrant and in violation of the accused's rights under Article 50(4) of the Constitution.[15] The Magistrate's Court ruled on 21st February 2023 to exclude the electronic evidence, concluding that it had been obtained in contravention of the accused persons' right to privacy and without the necessary procedural safeguards. Specifically, the court found that the failure to obtain a search warrant rendered the evidence inadmissible, and it upheld the defence's objection.[16]

3.2 Revision Application

Following the ruling of the Chief Magistrate's Court, the Office of the Director of Public Prosecutions (ODPP) sought a revision of the decision by filing a Notice of Motion Application in the High Court on 4th April 2023.[17] The ODPP contended that the lower court had erred in excluding the electronic evidence and argued that the exclusion endangered national security by potentially jeopardizing the prosecution of other similar cases.

3.2.1 Key Arguments

The key arguments during the revision application in the High Court centered on the admissibility of electronic evidence that had been excluded by the Magistrate's Court. Both the prosecution and the defense presented compelling arguments to support their respective positions.

[14] Ibid, paragraph 3
[15] Ibid, paragraph 4.
[16] Ibid, paragraph 7
[17] Ibid, paragraph 8

Prosecution's Arguments:

The prosecution's primary argument was that the exclusion of the electronic evidence endangered national security and public safety. They contended that the seriousness of the terrorism charges required the court to balance individual rights with broader societal interests. The prosecution maintained that excluding the evidence would undermine the effective prosecution of terrorism-related offenses, which could adversely affect ongoing investigations in other cases. [18]

Although the prosecution acknowledged that no search warrant was obtained for the forensic examination of the mobile phones, they argued that the accused persons had voluntarily submitted their devices and provided the passwords to law enforcement without any coercion.[19]The prosecution therefore contended that the voluntary surrender of the devices negated any claim that the evidence was illegally obtained. As such, the exclusionary rule should not apply in this context.

The prosecution cited Section 39A of the Prevention of Terrorism Act (POTA), which provides that courts should focus on the authenticity and accuracy of evidence without undue regard to procedural technicalities.[20] The prosecution argued that the urgency and severity of terrorism offenses created special circumstances that justified admitting evidence even if it was obtained without a warrant. The focus should be on ensuring that justice is served, especially when national security is at risk.

The prosecution also invoked the doctrine of inevitable discovery, which

[18] Ibid, paragraph 11
[19] Ibid, paragraph 5
[20] Ibid, paragraph 36

allows for the admission of illegally obtained evidence if it can be demonstrated that the evidence would have been discovered lawfully regardless of the procedural lapse. The prosecution contended that, given the nature of the investigation, the evidence would have been discovered through lawful means even without the alleged procedural missteps.[21]

The Defence's Arguments:

The defence's key argument was that the electronic evidence had been obtained in violation of the accused persons' right to privacy under Article 31 of the Constitution. They emphasized that the search and seizure of the mobile phones were conducted without a valid search warrant, as required under Sections 118 and 121 of the Criminal Procedure Code.[22]This violation, according to the defense, rendered the evidence inadmissible under Article 50(4) of the Constitution, which excludes evidence obtained in violation of any right in the Bill of Rights.[23]

The defense insisted that the exclusionary rule should be applied strictly in terrorism cases just as it is in other criminal matters. They argued that admitting evidence obtained without a warrant would set a dangerous precedent, potentially eroding constitutional protections against unlawful searches and seizures. The defense further argued that the right to privacy and other fundamental rights should not be compromised, regardless of the seriousness of the charges.[24]

The defense contended that admitting the evidence would render the trial

[21] Ibid, paragraph 40
[22] Ibid, paragraph 4
[23] Ibid, paragraph 48
[24] Ibid, paragraph 30

unfair and detrimental to the administration of justice, as provided for under Article 50(4) of the Constitution. They argued that there was no justification for violating the procedural safeguards designed to protect the rights of the accused. The defense also pointed out that the prosecution had not demonstrated that the evidence could not have been obtained through other legal means, such as applying for a search warrant.

The defense warned of the risk of abuse if courts allowed the admission of evidence obtained without following proper legal procedures. They argued that making exceptions in terrorism cases could lead to a broader erosion of due process protections in other areas of the law.[25]

3.3 Ruling of the High Court

The High Court's ruling in the Dusit D2 case was crucial in determining whether the excluded electronic evidence, obtained without a warrant, could be admitted in a terrorism trial. The court had to balance the protection of individual constitutional rights with the pressing needs of national security and public safety.

3.3.1 Key Issues for Determination

In its decision, the High Court identified several key issues for determination. Among them was the central question of whether admitting evidence obtained without a search warrant would render the trial unfair or be detrimental to the administration of justice[26]. This question was framed within the context of Article 50(4) of the Constitution, which prohibits the use of evidence obtained in violation of any right or fundamental freedom if its admission would render the trial unfair or otherwise undermine the administration of justice.

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[25] Ibid, paragraph 30
[26] Ibid, paragraph 46

As noted in paragraph 46, the court had to consider whether admitting such evidence would violate the accused's right to a fair trial. The High Court acknowledged the competing interests in this case: the need to uphold the rights of the accused versus the public's interest in ensuring that terrorism offenses are prosecuted effectively.

The specific issues the court examined included:

1. Whether the exclusion of electronic evidence obtained without a warrant was proper under the circumstances.
2. Whether the trial would be rendered unfair or otherwise detrimental to the administration of justice if the electronic evidence was admitted.
3. Whether the urgency and seriousness of terrorism cases warranted an exception to the strict application of procedural rules.

3.3.2 Findings of the High Court

In its findings, the High Court overturned the Magistrate's Court's decision to exclude the electronic evidence and ruled that the evidence should be admitted under the specific circumstances of the case. The High Court found that the electronic evidence obtained without a warrant could be admitted in this case. The court emphasized that the nature of the terrorism offences required a balance between protecting individual rights and safeguarding national security. The court pointed out that the Prevention of Terrorism Act (Section 39A) allows the admission of evidence based on its authenticity and accuracy, without undue regard to procedural technicalities.[27]

The court recognized that the seriousness of the terrorism charges and the potential threat to public safety necessitated the admission of the electronic evidence. The court noted that the investigation into the Dusit D2 attack was

[27] Ibid, paragraph 60

urgent, and the law enforcement officers acted in good faith. Had they delayed obtaining a warrant, there was a significant risk that the evidence could have been lost or tampered with.[28]

In its ruling, the High Court also highlighted the importance of balancing the rights of the accused with the need to protect the public from imminent security threats. The court determined that the right to privacy, while fundamental, is not absolute, and it can be limited under certain circumstances, especially when national security is at stake. The court cited Article 24 of the Constitution, which permits the limitation of rights in certain cases, as well as Section 35 of the Prevention of Terrorism Act.[29]

The High Court held that admitting the electronic evidence did not violate the accused's right to a fair trial and was not detrimental to the administration of justice. The court ruled that the evidence was critical to the prosecution of the accused persons and that the exclusion of the evidence would undermine public confidence in the judicial system, particularly in the context of serious terrorism offences.[30]

Ultimately, the High Court set aside the ruling of the Chief Magistrate's Court, allowing the electronic evidence obtained without a warrant to be admitted in the ongoing terrorism trial. The court reasoned that failing to admit such crucial evidence, given the severity of the charges, would compromise the ability to prosecute the offenders effectively.[31]

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[28] Ibid, paragraphs 60-61
[29] Ibid, paragraphs 60-62
[30] Ibid, paragraphs 63-64
[31] Ibid, paragraph 66

4. The Implications of the Dusit D2 Ruling for Criminal Justice in Terrorism Cases

4.1 Balancing the Rights of the Accused and the Rights of Victims of Terrorism

The Dusit D2 ruling has significant implications for the criminal justice system, particularly in how the courts balance the rights of the accused with the rights of victims of terrorism. The ruling highlights the need to ensure that justice is served while respecting constitutional safeguards. However, in cases of terrorism, the balance should ultimately tilt in favour of the victims for several key reasons:

- **Public Safety and National Security**: Terrorism cases inherently involve national security concerns that affect the broader public, including victims[32]. The rights of individuals who have suffered directly from terrorism—such as victims of attacks—should be prioritized in order to ensure public safety and prevent future attacks. The **Dusit D2 ruling** recognizes that procedural technicalities should not stand in the way of achieving justice for victims, especially in cases where the evidence is critical to proving the involvement of the accused.
- **Victims' Right to Justice**: The primary responsibility of the criminal justice system is to deliver justice to victims.[33] In terrorism cases, victims often suffer devastating consequences, such as loss of life,

[32] Papale, S. (2022). Fuelling the Fire: Al-Shabaab, Counter-terrorism and Radicalisation in Kenya. *Critical Studies on Terrorism*, 15(2), 356-380.

[33] *Joseph Lendrix Waswa v Republic* [2020] eKLR; UK Ministry of Justice (2021). Delivering Justice for Victims: A Consultation on Improving Victims' Experiences of the Justice System.

physical harm, and psychological trauma. It is crucial that the courts prioritize the rights of victims to seek justice, even if this means allowing exceptions to rigid procedural rules, such as the exclusion of evidence obtained without a warrant.[34] The High Court ruling in the Dusit D2 case made it clear that procedural hurdles should not obstruct the prosecution of those responsible for heinous crimes like terrorism.

- **Ensuring Accountability for Terrorism Offenses**: The ruling also underscores the importance of ensuring that those responsible for acts of terrorism are held accountable.[35] While the rights of the accused to a fair trial are fundamental, the gravity of terrorism offenses—such as the Dusit D2 attack—demands a more pragmatic approach. Courts should adopt measures that ensure offenders are brought to justice, and the victims are granted closure, without compromising public safety. The Prevention of Terrorism Act (Section 39A) allows for flexibility in the admission of evidence, recognizing the unique challenges in investigating terrorism cases.

- **The Limitation of Rights in Exceptional Circumstances**: In terrorism cases, the courts may need to limit certain rights of the accused in favour of broader public interests.[36] The Dusit D2 ruling referenced Article 24 of the Constitution, which permits the limitation of rights to protect national security and public safety. The limitation of the accused's rights in this case—by admitting electronic evidence obtained without a warrant—demonstrates the court's recognition that terrorism is an exceptional crime that warrants exceptional measures. This

[34] Victim Protection Act.
[35] Ibid
[36] ibid

approach ensures that victims' rights to justice and security are upheld, even if it means placing reasonable limitations on the accused's rights.

- **Precedent for Future Terrorism Cases**: The ruling sets a significant precedent for how courts will handle future terrorism cases. By prioritizing victims' rights and public safety over procedural technicalities, the High Court has provided a framework for balancing the constitutional rights of the accused with the urgent need to protect victims from further harm. This balance is crucial in maintaining public confidence in the criminal justice system's ability to combat terrorism effectively and provide justice for victims.[37]

4.2 Admissibility of Electronic Evidence

The Dusit D2 ruling represents a significant step forward in developing jurisprudence on the admissibility of electronic evidence in terrorism cases. Courts are increasingly faced with balancing strict procedural rules against the urgent need to admit critical evidence in the fight against terrorism. The High Court's ruling in this case highlights the need for exceptions to the rigid rules of evidence and emphasizes that, in certain circumstances, courts should prioritize national security and public safety over procedural technicalities.

Progressive Development of Jurisprudence: Exceptions to the Exclusionary Rule

In paragraphs 60-66 of the ruling, the High Court made a progressive interpretation of the Prevention of Terrorism Act (POTA) by emphasizing Section 39A, which allows courts to admit evidence based on its authenticity and accuracy without undue regard to procedural technicalities. This represents a shift from rigid procedural adherence to a more flexible approach, particularly in terrorism cases where the stakes involve national security and

[37] *Joseph Lendrix Waswa v Republic* [2020] eKLR

public safety.

The court acknowledged the unique nature of terrorism offences, which often involve advanced technology and transnational criminal networks.[38] This creates significant challenges in gathering and securing evidence, particularly when time-sensitive operations are involved.[39] The ruling recognized that delaying the collection of electronic evidence to comply with traditional procedural requirements could result in the loss or destruction of crucial evidence, ultimately undermining justice.

Justifiable Exceptions to the Exclusionary Rule

The court's decision in the Dusit D2 case provides a clear framework for when exceptions to the exclusionary rule should be applied. These include:

- **National Security and Public Safety**: The ruling underscores that where there is an imminent threat to national security or public safety, as in cases of terrorism, courts should allow the admission of evidence obtained without a warrant. In paragraph 60, the court ruled that the threat posed by terrorism justifies a departure from strict procedural rules.[40]
- **Doctrine of Inevitable Discovery**: The court also referenced the doctrine of inevitable discovery, which allows for the admission of evidence that would have been discovered lawfully through ongoing investigations. In this case, law enforcement acted in good faith in obtaining the electronic evidence, and the court found that it would have been discovered through lawful means regardless.[41] This doctrine

[38] Dusit case, paragraphs 60-66
[39] Ibid
[40] Ibid, paragraph 60
[41] Ibid, paragraph 40

is a key justification for admitting evidence in cases where strict procedural requirements cannot be met due to the nature of the offence.

- **Exigent Circumstances**: Another critical exception recognized by the court is the presence of **exigent circumstances**, where immediate action is required to prevent the destruction of evidence or to address an imminent threat to human life or property. The court ruled that in terrorism cases, the risk of destruction of electronic evidence—such as data being wiped remotely—justifies the use of warrantless searches and seizures.[42]

Supporting Jurisprudence and Comparative Perspectives

The unique circumstances of terrorism and transnational organized crime reveal gaps in Kenya's current legal framework regarding the admissibility of evidence obtained without a warrant. Procedural limitations in existing statutes fail to adequately address the challenges posed by advanced technology and the digital tools used by terrorists and organized criminal networks.

In comparative jurisdictions, there is a move toward adopting a more innovative and adaptive approach to the admissibility of evidence in terrorism cases. This flexibility ensures that crucial evidence is not excluded merely due to procedural technicalities.[43]Section 39A of the Prevention of Terrorism Act serves as a statutory example that allows courts to admit evidence based on its authenticity and accuracy, provided that the chain of custody is maintained and law enforcement acted in good faith.

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[42] Ibid, paragraph 60

[43] Gatuiku, P. V. (2016). *Countering Terrorism in the Horn of Africa: A Case Study of Kenya* (Doctoral dissertation, University of Nairobi).

Moreover, additional statutory exceptions to the exclusionary rule are necessary, particularly in terrorism cases. Constitutional provisions like Article 159(2)(d) of the 2010 Constitution of Kenya mandate that justice should be administered without undue regard to procedural technicalities. In terrorism cases, courts should prioritize the authenticity and accuracy of evidence, even if it was obtained without strict adherence to procedural rules.[44]

The Way Forward: Developing Kenyan Jurisprudence

The Dusit D2 ruling sets an important precedent for the Kenyan judiciary to further develop its jurisprudence on the admissibility of electronic evidence, particularly in the context of terrorism and organized crime. Moving forward, courts should continue to identify justifiable exceptions to the exclusionary rule, ensuring that evidence critical to national security is not excluded simply due to procedural formalities.

By expanding on the High Court's reasoning in paragraphs 60-66, Kenyan courts can strike a balance between protecting individual rights and ensuring public safety. This approach not only strengthens the fight against terrorism but also reinforces the rule of law by ensuring that justice is served in a manner consistent with the Constitution and statutory law.

4.3 Criminal Procedure in the Context of Terrorism Cases

The Dusit D2 ruling is a pivotal decision in shaping the application of criminal procedure in terrorism cases within Kenya. It underscores the necessity for courts to adopt a flexible approach, particularly when dealing with crimes that pose an imminent threat to national security and public safety. The ruling recognizes that terrorism cases often demand swift and decisive action from law enforcement agencies, making it essential not to overly prioritize

[44] ibid

procedural formalities at the expense of justice.

The Need for Flexibility in Criminal Procedure

One of the key aspects of the Dusit D2 ruling is the acknowledgment that strict adherence to procedural technicalities can hinder the effective prosecution of terrorism cases. In paragraphs 60-66, the court emphasized that the Prevention of Terrorism Act (Section 39A) provides for flexibility in admitting evidence in terrorism cases without undue regard to procedural technicalities. This provision allows courts to focus on the authenticity and accuracy of evidence rather than the manner in which it was obtained, provided that its integrity is maintained.[45]

The court's ruling sets a precedent for prioritizing substance over form in criminal procedure when dealing with serious offenses like terrorism. The urgency and severity of such cases demand that law enforcement agencies be granted some leeway to act without the constraints of traditional procedural requirements. This flexibility ensures that crucial evidence is not excluded due to minor procedural errors, particularly in situations where there is a real and immediate threat to public safety.[46]

The Impact of Procedural Technicalities in Terrorism Cases

Terrorism cases often involve the use of sophisticated technology, transnational networks, and digital communications, which can complicate the process of gathering and securing evidence.[47] In such cases, a rigid application of procedural rules could result in lost opportunities to capture critical

[45] Prevention of Terrorism Act, Section 39A

[46] Omeje, K. (2021). Exploring the concept of terrorism: the morphology of organised violence. In *Routledge Handbook of Counterterrorism and Counterinsurgency in Africa* (pp. 16-32). Routledge.

[47] ibid

evidence, allowing suspects to evade justice.[48] The Dusit D2 ruling highlights that procedural technicalities should not become an obstacle to obtaining justice in cases where the stakes involve the lives and security of the public.[49] The ruling recognizes that traditional procedural safeguards, such as the requirement for search warrants or strict timelines, may not always be feasible in terrorism investigations. Delays in obtaining judicial orders, particularly in time-sensitive situations, could lead to the destruction of evidence or allow suspects to continue plotting further attacks. The court, therefore, found that in such exceptional cases, the overriding concern must be ensuring that justice is served and that public safety is preserved.

Striking a Balance: Rights vs. Public Safety

While it is crucial to protect the rights of the accused in any criminal proceeding, the Dusit D2 ruling makes it clear that, in terrorism cases, these rights must be balanced against the need to protect the public. Courts must be able to exercise discretion when it comes to procedural requirements, especially when the failure to act swiftly could have catastrophic consequences.[50] This approach allows law enforcement agencies to collect and present evidence that might otherwise be deemed inadmissible under more stringent procedural frameworks.[51]

The ruling effectively signals to lower courts that the rules of criminal procedure should not become a shield for terrorists to exploit legal loopholes. Instead, courts are encouraged to adopt a pragmatic approach that ensures the admission of relevant and reliable evidence in terrorism cases, provided that

[48] ibid
[49] ibid

[51] ibid

the rights of the accused are not grossly violated and the integrity of the evidence is maintained.[52]

4.4 Scope of the Right to Privacy in Terrorism Cases

The Dusit D2 ruling provides important guidance on the scope of the right to privacy in terrorism cases, emphasizing that privacy rights are not absolute and can be limited when public safety and national security are at stake. The court's decision reflects the need for a careful balance between protecting the individual rights of the accused and ensuring that law enforcement can effectively prosecute those involved in terrorism, which often poses a grave and immediate threat to society.

Limitation of Privacy Rights in the Context of National Security

The right to privacy, as guaranteed under Article 31 of the Constitution of Kenya, is a fundamental right that protects individuals from unlawful searches and the unwarranted collection of personal data.[53] However, the Dusit D2 ruling underscores that this right must be weighed against the need to protect national security and public safety, particularly in cases involving terrorism.

In paragraphs 60-66, the court acknowledged that while the right to privacy is critical, it is not absolute.[54] This is especially true in the context of terrorism, where the stakes involve potential loss of life, destruction of property, and destabilization of society. The court found that terrorism offenses, by their nature, require law enforcement agencies to take swift and sometimes invasive actions to prevent further attacks or gather critical evidence. As such, privacy rights can be limited where there is a demonstrable need to secure national

[53] Constitution of Kenya, 2010 Article 31

[54] Dusit case, paragraphs 60-66

security interests.[55]

Balancing Privacy and Public Interest

The ruling emphasizes the necessity of limiting privacy rights when the public interest is at risk. In cases of terrorism, where evidence may be stored on electronic devices or communicated through encrypted digital platforms, the collection and examination of such data may necessitate warrantless searches or other actions that, in normal circumstances, would be deemed a violation of privacy rights.[56]

The court highlighted that procedural technicalities, such as obtaining search warrants, may not always be feasible in situations where there is an imminent threat to public safety. For instance, terrorists may use advanced digital tools to encrypt communications, hide their activities, or destroy evidence remotely. The ruling acknowledged that if law enforcement waited for traditional judicial processes, critical evidence could be lost or tampered with, severely undermining the administration of justice.[57]

The Prevention of Terrorism Act (POTA), particularly Section 39A, provides a statutory framework that allows for the limitation of privacy rights in terrorism cases by admitting evidence that would otherwise be excluded under more rigid procedural rules. This provision underscores the importance of focusing on the authenticity and accuracy of evidence, rather than strictly adhering to procedural safeguards that may impede justice.

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[55] Nyaundi, K. (2018). Kenya: Fighting Terrorism Within and Without the Law. *Confronting Violent Extremism in Kenya*, 43.
[56] ibid
[57] ibid

The Justifiable Limitation of Privacy Rights

The court's recognition of the necessity of limiting privacy rights in terrorism cases is in line with Article 24 of the Constitution, which allows for the limitation of rights if such limitations are reasonable and justifiable in an open and democratic society. The court found that limiting the privacy rights of the accused in terrorism cases is justified by the special circumstances of such cases, which involve protecting the lives and security of innocent people.

Moreover, the court pointed out that law enforcement agencies must act in good faith when conducting searches or collecting evidence in terrorism cases. While privacy rights can be limited, the integrity of the evidence must still be maintained, and law enforcement should not abuse their powers by conducting unreasonable or unlawful searches. The limitation of privacy rights in terrorism cases should therefore be applied judiciously, ensuring that it is done in a manner that upholds both public safety and the rule of law.

4.5 Limitation of Rights in Terrorism Cases

The Dusit D2 ruling brings into sharp focus the necessity of limiting certain rights in terrorism cases, especially when public safety and national security are at risk. Both Article 24 of the Constitution of Kenya and Section 35 of the Prevention of Terrorism Act (POTA) provide the legal framework within which these limitations are justified, ensuring that the fight against terrorism can proceed effectively without unduly compromising fundamental freedoms.

Article 24 of the Constitution: A Balanced Approach to Limiting Rights

Article 24 of the Constitution[58] permits the limitation of fundamental rights, provided such limitations are reasonable and justifiable in an open and democratic society. The article ensures that any restriction of rights is

[58] Constitution of Kenya, 2010, Article 24

proportional, only extending to the degree necessary to achieve a legitimate purpose. In the context of terrorism cases, this provision becomes crucial as it allows the state to curtail certain rights when public safety, national security, or the rights of others are under threat.

The factors listed in Article 24(1) require courts to consider the nature of the right being limited, the importance of the limitation's purpose, and whether there are less restrictive means available to achieve that purpose. In terrorism cases, where the stakes often involve mass casualties, courts are tasked with weighing individual rights—such as the right to privacy—against the broader interest of protecting the public from terrorist acts.

The Dusit D2 ruling is a direct application of this balancing test. The court, in acknowledging the limitations imposed by Section 39A of POTA, emphasized that the threat of terrorism justifies certain limitations on the accused's rights, particularly where evidence is obtained without a warrant. The ruling reflects the reality that in terrorism cases, the traditional safeguards of individual rights must sometimes give way to urgent considerations of public safety.

Section 35 of the Prevention of Terrorism Act (POTA): Specific Limitations

Section 35 of POTA[59] elaborates on how certain fundamental rights can be limited in the context of terrorism. The section specifically allows for limitations on the right to privacy, the rights of arrested persons, freedom of expression, and the right to property, provided these limitations are necessary for the investigation, prevention, or detection of terrorism.

- **Limiting the Right to Privacy**: Section 35(3)(a) of POTA explicitly permits searches of persons, homes, or property, and allows for the

[59] Prevention of Terrorism Act (POTA), Section 35

seizure of possessions and the interception of private communications. These measures are essential for investigating and preventing terrorism, where the ability to gather electronic evidence quickly and discreetly is often crucial to stopping attacks before they occur. The Dusit D2 ruling highlighted this by admitting electronic evidence obtained without a warrant, recognizing that the need to secure public safety can override the accused's expectation of privacy.

- **Rights of Arrested Persons**: Under Section 35(3)(b), the rights of arrested persons, such as the right to be brought before a court within 24 hours, may be limited to ensure the protection of witnesses or to prevent interference with investigations. This limitation ensures that investigations into terrorism can proceed without hindrance, even when strict procedural safeguards cannot be met.

- **Freedom of Expression**: The freedom of expression can be limited to prevent the promotion or facilitation of terrorist activities under Section 35(3)(c). In cases where individuals use speech or media to incite or support terrorism, the limitation of this right is justified to prevent harm and preserve public order.

- **Right to Property**: The limitation on the right to property under Section 35(3)(e) allows for the detention or confiscation of property used in the commission of terrorism-related offenses. This provision ensures that any tools or assets used to facilitate terrorism are removed from circulation, thus preventing future attacks.

Justifying the Limitation of Rights in Terrorism Cases

In terrorism cases, the justification for limiting rights lies in the need to prevent imminent threats to life and national security. Both Article 24 and Section 35 of POTA ensure that these limitations are not arbitrary but are imposed within a legal framework that respects human dignity, equality, and freedom. The

Dusit D2 ruling demonstrated how these legal provisions are applied in practice, showing that while privacy and other rights are fundamental, they can be curtailed to protect the greater good in circumstances involving terrorism.

The ruling also emphasized the importance of proportionality in limiting rights. Any limitation must be reasonable and necessary, with a clear purpose tied to preventing or investigating terrorism. This approach ensures that limitations do not extend beyond what is necessary to address the specific threat posed by terrorism.

4.6 Obligation of the State to Ensure Security and Safety

The Dusit D2 ruling reaffirms the critical obligation of the State to ensure the security and safety of its citizens, particularly in the face of terrorism. The ruling emphasizes that the State has a duty not only to uphold constitutional rights but also to take necessary actions to protect the public from the severe threats posed by terrorist activities. This responsibility extends to preventing, investigating, and prosecuting terrorism offenses effectively, while ensuring that the legal framework evolves to meet the unique challenges posed by modern terrorism.

State's Obligation to Protect Against Terrorism

The Constitution of Kenya, in its preamble and various provisions, highlights the fundamental role of the State in securing the welfare of its people. This duty includes ensuring protection from threats to life, security, and property, which are often the targets of terrorist activities. In the context of terrorism, the State's obligation to protect its citizens from harm involves implementing adequate legal measures to detect, prevent, and respond to acts of terror.

The Dusit D2 ruling acknowledges this obligation, particularly in its focus on the need for law enforcement agencies to act decisively when faced with threats of terrorism. The court, by allowing the admission of evidence obtained without a warrant, underscored the importance of the State's duty to protect its citizens from imminent harm, even if it means temporarily limiting certain procedural safeguards.

Developing the Content of State Obligations

The ruling highlights the need for further development of the content of state obligations related to the protection against the harms of terrorism. In particular, this means refining legal frameworks to address the evolving nature of terrorism, which increasingly involves sophisticated technology, cross-border networks, and digital platforms. The existing legal instruments, while effective to an extent, may not fully encompass the tools necessary for the State to prevent, investigate, and prosecute terrorist acts in today's complex global landscape.

Key areas for further development include:

- **Expanding the Legal Framework for Evidence Collection**: As seen in the Dusit D2 ruling, the court recognized the challenges posed by traditional procedural rules in the face of terrorism. The evolving threat landscape requires that the State continuously review and adapt its legal framework to facilitate the timely collection of evidence, especially electronic evidence. The development of more robust legal provisions that allow for warrantless searches, surveillance, and interception of communications under strict oversight mechanisms is

essential. This ensures that the State can effectively disrupt terrorist plots while still respecting constitutional safeguards.[60]

- **Strengthening Preventive Measures**: The State's obligation extends beyond reacting to terrorist acts—it must also prevent them. This necessitates further development of legal and policy tools aimed at early detection and prevention. The ruling points to the need for the State to improve intelligence-gathering capabilities, enhance cooperation between law enforcement and technology providers, and introduce legal mechanisms that facilitate real-time access to critical information that can prevent attacks. Strengthening these preventive measures ensures that the State can fulfil its duty to protect citizens before harm occurs.[61]

- **Developing International Cooperation Frameworks**: Terrorism is often a transnational crime, with actors and operations crossing borders. The State's obligation to protect its citizens includes enhancing international cooperation with other jurisdictions. Developing frameworks for the exchange of intelligence, extradition, and cross-border enforcement are crucial in combating terrorism effectively. The State must work with international bodies and neighbouring countries to share information and resources, ensuring that terrorists cannot exploit legal gaps between jurisdictions.[62]

- **Human Rights and National Security Balance**: As the legal framework evolves, it is essential that the State continues to balance national

[60] Tyitende, R. A. (2021). *Terrorism and international counter-terrorism regime in Africa: A comparative analysis of Kenya and Tanzania* (Doctoral dissertation, Stellenbosch: Stellenbosch University).
[61] ibid
[62] ibid

security concerns with the protection of human rights. While the Dusit D2 ruling allows for the limitation of certain rights, including the right to privacy, these limitations must always be reasonable, proportionate, and subject to oversight. The development of clear guidelines on how and when these rights can be limited in the fight against terrorism is crucial to ensuring that the State fulfils its constitutional obligations without undermining the rule of law.[63]

Enhancing the Role of Law Enforcement and Judicial Oversight

The State's obligation to ensure security and safety also requires the strengthening of law enforcement agencies and the judiciary's capacity to deal with terrorism cases. This involves providing adequate training and resources to law enforcement personnel to handle the complexities of terrorism investigations, particularly with regard to handling digital evidence and navigating international cooperation. Additionally, the judiciary must be empowered to exercise oversight in a manner that balances effective law enforcement with the protection of constitutional rights.[64]

Conclusion

The Dusit D2 ruling marks a significant development in the prosecution of terrorism cases in Kenya, highlighting the urgent need for the criminal justice system to adapt to the evolving nature of organized crime and advanced technology. The ruling establishes a precedent for allowing electronic evidence to be admitted even when obtained without strict adherence to traditional procedural requirements, reflecting the recognition that rigid criminal procedure can sometimes obstruct the pursuit of justice in terrorism cases.

As this paper has argued, it is imperative that Kenyan courts strike a balance between upholding constitutional rights and ensuring that procedural

[63] ibid

[64] ibid

technicalities do not hinder the effective prosecution of serious crimes. Terrorism, by its very nature, presents unique challenges that demand a more flexible approach in the gathering and admissibility of evidence. Courts must be willing to adapt to these challenges by developing progressive jurisprudence that allows for exceptions to the exclusionary rule, particularly in cases where national security and public safety are at stake.

The core take-away from the Dusit D2 case is that criminal procedure should serve the broader goal of justice rather than becoming an obstacle to it. Kenyan courts must ensure that technicalities do not prevent successful prosecutions, especially in the context of terrorism, where the stakes are often exceptionally high. Moving forward, there is a need for continued legal reforms and judicial innovation that allow the justice system to remain agile and effective in combating terrorism, while still respecting the rule of law and protecting individual rights.

By embracing a more pragmatic approach, the Kenyan legal system can continue to evolve in its fight against terrorism, ensuring that justice is not only done but seen to be done, even in the most challenging of cases.

References

Constitution of Kenya, 2010

Gatuiku, P. V. (2016). *Countering Terrorism in the Horn of Africa: A Case Study of Kenya* (Doctoral dissertation, University Of Nairobi).

Nyaundi, K. (2018). Kenya: Fighting Terrorism Within and Without the Law. *Confronting Violent Extremism in Kenya*, 43.

Omeje, K. (2021). Exploring the concept of terrorism: the morphology of organised violence. In *Routledge Handbook of Counterterrorism and Counterinsurgency in Africa* (pp. 16-32). Routledge.

Oyiembo, R. et al (2025). Prosecutorial Efficiency in Terrorism Cases in Kenya: Legal and Institutional Challenges. *International Journal of Research and Innovation in Social Sciences*, 1.

Papale, S. (2022). Fuelling the fire: Al-Shabaab, counter-terrorism and radicalisation in Kenya. Critical Studies on Terrorism, 15(2), 356-380.
Prevention of Terrorism Act

Republic V Alias Mire Abdulahi Ali & 2 Others Criminal Revision No. E055 Of 2023

Tyitende, R. A. (2021). *Terrorism and international counter-terrorism regime in Africa: A comparative analysis of Kenya and Tanzania* (Doctoral dissertation, Stellenbosch: Stellenbosch University).

Balancing Environmental Conservation and the need for Renewable Energy Developments

By: ***Hon. Prof. Kariuki Muigua****

Abstract

This paper critically examines how to balance environmental conservation and the need for renewable energy developments. It argues that renewable energy developments are vital in fast-tracking global energy transition. However, the paper also notes that renewable energy developments can fuel environmental concerns. The paper discusses some of the major environmental impacts of renewable energy developments. In light of these concerns, the paper proposes measures towards balancing environmental conservation and the need for renewable energy developments in order to realise energy transition for Sustainable Development.

1.0 Introduction

Renewable energy refers to energy that is derived from natural sources that are replenished at a higher rate than they are consumed[1]. Renewable energy has also been defined as non-fossil energy generated from natural non-depleting resources including but not limited to solar energy, wind energy, biomass energy, biological waste energy, hydro energy, geothermal energy and ocean and tidal energy[2]. Renewable energy can also be described as energy that

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[1] United Nations., 'What is Renewable Energy?' Available at https://www.un.org/en/climatechange/what-is-renewable-energy (Accessed 29/07/2025)

[2] Energy Act, No. 1 of 2019, Government Printer, Nairobi

comes from resources that nature replenishes on a human timescale such as sunlight, wind, tides, waves, and geothermal heat[3].

Renewable energy is a healthy and sustainable option for both people and planet. The economic, societal and environmental benefits of renewable sources of energy are numerous. For example, renewable sources of energy are available in abundance, cheaper and are a healthier option for people and the planet[4]. In addition, generating renewable energy creates far lower emissions than burning fossil fuels[5]. It has been argued that most renewable energy sources produce zero carbon emissions and minimal air pollutants[6]. Renewable sources of energy such as solar power, wind power, hydropower, geothermal energy and biomass are therefore considered as clean energy[7].

Due to its importance for people and planet, renewable energy is at the heart of energy transition. Energy transition refers to the shift in the global energy sector from fossil-based systems of energy production and consumption including oil, natural gas and coal to renewable energy sources like wind, geothermal and solar[8]. It involves the long-term structural change to energy

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[3] Dale. V.H., 'Incorporating bioenergy into sustainable landscape designs' *Renewable and Sustainable Energy Reviews*., Volume 56, 2016, pp 1158-1171

[4] United Nations., 'Climate Action.' Available at https://www.un.org/en/climatechange/howcommunities-are-embracing-renewable-energy (Accessed on 29/07/2025)

[5] United Nations., 'What is Renewable Energy?.' Available at https://www.un.org/en/climatechange/what-is-renewable-energy (Accessed on 28/09/2023)

[6] What is Renewable Energy?., Available at https://www.ibm.com/think/topics/renewable-energy (Accessed on 29/07/2025)

[7] Ibid

[8] S & P Global., 'What is Energy Transition?' Available at https://www.spglobal.com/en/researchinsights/articles/what-is-energy-transition (Accessed on 29/07/2025)

systems from fossil-fuel based systems to cleaner and sustainable systems such as renewable sources of energy towards tackling environmental threats including climate change and pollution[9]. Energy transition therefore focuses on shifting from an energy mix based on fossil fuels to one that produces very limited, if not zero, carbon emissions, based on green and clean sources of energy such as renewable energy sources[10]. According to the International Energy Agency (IEA), renewables, including solar, wind, hydropower, biofuels and others, are at the centre of the transition to less carbon-intensive and more sustainable energy systems[11].

The global quest for energy transition is envisioned under the United Nations *2030 agenda for Sustainable Development*[12]. Under the Agenda, Sustainable Development Goal (SDG) 7 seeks to ensure access to affordable, reliable, sustainable and modern energy for all with a focus on renewable energy[13]. At a continental level, African Union's *Agenda 2063*[14] sets out the need for energy transition in Africa. Agenda 2063 portrays the vision of a Continent where renewable energy including wind, solar, hydro, bioenergy, ocean tidal waves, geothermal and other renewables claim more than half of the energy

[9] Nalule. V., & Leal-Arcas. R., 'Energy Decentralization and Energy Transition in Poland.' *Electricity Decentralization in the European Union* 2nd Edition., 2023 pp 209-240
[10] The energy transition., Available at https://www.enelgreenpower.com/learning-hub/energy-transition (Accessed on 27/04/2025)
[11] International Energy Agency., 'Renewables' Available at https://www.iea.org/energy-system/renewables (Accessed on 29/07/2025)
[12] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf (Accessed on 29/07/2025)
[13] ibid
[14] Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 29/07/2025)

consumption for households, businesses and organizations[15].

In order to fast-track global energy transition, there has been an increase in renewable energy developments[16]. It has been observed that renewable energy generation capacity has grown rapidly all over the world in recent years, driven by policy support and sharp cost reductions for solar photovoltaics and wind power[17]. Renewable energy developments are therefore necessary in harnessing renewable energy towards achieving energy transition. Despite their role in energy transition, it has been argued that renewable energy developments can have adverse environmental impacts including biodiversity loss, land use changes, impacts on water quality and quantity, and environmental degradation[18]. Addressing these impacts is key towards effectively harnessing renewable energy for people and planet.

This paper critically examines how to balance environmental conservation and the need for renewable energy developments. It argues that renewable energy developments are vital in fast-tracking global energy transition. However, the paper also notes that renewable energy developments can fuel environmental concerns. The paper discusses some of the major environmental impacts of renewable energy developments. In light of these concerns, the paper proposes measures towards balancing environmental conservation and the need for renewable energy developments in order to realise energy transition for Sustainable Development.

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[15] Ibid
[16] International Energy Agency., 'Renewables' Op Cit
[17] Ibid
[18] Environmental Impacts of Renewable Energy Sources., Available at https://www.adecesg.com/resources/blog/environmental-impacts-of-renewable-energy-sources/ (Accessed on 29/07/2025)

2.0 Renewable Energy Developments: Promises and Pitfalls

Renewable energy developments are on the rise globally. Driven by the global energy crisis, the environmental impacts of fossil fuels and policy momentum, renewable energy projects, in particular solar photovoltaic and wind energy, have grown drastically[19]. Renewable energy developments are also being implemented in Africa. It has been observed that Africa has immense potential for renewable energy with wind, solar, hydro, bioenergy, ocean tidal waves, geothermal among other renewables being abundant throughout the continent[20]. Africa is rich in renewable energy resources, including abundant sunlight, strong winds, and geothermal energy[21]. As a result, there has been an increase in investments and adoption of renewable energy in Africa. It has been observed that the production of renewable energy in Africa is growing with hydro, solar, wind, geothermal, biofuels and biomass accounting for a significant percentage of the total primary energy produced in the continent[22]. Renewable energy investments are beginning to bear fruit in several African countries with wind and solar power dominating non-hydro renewable energy generation and installed capacity[23].

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[19] United Nations Environment Programme., 'Renewable Energy' Available at https://www.unep.org/topics/energy/renewable-energy/renewable-energy (Accessed on 30/07/2025)

[20] Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

[21] AUDA-NEPAD., 'Empowering Africa: Enhancing Access To Electricity Through Renewable Energy' Available at https://www.nepad.org/blog/empowering-africa-enhancing-access-electricity-through-renewable-energy (Accessed on 30/07/2025)

[22] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Available at Available at https://unctad.org/publication/commodities-glance-special-issue-access-energy-sub-saharan-africa#:~:text=Access%20to%20energy%20is%20defined,be%20scaled%20up%20over%20time (Accessed on 30/07/2025)

[23] United Nations., 'Advancing SDG 7 in Africa.' Available at https://sdgs.un.org/sites/default/files/2023-

Renewable energy developments are therefore vital in the quest towards energy transition. Further, it has been argued that these projects can also enhance energy security and promote energy justice by fostering the attainment of the right of access to clean, affordable and sustainable energy[24]. Renewable energy developments provide many benefits including new industrial opportunities and jobs, greater energy security, cleaner air, universal energy access and a safer climate for everyone[25]. It has been argued that renewable energy projects can foster Sustainable Development by reducing greenhouse gas emissions, improving energy access and security, creating jobs, and stimulating socio-economic development across education, healthcare, transport and infrastructure, water and sanitation among other vital areas[26]. In addition, to fast-tracking energy transition, it has been argued that renewable energy developments provide added benefits of stimulating employment and economic growth, which move the world closer to a low-carbon economy[27].

Despite providing benefits for people and planet, renewable energy developments can have adverse environmental impacts. For example, clearing

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06/2023%20Advancing%20SDG7%20in%20the%20Africa-062923.pdf (Accessed on 30/07/2025)

[24] Nizic. M.K., 'The Advantages and Disadvantages of Renewable Energy in the Tourist Destination.' Available at https://www.researchgate.net/publication/320584990_The_Advantages_and_Disadvantages_of_Renewable_Energy_in_the_Tourist_Destination (Accessed on 30/07/2025)

[25] International Energy Agency., 'The Energy World is Set to Change Significantly by 2030, Based on Today's Policy Settings Alone' Available at https://www.iea.org/news/the-energy-world-is-set-to-change-significantly-by-2030-based-on-today-s-policy-settings-alone (Accessed on 30/07/2025)

[26] The role of renewable energy technologies in sustainable development., Available at https://timesofindia.indiatimes.com/blogs/voices/the-role-of-renewable-energy-technologies-in-sustainable-development/ (Accessed on 30/07/2025)

[27] The Global Environment Facility., 'Renewable Energy and Energy Access' Available at https://www.thegef.org/what-we-do/topics/renewable-energy-and-energy-access (Accessed on 30/07/2025)

land to support renewable energy developments such as wind and geothermal projects can impact wildlife, biodiversity and ecosystems[28]. The production of renewable energy also depends on harnessing critical raw materials. These materials including copper, lithium, nickel, cobalt and rare earth elements are vital components of many of today's rapidly growing renewable energy technologies including wind turbines, electricity networks and electric vehicles[29]. IEA notes that the use of critical raw materials in the energy sector varies by technology; for instance, lithium, nickel, cobalt, manganese and graphite are crucial in enhancing battery performance; rare earth elements are essential for permanent magnets used in wind turbines and electric vehicle motors; and electricity networks need a huge amount of aluminium and copper[30]. The extraction of critical raw materials to support renewable energy technologies often takes a huge toll on the environment and natural resources[31]. It has been argued that unsustainable extraction of critical raw materials can fuel environmental degradation, deforestation, pollution, and biodiversity loss[32]. The extraction of critical raw materials is also associated with significant greenhouse gas emissions arising from energy-intensive mining and processing activities which can worsen the climate crisis[33].

Further, it has been argued that poorly planned hydropower projects can impact ecosystems and biodiversity while also generating greenhouse gas

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[28] Environmental Impacts of Renewable Energy Sources., Op Cit
[29] International Energy Agency., 'Critical Minerals' Available at https://www.iea.org/topics/critical-minerals (Accessed on 30/07/2025)
[30] Ibid
[31] United Nations Environment Programme., 'What are energy transition minerals and how can they unlock the clean energy age?' Available at https://www.unep.org/news-and-stories/story/what-are-energy-transition-minerals-and-how-can-they-unlock-clean-energy-age (Accessed on 30/07/2025)
[32] Ibid
[33] Ibid

emissions[34]. Hydropower projects often require the building of dams that can disrupt fish migrations and create reservoirs that emit large amounts of greenhouse gases[35]. Further, harnessing renewable energy from the ocean through tidal power projects can impact marine environments and harm marine biodiversity including fish and other species[36]. Renewable energy developments including hydropower projects can also impact water quality and quantity[37].

From the foregoing, it is evident that renewable energy developments can have negative environmental impacts. Balancing environmental conservation and the need for renewable energy developments is therefore key in actualising energy transition for people and planet.

3.0 Balancing Environmental Conservation and the need for Renewable Energy Developments

Renewable energy developments are needed globally in order to support the transition from fossil fuels to clean sources of energy. These projects also support energy justice, energy security, job creation and socio-economic development across key sectors including education, healthcare, agriculture, transport and infrastructure, water and sanitation among others[38]. Renewable energy developments are therefore vital in unlocking Sustainable Development. SDG 7 urges all countries to promote investments and expand infrastructure in the renewable energy sector towards ensuring universal

[34] Environmental Impacts of Renewable Energy Sources., Op Cit
[35] Ibid
[36] Tidal Power., Available at https://www.eia.gov/energyexplained/hydropower/tidal-power.php (Accessed on 30/07/2025)
[37] Environmental Impacts of Renewable Energy Sources., Op Cit
[38] The role of renewable energy technologies in sustainable development., Op Cit

access to affordable, reliable, sustainable and modern energy for all[39]. Despite their vital importance, renewable energy developments can also trigger environmental concerns such as biodiversity loss, pollution, environmental degradation, climate change from greenhouse gases emitted due to unsustainable extraction of critical raw materials, and impacts on water quality and quantity[40].

In light of the foregoing challenges, it is imperative to balance environmental conservation and the need for renewable energy developments. In order to achieve this ideal, it is imperative to plan and implement renewable energy developments in an effective and sustainable manner[41]. It has been argued that greenhouse gas emissions during manufacturing, construction, and maintenance of renewable projects depend largely on how efficiently energy is used as well as the degree of pollution control at the manufacturing site[42]. As a result, there is need to effectively plan renewable energy developments including through involving local communities where such developments are situated in order to ensure that such projects minimise impacts on the environment[43].

There is also need to ensure efficient use of resources such as water and energy in renewable energy developments. It has been argued that the impacts of wind and solar projects can be successfully mitigated through longer lifetimes,

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[39] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit
[40] Environmental Impacts of Renewable Energy Sources., Op Cit
[41] What are the environmental impacts of renewable energy?., Available at https://www.wilderness.org/news/blog/faq-what-are-environmental-impacts-renewable-energy (Accessed on 30/07/2025)
[42] Ibid
[43] Ibid

larger power capacities, and higher recycling rates[44]. For instance, a plant with a higher capacity and longer lifetime produces larger amounts of energy with lower relative emissions[45]. Consequently, it has been argued that renewable energy developments should be based on large-scale plants, with efficient operation and high end-life recycling rates in order to foster environmental conservation[46].

In addition, it is imperative to harness critical raw materials that support renewable energy developments in a sustainable manner. It has been argued that there is need to embrace responsible extraction practices in harnessing critical raw materials in order to achieve socially just and environmentally sustainable outcomes[47]. It has been suggested that developing circular economy and waste policies to reduce the generation of waste and the input of raw materials in products can enhance sustainability in harnessing critical raw materials[48]. By fostering responsible mining and ensuring circularity through recycling, reusing, and remanufacturing products and components, it is possible to ensure stability in supply of critical raw materials while reducing demand through responsible sourcing and resource circulation[49].

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[44] Torres. J.F., & Petrakopoulou. F., 'A Closer Look at the Environmental Impact of Solar and Wind Energy' Available at https://pmc.ncbi.nlm.nih.gov/articles/PMC9360340/ (Accessed on 30/07/2025)
[45] Ibid
[46] Ibid
[47] United Nations Environment Programme., 'Critical Energy Transition Minerals' Op Cit
[48] Organisation for Economic Co-operation and Development., 'Making critical minerals work for sustainable growth and development' Available at https://www.oecd.org/en/topics/policy-issues/sustainable-mining-for-development.html (Accessed on 30/07/2025)
[49] United Nations Environment Programme., 'Critical Energy Transition Minerals' Op Cit

4.0 Conclusion

Renewable energy developments are the heart of sustainability by ensuring energy transition and supporting job creation and socio-economic development. However, if not implemented appropriately, these projects can also harm the environment. It is therefore imperative to ensure that renewable energy developments are implemented in an environmentally, culturally and socially responsible manner including through involving local communities in order to ensure that such projects are located in appropriate places that avoid or minimize such environmental impacts, conserving water and energy among other resources, protecting biodiversity, embracing circularity and developing large-scale plants, with efficient operation and high end-life recycling rates[50]. Balancing environmental conservation and the need for renewable energy developments is therefore possible towards realising energy transition for sustainability.

[50] Torres. J.F., & Petrakopoulou. F., 'A Closer Look at the Environmental Impact of Solar and Wind Energy' Op Cit

References

Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf

AUDA-NEPAD., 'Empowering Africa: Enhancing Access To Electricity Through Renewable Energy' Available at https://www.nepad.org/blog/empowering-africa-enhancing-access-electricity-through-renewable-energy

Dale. V.H., 'Incorporating bioenergy into sustainable landscape designs' *Renewable and Sustainable Energy Reviews*., Volume 56, 2016, pp 1158-1171

Energy Act, No. 1 of 2019, Government Printer, Nairobi

Environmental Impacts of Renewable Energy Sources., Available at https://www.adecesg.com/resources/blog/environmental-impacts-of-renewable-energy-sources/

International Energy Agency., 'Critical Minerals' Available at https://www.iea.org/topics/critical-minerals

International Energy Agency., 'Renewables' Available at https://www.iea.org/energy-system/renewables

International Energy Agency., 'The Energy World is Set to Change Significantly by 2030, Based on Today's Policy Settings Alone' Available at https://www.iea.org/news/the-energy-world-is-set-to-change-significantly-by-2030-based-on-today-s-policy-settings-alone

Nalule. V., & Leal-Arcas. R., 'Energy Decentralization and Energy Transition in Poland.' *Electricity Decentralization in the European Union* 2nd Edition., 2023 pp 209-240

Nizic. M.K., 'The Advantages and Disadvantages of Renewable Energy in the Tourist Destination.' Available at https://www.researchgate.net/publication/320584990_The_Advantages_and_Disadvantages_of_Renewable_Energy_in_the_Tourist_Destination

Organisation for Economic Co-operation and Development., 'Making critical minerals work for sustainable growth and development' Available at https://www.oecd.org/en/topics/policy-issues/sustainable-mining-for-development.html

S & P Global., 'What is Energy Transition?' Available at https://www.spglobal.com/en/researchinsights/articles/what-is-energy-transition

The energy transition., Available at https://www.enelgreenpower.com/learning-hub/energy-transition

The Global Environment Facility., 'Renewable Energy and Energy Access' Available at https://www.thegef.org/what-we-do/topics/renewable-energy-and-energy-access

The role of renewable energy technologies in sustainable development., Available at https://timesofindia.indiatimes.com/blogs/voices/the-role-of-renewable-energy-technologies-in-sustainable-development/

Tidal Power., Available at https://www.eia.gov/energyexplained/hydropower/tidal-power.php

Torres. J.F., & Petrakopoulou. F., 'A Closer Look at the Environmental Impact of Solar and Wind Energy' Available at https://pmc.ncbi.nlm.nih.gov/articles/PMC9360340/

United Nations Conference on Trade and Development., 'Commodities at a

Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Available at Available at https://unctad.org/publication/commodities-glance-special-issue-access-energy-sub-saharan-africa#:~:text=Access%20to%20energy%20is%20defined,be%20scaled%20up%20over%20time

United Nations Environment Programme., 'Renewable Energy' Available at https://www.unep.org/topics/energy/renewable-energy/renewable-energy

United Nations Environment Programme., 'What are energy transition minerals and how can they unlock the clean energy age?' Available at https://www.unep.org/news-and-stories/story/what-are-energy-transition-minerals-and-how-can-they-unlock-clean-energy-age

United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf

United Nations., 'Advancing SDG 7 in Africa.' Available at https://sdgs.un.org/sites/default/files/2023-06/2023%20Advancing%20SDG7%20in%20the%20Africa-062923.pdf

United Nations., 'Climate Action.' Available at https://www.un.org/en/climatechange/howcommunities-are-embracing-renewable-energy

United Nations., 'What is Renewable Energy?.' Available at https://www.un.org/en/climatechange/what-is-renewable-energy

United Nations., 'What is Renewable Energy?' Available at

https://www.un.org/en/climatechange/what-is-renewable-energy

What are the environmental impacts of renewable energy?., Available at https://www.wilderness.org/news/blog/faq-what-are-environmental-impacts-renewable-energy

What is Renewable Energy?., Available at https://www.ibm.com/think/topics/renewable-energy

The Forgotten Gender? A Critical Analysis of Boy Child Marginalization in The Era of Girl Child Empowerment in Kenya

By: ***Dr Nelly Wamaitha, PhD***[1]

Abstract

Although gender inequality frameworks around the world and in Kenya place the empowerment of the girl child at the center of national and international discourse, boy child empowerment has been an undercurrent in the new social and legal paradigm. The discourse has so far revolved around the social and moral need to empower the girl child, without any structured, coordinated policy for boy child re-orientation in a new paradigm of rights, roles, and relationships. The paper examines the research desk to explore how this gendered asymmetry can be read in Kenya in light of the growing marginalization of the boy child. The paper traces the history of girl child empowerment globally and in Kenya, explores the social and institutional neglect of the boy child, and identifies the psychosocial implications of this negligence in male mental health challenges, education gaps, and gender-based violence. It draws on legal studies, sociology, education, and gender theory from across the world and grounds the discussion in African contexts. The paper makes the argument that a more balanced and inclusive gender paradigm is needed to address and address the inequalities that exist in current frameworks. The paper ends by offering a gender-sensitive model for policy, which is anchored in both boys and girls.

Key words*: Boy child; marginalization crisis; gender; Patriarchy; Inclusive gender policy and legal reforms; Psychosocial wellbeing*

1. Introduction

The history of gender equity in Kenya and around the world has been a long

[1] *LLM, Ph.D, An advocate of the High court of Kenya*

and winding one, and the current push to empower the girl child is the latest chapter in this narrative. In Kenya, frameworks such as the Constitution of Kenya 2010, the Basic Education Act, and the Vision 2030 have created a legal and institutional framework for the girl child to have a seat at the table, to have her rights protected, to have her education guaranteed, and to be at the center of the national discourse. This effort has borne fruits with the number of girls completing primary and secondary school close to 50 percent, girls accessing leadership roles, and a rising representation of women in Kenya's politics (Ngware & Mutisya, 2020). But the success of the girl child has also come at a price: the neglect of the boy child Mwai & Mwangi, (2022). The authors argued that without as much attention and investment in the building of a new masculinity, and support for the education and emotional life of boys, they are left exposed and are vulnerable to various forms of violence. This paper explores the nature of this neglect in Kenya, how it has become part of the new paradigm of rights, roles, and relationships, and what role it plays in the challenges we see today in male suicide, violent extremism, dropping out of school, and gender-based violence in Kenya. Dr. Nelly Wamaitha (2006) has pointed out how Kenyan law has entrenched patriarchy, and this paper builds on that assertion but goes further to argue that removing patriarchy without re-conceptualizing masculine identity has left the boy child in a limbo, without any social or legal guidance in a new social reality. The paper concludes by offering a gender-sensitive model for social justice and empowerment.

2. The Historical Trajectory of Girl Child Empowerment: Global to local

The first push for girl empowerment around the world was born out of the broader women's rights movement that emerged in the 20th century. The Universal Declaration of Human Rights in 1948 gave rise to international legal instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979 and the Convention on the

Rights of the Child (CRC) in 1989, which created obligations on countries to protect girls from gender-based discrimination. The Beijing Declaration and Platform for Action in 1995 built on this framework by calling for equal access to education, end to child marriage, and protection from gender-based violence. These instruments inspired the formation of numerous girl-centered policies and programs and gave rise to thousands of nongovernmental and international development programs focused on girls. For example, the UN Girls' Education Initiative (UNGEI) and Plan International's "Because I am a Girl" campaign have changed the gender paradigm around the world (Unterhalter, 2013).

The same trend has happened in Africa. The African Charter on the Rights and Welfare of the Child in 1990 placed a special emphasis on the vulnerability of the girl child in the face of harmful traditional practices, such as female genital mutilation (FGM) and early marriage. The Maputo Protocol in 2003 was a watershed moment in African feminism, and required that African countries take steps to eliminate gender-based discrimination and to protect the reproductive rights of women and girls. The Africa Union's Agenda 2063 also reflected this trend, and included strong provisions to end gender inequality. Member states were urged to make laws, budgets, and create affirmative action programs for girls' education and protection. Kenya has made substantial progress. Article 27 of the Constitution of Kenya 2010, which guarantees equality and non-discrimination, has been complemented by the right of every child to shelter, education, health, and protection in Article 53. The Basic Education Act 2013 and Children Act 2022 (revised) require that no girl be expelled from school due to pregnancy, and the government continues to sponsor programs like sanitary towel distribution to ensure girls attend school (Orodho, 2014). According to the Kenya Demographic and Health Survey (KDHS) 2022, female school enrollment and completion rates have overtaken those of males in some counties, reflecting a reversal of the historical pattern

of gender disparity. Girls have also benefited from scholarship programs, leadership training, and civic participation programs sponsored by the state and international development partners (FAWE, 2021). Yet, in the midst of all these gains, there is a vacuum in how the girl child reforms affect the boy child or what support structures are in place to help him adapt to the new reality Ratele,K.(2013)

3. The Unattended Boy Child: A Silent Casualty of Gender Progress

Although the girl child has made strides in terms of education, health, leadership, and civic participation, there is a vacuum in Kenya's gender discourse: the wellbeing, development, and psychosocial orientation of the boy child Mwai & Mwangi, (2022) It is assumed that boys have historically benefited from patriarchy and are self-sufficient, and so any shifts in gender paradigms would have no bearing on them. However, research is beginning to show that the reality is different. The boy child in Kenya is underperforming in school, overrepresented in correctional facilities, and increasingly becoming vulnerable to substance abuse, gang violence, and depression (National Crime Research Centre [NCRC], 2020; Mwai & Mwangi, 2022). These outcomes are not isolated cases; they are symptoms of a deeper institutional neglect and conceptual framework that views gender inequality as a problem that only affects the girl child. According to a UNESCO 2021 report, dropout rates for boys in Kenya are higher than those for girls in some counties, especially in marginalized areas such as Turkana, Samburu, and parts of Nairobi's informal settlements. The reasons range from the economic pressure on boys to work, lack of school support structures, and cultural perceptions that do not value academic achievement for males (Unterhalter, North, Arnot & Lloyd, 2014). Also, there are few school programs aimed at addressing the emotional or mental health needs of boys. This is not only wrong but also problematic because boys are less likely to internalize the belief that they are capable and less likely to ask for help from teachers or counselors. This can lead to

psychosocial challenges and poor adjustment in school (Wekesa & Oketch, 2019). There are no national programs for the empowerment of the boy child. Programs sponsored by the government and civil society have focused on girls' empowerment. Affirmative action policies, mentorship programs, and legal protections have all been focused on the girl child Mwai & Mwangi, (2022) The National Gender and Equality Commission (NGEC) has championed gender equity, but its programming has been disproportionately skewed toward women and girls and justifiably so, given the history of patriarchy Wamaitha, (2006) Yet, this leaves a gap in terms of addressing the unique challenges facing boys Ratele, (2013) The idea that gender is a women's issue has normalized the idea of men's crisis of masculinity, in which boys are neither nurtured nor socialized for egalitarian relationships in adulthood (Chimamanda Ngozi Adichie, 2014).

4. Masculinity in Transition: Cultural and Social Reconfigurations

The Kenyan boy child is in a crisis of masculinity Mwai & Mwangi,(2022) Socialized in traditional norms of male dominance, control, and emotional restraint, the boy is being told to be empathetic, to be more emotional, and to share responsibilities in adulthood (Ratere 2013) This is not only a legal shift—it is a cultural, economic, and symbolic one. Yet, few programs exist to help boys navigate this shift (Silberschmidt, 2001).

i. Collapse of Traditional Male Identity Structures

Circumcision among Kikuyu, Kalenjin, and Luhya communities was part of the rituals that formed part of the identity structures for boys into manhoodMbiti, (1990) Boys were mentored on responsibility, leadership, and community values, among othersMbiti,1990; Ocieng, (2020) However, these rituals have been eroded due to urbanization, changing religions, and legal reforms. Without rites of passage, boys have no defined pathways to manhood (Mbiti, 1990; Ochieng, 2020). However, girl child empowerment has been

institutionalized through schools, churches, community programs, and the media. Girls are taught resilience, agency, and rights. Boys, on the other hand, are told to "man up" or "get the girl" without a vocabulary or framework for this new identity. (Morrell, 2001)

ii. Toxic Masculinity and Social Alienation

Without the anchorages or support of culture and mentors, some boys develop toxic masculinities, built on misogyny, emotional detachment, or hyper-aggression,Mwai & Mwangi, (2022) Others internalize a sense of failure or confusion and go into substance abuse, social withdrawal, or depression (Kimmel, 2008; Ratele, 2013). The increase in femicide and domestic violence may be a sign of this social dislocation. Here, the work of Dr. Nelly Wamaitha (2006) is instructive not only in excusing male dominance but in showing that dismantling patriarchy without providing an equally visionary structure for the redefinition of masculine roles in democratic settings can create social instability. As she argues, Kenya's legal reforms have empowered women, but have not provided an equally visionary structure for the redefinition of masculine roles in democratic settings.

5. The Masculinity Paradox: The Present Dilemma of Kenyan Men

These days, men find themselves in a double bind. On the one hand, as a result of legal reform, education and feminist activism, society has accepted the principle of gender equality, (Silberschmidt, (2001) Women insist on their freedom in the public sphere, at work and in their families, and want to be treated equally,Gifford, (2009) On the other hand, they still expect men to be the provider, protector and leader in the family. This results in a psychological and social impasse for Kenyan men Morrell, Jewkes & Lindegger, (2012).

When a man takes the leadership role in the family, he may be perceived as an autocrat or as emotionally controlling. Morrell, Jewkes & Lindegger,(2012).

If he tries to adopt an equal role and is as responsible as his wife for childcare,

expresses his feelings or gives up his space, he is seen as weak, emasculated or "not a real man" (Morrell, Jewkes & Lindegger, 2012).

i. Popular Culture and the Media

This further exacerbated by the depiction of men in popular culture. In Kenyan music, the media and on social media, men are made fun of for being broke, overly emotional or weak and dependent on women. At the same time, they are ridiculed for showing traits of the old "strong man" (Morrell, Jewkes & Lindegger, 2012). TV shows and skits depict male partners as bumbling idiots or patriarchal bullies, providing few role models in the middle (Wangari, 2020). Popular culture has in effect given men two opposing choices. As Kimmel (2008) has argued, men find themselves in "masculinity in contradiction", trapped between the erosion of old expectations and the absence of accepted alternatives. In Kenya, this is further complicated by the division between the older generation of men who still exercise power in the rural communities and the young generation of men who have to navigate drastically changed gender roles in dating, work and family life. Silberschmidt, (2001).

ii. Lived experience: Economic and Emotional Disempowerment

Rising cost of living, unemployment and the reduction of the formal sector job market has made it difficult for young men to meet the traditional expectations of being the provider. The Kenya National Bureau of Statistics (KNBS, 2021) reports that youth unemployment disproportionately affects men between 18 and 35 years of age, resulting in a sense of inadequacy and frustration. At the same time, the emotional expectations have changed. Women demand to be heard and men need to show their feelings, but men are not supposed to cry or seek help, at least not in public. As a result, many men find themselves in an emotional double bind of being expected to be present, but not vulnerable (Ratele, 2013). They may fall silent, withdraw or overcompensate with

aggression Ratele, (2013).

iii. Gender Tensions and the Social Backlash

These tensions may explain why there is an increase in gender-based violence in Kenya. In 2023 alone, there were several cases of femicide where the perpetrators claimed that their partners had provoked them by leaving them, causing economic stress or manipulating them emotionally Reuters, (2025, January 31) This is not to justify violence, but these are just some of the examples that highlight the emotional illiteracy in many men. Even attempts to define a new masculinity can backfire. Men who speak openly about their own rejection of gender stereotypes can be laughed at as "simp", "feminist" or "un-African".(Karanja,2021) Others are ridiculed as toxic, chauvinistic or violent. This no-win mentality has left many men confused, isolated and susceptible to right-wing or extremist ideologies that promise a return to male dominance (Silberschmidt, 2001; Karanja, 2021).

iv. Bridging the Gap: Rethinking Leadership and Partnership

To overcome this dilemma, Kenyan society must move beyond the two-party narrative of genderJewkes, Flood & Lang, (2015) Leadership in the home is not a matter of domination, but a shared responsibility, a way of sharing power (Oduyoye,2001) It is about being present, not controlling, and showing respect. Being equal does not mean the same, but mutual dignity and flexibility in their roles. Oduyoye, (2001)

Programs like "Men Engage Kenya" and faith-based initiatives like the Kenya Conference of Catholic Bishops (KCCB) have already started to redefine masculinity, teaching boys and men that being strong does not mean that they cannot be empathetic, and being a leader does not mean being domineering (Men Engage Kenya, 2022).

Ultimately, defining masculinity is not about changing men, but creating a shared language of partnership where all genders can negotiate power, responsibility and love in a new way.

6. The Legal and Institutional Blind Spot

i. Constitutional and Statutory Gains—With Gender Bias?

The 2010 Constitution of Kenya (CoK) was a landmark document for gender equality. Article 27(6) enabled affirmative action to redress historical gender inequality. As a result, Kenya has seen increased girl child representation in parliament, scholarship programs, and protection laws against sexual and domestic violence.

Nevertheless, the CoK has no similar provisions for the psychosocial or educational dimensions of boy child struggles. The laws may be gender-neutral, but in practice they reinforce girls' empowerment by addressing the past inequity of men over women.

Kenya's Children Act 2022 and Sexual Offences Act 2006 reveal a gendered bias. Although the Sexual Offences Act, 2006 in Kenya is gender-neutral, and is meant to protect everyone regardless of sex or gender, the law continues to be used differently to reflect existing gender stereotypes. Section 3 of the Act defines rape as a crime and applies to anyone. Similarly, Section 24 prohibits indecent acts regardless of the victim's gender. In theory, then, the law does not discriminate against male victims or assume that the perpetrator is a male. However, in practice, law enforcement officers, judicial officers and even health workers tend to respond differently to male victims of sexual violence. This translates to underreporting of male sexual abuse and denial of justice or support services to the boy child and man. Research shows that male survivors of sexual abuse are more likely to be met with stigma, disbelief or ridicule and,

by implication, the 'myth of male invulnerability' as Mutua (2001) puts it, that men are not likely to suffer or be abused (Human Rights Watch, 2016). Therefore, while the law offers a way out, the implementation system is lacking or is biased against the boy child or man. This neglect on the part of the institutions contributes to what Mutua (2001) describes as the 'myth of male invulnerability', a myth that creates a fiction that men cannot suffer or be abused and that male pain is unlikely and deviant. It renders the boy child's experience of sexual abuse or emotional trauma socially and institutionally invisible. Moreover, the boy child or man himself may also internalize this social construction and not disclose his experience out of shame, for a long time or never at all and this would mean denying him his legal and therapeutic rights. For instance, in Republic v Mohamed Dadi Kokane [2014] eKLR, the High Court confirmed that sexual offences can be committed against male victims, especially minors. In this case, the accused was convicted of sodomizing a young boy. It is clear that the boy child is also protected under the Act. However, cases of sexual offences against boys remain under litigated and underreported, probably because society is not ready to accept that a boy can be a victim. In the case of Republic v SWW [2019] eKLR, the court dealt with a case in which a woman was charged with committing an indecent act with a male minor, clearly demonstrating that the law does not discriminate against anyone. However, such cases are rarely reported and police stations do not have the training to deal with cases involving the boy child in a sensitive manner. In conclusion, the problem is not in the law itself, but in the manner of implementation, training and bias against the boy child held by front-line justice actors. Unless the criminal justice system is trained to handle cases involving male survivors without bias, the boy child will remain legally visible but practically unattended in cases of sexual offences.

Despite being gender neutral, the Children Act, 2022 which replaced the Children Act of 2001 has played a major role in enhancing protection, care, and

rights for the child in Kenya. The Children Act 2022 was to address a long-standing legislative vacuum in Kenya regarding the wellbeing of children. The law was explicitly gender-neutral. Section 5 provides that all children are entitled to equal treatment before the law and to be protected from all forms of discrimination based on sex, age, or disability. While the statute does not specifically mention the boy child, the child protection and welfare programs in Kenya have mainly targeted the girl child. For example, the government's child protection programs, such as the National School Health Policy and the Sanitary Towels Programme, explicitly cater to adolescent girls, a justified move to address past disadvantages but also ignore the emotional, psychological, and welfare needs of boys. In this regard, the boy actually does not need to be supported with physical items like the sanitary towels, but rather support in terms of education on how to understand the girl and what support the girl might need from the male counterparts. Such education prepares the boy child to become a more supportive husband, father brother, colleague etc. and in the process enhance the quality of life for the women and society at large. The reality is that the men have been left out of such programmes and are left to figure it out on their own.

Latter on in life they are loaded with blame for not being supportive while in the real sense they may not understand what is expected of them. Research by the Kenya Institute of Public Policy Research and Analysis (KIPPRA, 2022) found that boys are more likely than girls to experience corporal punishment, school dropout due to child labor, and delayed access to psychosocial support. These are, however, the risks that government intervention does not cater for, and child's services department with the mandate under the Children's Act to handle child abuse and neglect cases lacks training on gender-sensitive responses to boys who are victims of sexual or domestic violence. For instance, in FMM (a child) v Director of Children Services & Another [2019] eKLR, the court held that the defendant had failed to establish that the boy child had

committed a crime and ought to be taken to a remand home, and the case had to be thrown out. The court ruled that the boy child had the right to liberty, dignity, and fair treatment and that his rights are protected by the Constitution and the Children Act 2022. However, cases like these are the exception, not the norm, as most boy child victims of the law or the boys who need protection are denied effective legal representation or institutional advocacy. Further, under section 144 of the Children Act, 2022, the State is mandated to establish rehabilitation schools and child protection centers, yet many of these centers house girls or are not well-equipped to cater to the specific psychosocial needs of boys, particularly those that are trauma and abuse victims. There are no well-established mentorship programs, mental health counseling, and reintegration strategies for boys who are in this situation. To summarize, the Children Act 2022, though gender neutral, has failed in delivery in terms of gender responsiveness and the failure to establish programs to balance the need of boys further marginalizes them and makes them invisible in the child welfare ecosystem in Kenya. Onyango (2021) asserts that there must be gender parity in the law and its implementation for gender responsiveness to reflect in programming to prevent the law from being simply equal and masking disparities.

ii. Legal and Institutional Disenfranchisement of Boy Child-Specific Initiatives

The few initiatives for the boy child remain fragmented and largely informal. MenEngage Kenya (2022). Apart from some school-based mentorship, few counties have boy child-specific frameworks. According to the KIPPRA policy review, boy child specific programs are underrepresented in national frameworks and whereas significant resources are directed towards girls support and empowerment programs, intervention for boys are largely based on school based mentorships or church youth groups, (KIPPRA,2022). Civil society campaigns such as "The Boy Child Agenda" are underfunded and lack

national coordination. , KIPPRA, (2022). Furthermore, legal and institutional reluctance to include boys in gender-based policy discussions further marginalizes their experiences. According to West and Zimmerman's (1987) theory of gender performativity, institutions may reify gender by naming and validating only certain gender expressions that is typically those of women's struggles. In this context, the boy child becomes a statistical ghost.

7. Religious Narratives and the Crisis of Masculine Spirituality

Religion in Kenya (whether Christianity, Islam, or traditional African spirituality) has historically upheld patriarchal traditions that reinforced male dominance and female subordination. Men were perceived as household heads, spiritual leaders, and moral teachers, while women were followers, caregivers, and nurturers (Parsitau, 2009; Mugambi, 1995). As Kenya democratized and embraced gender equality, many religious communities began changing their messaging to support women's empowerment. Parsitau, (2009; Mugambi, 1995. However, this transition has not resulted in the development of new masculinities. (Silberschmidt, (2001)

i. Changing Religious Messaging and Gender Equity

Christian churches, especially Pentecostal and Anglican denominations, have increasingly promoted women's empowerment through leadership training, women bible study groups, and anti-GBV campaigns (Gifford, 2009). Similarly, Muslim organizations in Kenya, such as the Supreme Council of Kenya Muslims (SUPKEM), have engaged in issues such as girls' education and early marriage. Njogu, & Orchardson-Mazrui, (2006) While these initiatives are necessary and commendable, they have inadvertently contributed to the invisibility of the emotional, moral, and spiritual development of boys. Karanja, (2021) As a result, many young men in Kenya find little resonance in religious teachings that either define masculinity as inherently flawed or nostalgically glorify male dominance. Parsitau, (2009) Boys are thus without

religious role models or spiritually sensitive mentorship tailored to their needs. According to Karanja (2021), many disaffected youths have either abandoned religious institutions or gravitated towards populist, often misogynistic, religious movements that promise to restore "lost male honor."

ii. The Need for Theological Masculinities

Kenya's religious communities must rethink their pastoral theology to include male emotional development, non-violent masculinities, and gender-equal spirituality. Drawing from African feminist theology and liberation theology, scholars such as Oduyoye (2001) have called for inclusive spiritual spaces that validate both male and female experiences. Religious institutions can be healing spaces for the boy child, if only they would move beyond patriarchal nostalgia and embrace transformative masculinities. Parsitau, (2009)

8. Psychosocial Crisis: Mental Health, Violence, and the Broken Identity of the Kenyan Boy Child

One of the most powerful signs of the boy child's marginalization is the mental health crisis among young men and as a result, suicide rates in Kenya are significantly higher among males, especially those aged 18-35 (Kenya Mental Health Taskforce Report, 2020). Many of these deaths occur in contexts of joblessness, romantic rejection, low self-esteem, or domestic conflict. These issues are rarely addressed through gender-specific psychosocial initiatives for boys. Muriithi & Kamau, (2022). In Kenyan society, boys are socialized to suppress emotions, equate vulnerability with weakness, and resolve conflict through domination. These gendered norms are unchallenged and internalized as emotional repression (Kimmel, 2008). When societal expectations shift for instance when women achieve parity or dominance in certain spaces boys may experience identity confusion, resentment, or disorientation. According to Muriithi and Kamau (2022), many boys in secondary schools feel pressured to prove their masculinity through

aggression, academic competitiveness, or sexual conquest. In the absence of supportive environments that teach empathy, emotional literacy, and constructive self-expression, these expectations foster psychological distress. Kenya has seen a worrying rise in femicide cases, with numerous women killed by current or former partners, often following rejection or conflict Africa Data Hub, (2025). Scholars such as Jewkes et al. (2015) link this violence to patriarchal backlash. This is a process whereby men, threatened by the empowerment of women, resort to violence to restore lost power. Jewkes et al. (2015) This is not to suggest that empowerment causes violence, but rather that failure to empower both genders equitably creates emotional and psychological conditions for volatility. The boy child, having not been mentored into non-patriarchal manhood, lacks the tools to navigate rejection, partnership, or gender equality. Jewkes et al. (2015)

9. Towards an Inclusive Framework for Gender Empowerment

Kenya needs a recalibrated gender discourse that affirms both boys and girls as stakeholders in the journey toward equality. Empowerment should not be viewed as a zero-sum game to be redistributed from men to women; rather, it should be seen as a holistic strategy to enable all individuals to reach their full potential regardless of gender.

i. Legal and Policy Recommendations

- There is a need to develop a National Boy Child Empowerment Policy, modeled on successful girl child initiatives. Such a policy should address mentorship, education, mental health, and vocational support for boys.
- Curriculum Reforms: Include life skills education that focuses on emotional intelligence, respectful gender relations, and positive masculinities. Affirmative Action for At-Risk Boys: Especially in

counties where boys have lower school retention or higher incarceration rates.

- Legal Review of Gender-Based Laws: Ensure that laws such as the Sexual Offences Act recognize male victims and affirm male dignity.

ii. Faith-Based and Cultural Institutions

Religious institutions should develop theologies that affirm emotional and spiritual wholeness for boys. Elders and cultural custodians should reconstruct rites of passage and male mentorship systems that reflect contemporary values of equality, respect, and responsibility.

iii. Civil Society and Media Campaigns

Civil society should include boys in campaigns about gender-based violence, not just as potential perpetrators but also as vulnerable individuals in need of guidance and support. Media should portray diverse, non-violent masculinities and challenge the glorification of toxic masculinity.

10. Conclusion

This article has argued that while girl child empowerment in Kenya is morally and constitutionally warranted, its implementation has overlooked the integration of boy child in the process. By failing to integrate boys into the gender equity agenda, Kenyan society has fostered a silent crisis of school dropout, depression, violence, and identity loss among young men. This paper has employed a critical analysis of educational, legal, religious, and psychosocial domains to reveal the absence of structured support for boys amid shifting gender roles. It has called for a comprehensive and inclusive gender empowerment model, one that affirms the dignity and agency of both boys and girls. As Kenya continues its journey towards social justice and democratic maturity, it must not only ask how far the girl child has come, but also how far the boy child has been left behind.

References

Adichie, C. N. (2014). *We should all be feminists*. Vintage.

Africa Data Hub. (2025). *Femicide Kenya: Unmasking the epidemic of violence against women*. National Gender and Equality Commission

Amadiume, I. (1987). *Male daughters, female husbands: Gender and sex in an African society.* Zed Books.

FAWE. (2021*). FAWE Kenya Annual Report 2021. Forum for African Women Educationalists.* https://fawe.or.ke

Gifford, P. (2009). *Christianity, Politics and Public Life in Kenya*. Hurst Publishers.
Jewkes, R., Flood, M., & Lang, J. (2015*). From work with men and boys to changes of social norms and reduction of inequities in gender relations: A conceptual shift in prevention of violence against women and girls*. The Lancet, 385(9977), 1580–1589. https://doi.org/10.1016/S0140-6736(14)61683-4

Karanja, J. (2021*). Religion, masculinity and youth disengagement in Kenya's urban slums.* Journal of Contemporary African Studies, 39(4), 631–648. https://doi.org/10.1080/02589001.2021.1930152

Kenya National Bureau of Statistics. (2021). *Kenya Demographic and Health Survey 2021*. Government of Kenya.

Kenya Mental Health Taskforce. (2020). *Mental health and well-being towards happiness and national prosperity: Final report*. Government of Kenya.

Kenya National Bureau of Statistics (KNBS). (2021). *Kenya Youth Employment Survey Report*. Nairobi: Government of Kenya.

Kenya Institute of Public Policy Research and Analysis (KIPPRA). (2022). *Gendered Disparities in Education and Child Protection in Kenya*. Nairobi: Government of Kenya.

Kimmel, M. (2008). Guyland: *The perilous world where boys become men*. Harper.

Mbiti, J. S. (1990). *African religions and philosophy* (2nd ed.). Heinemann.
Men Engage Kenya. (2022). *Rewriting the narrative: Engaging boys and men in gender equality*. Nairobi: Men Engage Alliance Kenya.

Morrell, R. (2001). *Changing men in Southern Africa.* University of Natal Press.
Morrell, R., Jewkes, R., & Lindegger, G. (2012*). Hegemonic masculinity/masculinities in South Africa: Culture, power, and gender politics*. *Men and Masculinities*, *15*(1), 11–30. https://doi.org/10.1177/1097184X12438001

Mugambi, J. N. K. (1995*). From liberation to reconstruction*: African Christian theology after the Cold War. East African Publishers.

Muriithi, E., & Kamau, S. (2022). *Gender socialization and masculinities in Kenyan boys'*
boarding schools. African Journal of Education and Practice, 8(2), 47–61.

Mutua, M. (2001). *Human rights and powerlessness: Pathologies of choice and substance.* Buffalo Human Rights Law Review, 1(1), 1–23.

Mutua, M. (2011). *What is the future of the boy child in Kenya?* The Standard (Kenya), October 13.

Mwai, J., & Mwangi, E. (2022). *Masculinities and violence: Analyzing the social roots of gendered violence in Kenya.* Journal of African Gender Studies, 6(1), 23–

41. National Crime

Ngware, M., & Mutisya, M. (2020). *Gender parity and school retention in Kenya: Progress and disparities.* International Journal of Educational Development, 78, 102278.

Njogu, K., & Orchardson-Mazrui, E. (2006). *Gender Inequality and Women's Rights in the Great Lakes: Can Culture Contribute to Women's Empowerment?* UN Women/UNESCO.

Ochieng, P. (2020). *The death of male initiation rites and the crisis of identity in Kenyan boys.* Cultural Studies in Africa, 4(2), 67–85.

Oduyoye, M. A. (2001). *Introducing African women's theology*. Sheffield Academic Press.

Orodho, J. A. (2014). *Gender equality and equity in education: A reflection on the Kenyan situation.* Journal of Education and Practice, 5(29), 1–7.

Parsitau, D. S. (2009*). Keep holy distance and abstain till he comes: Interrogating a Pentecostal Church's engagement with HIV/AIDS and the youth in Kenya*. Africa Today, 56(1), 45–64.

Ratele, K. (2013). *Subordinate black South African men without fear*. Cultural Studies, 27(3), 539–559.

Ratele, K. (2013*). Masculinities without tradition. Politikon: South African Journal of Political Studies*, *40*(1), 133–156. https://doi.org/10.1080/02589346.2013.766664

Research Centre. (2020). *Survey on the status of gender-based violence in Kenya*. Government of Kenya.

Reuters. (2025, January 31). *Kenya's wave of deadly violence spurs women to fight back*. Reuters

Silberschmidt, M. (2001*). Disempowerment of men in rural and urban East Africa: Implications for male identity and sexual behavior. World Development*, 29(4), 657–671.

Unterhalter, E. (2013). Gender, schooling and global social justice. Routledge.

Unterhalter, E., North, A., Arnot, M., & Lloyd, C. (2014). *Education, gender and global development: Challenges for international agendas*. Routledge.

Wamaitha, N. (2006). *Patriarchy and the legal developments in Kenya*. Law Society of Kenya Journal, 1.

Wangari, M. (2020). Masculinity, media, and identity in contemporary Kenya. *African Journal of Cultural Studies*, *18*(2), 85–101. https://doi.org/10.1080/13696815.2020.1799165

Wekesa, M., & Oketch, O. (2019*). Corporal punishment, emotional trauma, and underperformance among Kenyan male pupils.* Journal of African Child Psychology and Education, 5(1), 19–36.

West, C., & Zimmerman, D. H. (1987). *Doing gender. Gender & Society*, 1(2), 125–151

Dealing With Concurrent Delay on Construction Projects: The Novel Approach from *Thomas Barnes*

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Abstract

Concurrent delay remains a contentious issue in construction law. Despite significant jurisprudence, English courts have yet to settle on a single approach to its treatment. Traditionally governed by the *Malmaison* principle which grants full extensions of time where one of the concurrent causes is a Relevant Event, recent judicial decisions have begun to challenge this orthodoxy. This paper examines the evolving legal treatment of concurrent delay in English jurisprudence, culminating in the recent and groundbreaking decision in *Thomas Barnes & Sons Plc v Blackburn with Darwen BC*. In this case, the English Court marked a departure from the "all or nothing" approach of *Malmaison* by permitting partial compensation for prolongation costs despite awarding a full Extension of Time which effectively introduced a quasi-apportionment approach. This was the first time that compensation was apportioned within an Extension of Time period in English law. The paper also explores how *Thomas Barnes* refined the definition of the critical path and challenged the "first in time" principle established in *Adyard Abu Dhabi v SD Marine Services*. While the decision leaves some gaps, particularly in failing to define "true concurrency", it offers a novel and pragmatic solution that balances contractor and employer risk.

Keywords: Concurrent delay, Extension of Time, Malmaison test, Thomas

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Barnes, critical path, apportionment, Prevention Principle.

Introduction

Concurrent delay, where multiple delay events simultaneously impact a construction project's completion, poses significant challenges in allocating responsibility and determining entitlements to time and cost relief (Burr, 2016). Despite extensive judicial consideration, English courts have yet to establish a definitive framework for addressing concurrent delay, resulting in uncertainty for contractors and employers alike (Grewal, 2012). The Malmaison approach, established in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*, has long dominated, entitling contractors to full Extensions of Time when a Relevant Event coincides with a contractor-caused delay. However, this "all or nothing" approach has faced criticism for its rigidity and failure to equitably address prolongation costs.

The recent case of *Thomas Barnes & Sons Plc v Blackburn with Darwen BC* marks a pivotal shift, introducing a novel quasi-apportionment framework that permits partial compensation within a full Extension of Time. This decision not only challenges the Malmaison orthodoxy but also redefines the critical path and questions the "first in time" principle from *Adyard Abu Dhabi v SD Marine Services*. This paper explores the evolution of concurrent delay in English law, critically analyzes the Thomas Barnes decision, and evaluates its implications for construction dispute resolution.

What is Concurrent Delay?

The courts have yet to provide a clear definition of concurrent delay (Furst et al., 2023). In the case of *Adyard Abu Dhabi v SD Marine Services*[1], the court defined concurrent delay as a period of project overrun resulting from two or more delay events that have roughly equal causal impact. In the case of *Royal*

[1] [2011] EWHC 848 (Comm).

Brompton Hospital NHS Trust v Hammond[2], Judge Richard Seymour QC described concurrent delay as a situation where the Works are progressing on schedule when two events occur, either of which alone would have caused delay with one being a relevant event and the other not. The definitions from *Adyard*[3] and *Royal Brompton Hospital*[4] clarify that true concurrent delay only arises when a contractor-responsible delay and an employer-responsible delay happen simultaneously, with their effects on project completion occurring simultaneously. It is worth noting that most construction contracts typically offer little guidance on handling concurrent delays (Furst et al., 2023).

How have concurrent delays been dealt with by the courts?

The debate on how to deal with concurrent delays has been distilled into two schools of thought (Grewal, 2012). The first is the "dominant cause" test, which originates from insurance law, as seen in the case of *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*[5]. This principle was later applied in the construction context in the case of *City Inn Ltd v Shepherd Construction Ltd*[6] in Scotland. In that case, Lord Drummond Young emphasised that causation should be determined using common sense and logical reasoning and that if an employer's action can be identified as the dominant cause of the delay, that alone is sufficient (Furst et al., 2023). The dominant cause theory posits that when concurrent delay occurs, one attributed to the employer and the other to the contractor, only the most significant delay is considered the primary cause affecting the project's timeline as highlighted in *H Fairweather & Co Ltd v Wandsworth LBC*[7]. Court further held that apportioning delay responsibility is akin to allocating liability in cases of contributory negligence or shared wrong doing. As such, courts should assess the relative culpability of each delay factor

[2] [2001] EWCA Civ 2006; 76 Con LR 131 at [31].
[3] Adyard (n 1)
[4] Royal Brompton Hospital (n 2).
[5] [1918] A.C. 350
[6] [2007] CSOH 190.
[7] (1987) 39 B.L.R 106.

and the significance of each contributing event (Furst et al., 2023).

The English courts have declined to adopt the "dominant cause" test as seen in the case of *H Fairweather*[8] because identifying a single dominant cause is not always feasible. This test also necessitates a relaxation of the "but for" principle and contradicts the Prevention Principle. Similarly, in *Walter Lily & Co Ltd v Mackay*[9], the courts dismissed the argument that prolongation costs should be apportioned based on competing causes of delay, unless the contract expressly provides for such an approach. Additionally, in *City Inn*[10], it was observed that apportionment does not stem from a proper interpretation of the contract. Employers and contract administrators have seized on this approach as a way to deny contractors extensions of time in case of concurrent delay (Grewal, 2012).

The English approach to concurrent delay was established in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*[11] where the court held that a contractor is entitled to a full extension of time if one of the multiple causes of delay qualifies as a relevant event under the contract. The reasoning behind this stance is that when parties explicitly agree in their contract that certain events justify an Extension of Time, they must have anticipated the possibility of multiple concurrent causes of delay (Burr, 2016). Despite this, they have expressly provided that the contractor remains entitled to an Extension of Time if at least one effective cause falls within the contractual provisions as seen in *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd*[12]. The allocation of risk in standard form contracts was clearly outlined in *Henry Boot Construction Ltd v Central Lancashire New*

[8] Ibid.
[9] [2012] EWHC 1733 (TCC).
[10] City Inn (n 5).
[11] (1999) 70 Con L.R. 32.
[12] [2010] EWHC 3276 (TCC).

Town Development Corp[13]. The Malmaison approach was accepted by Akenhead J in *Walter Lily*[14] where he stated that if a contract includes an Extension of Time clause and a delay arises from multiple effective causes, one of which is a relevant event, the contractor is entitled to a full Extension of Time. The court further ruled that unless explicitly stated in the contract, there is no basis for reducing an extension of time based on an apportionment of causation (Burr, 2016).

A more stringent approach is taken in cases where a contractor seeks to recover prolongation costs due to concurrent delay as seen in *De Beers*[15]. In this case, Edwards Stuart J held that if a project is delayed by factors attributable to both the employer and the contractor, the contractor may be granted an extension of time but cannot claim compensation for losses arising from the delay. This distinction means that the Malmaison approach provides different outcomes for concurrent delay depending on whether the claim concerns an extension of time or financial compensation for loss and expense.

In *Walter Lily*[16], Akenhead J acknowledged that failing to apply the Malmaison test to extensions of time would mean that many Relevant Events could be classified as acts of prevention. In *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd*[17], court clarified the core of the Prevention Principle stating that an employer cannot demand the performance of an obligation that they have hindered the contractor from fulfilling. If there were no provisions for extending time in cases of concurrent delay, where one Relevant Event is the employer's fault and another is the contractor's, then as established in *Jerram Falkus Construction Ltd v Fervice Investments Inc*[18], the Prevention Principle

[13] (1980) 15 B.L.R. 1.
[14] Walter Lily (n 9).
[15] De Beers (n 12).
[16] Walter Lily (n 9).
[17] [2007] EWHC 447 (TCC).
[18] [2011] EWHC 1935 (TCC).

would prevent the employer from imposing liquidated damages. It is an established principle established in *Percy Bilton Ltd v Greater London Council*[19] that employers forfeit their right to liquidated damages if their actions or omissions have delayed the contractor's ability to complete the work on time. Additionally, in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*[20], the court held that whether the employer's delay coincides with a contractor's delay or not, the Prevention Principle should still apply consistently.

The Malmaison test also prevents the opposite issue that arose in *SMK Cabinets v Hili Modern Electrics Pty*[21], where a contractor's claim for an Extension of Time could be countered by an employer's cross claim for liquidated damages due to failure to meet the contractual completion date. However, if the Extension of Time claim is upheld, the counterclaim for liquidated damages would automatically be invalid (Grewal, 2012).

Evolution of English law on concurrent delay

The evolution of English law on concurrent delay began with the Malmaison approach, which was established in *Henry Boot*[22] and grants contractors an Extension of Time in cases of concurrent delay. The case of *Royal Brompton Hospital*[23] upheld this approach in 2000 clarifying that concurrency arises only when both delay events occur simultaneously and have an identical effect on project completion. In *Great Eastern Hotel Co Ltd v John Laing Construction Ltd*[24] court held that if an employer's breach significantly contributed to the contractor's loss, the contractor could claim full compensation provided there was no double recovery.

[19] [1982] 1 WLR 794.
[20] (1970) 1 B.L.R. 111.
[21] [1984] VR 391 at 398.
[22] Henry Boot (n 11).
[23] Royal Brompton Hospital (n 2).
[24] [2005] EWHC 181 (TCC).

This reasoning was reaffirmed in *Steria Ltd v Sigma Wireless Communications Ltd*[25], where courts awarded both time extensions and financial compensation despite concurrent contractor delays. However, the case of *Costain Ltd v Charles Haswell & Partners Ltd*[26] refined the approach by requiring claimants to demonstrate that the delay affected all site activities, not just the critical path, to recover prolongation costs.

In *De Beers*[27],courts denied compensation for concurrent delays if the contractor would have incurred the same loss due to his own delays. In 2011, *Adyard*[28] introduced the "first in approach" to concurrency where an event occurring first would be regarded as critical and an effective cause of delay to completion and the delay occurring second would not be critical. This approach was upheld in *Jerram Falkus Construction*[29].

The recent case of *Thomas Barnes* on concurrent delay.

In the recent case of *Thomas Barnes & Sons Plc (In Administration) v Blackburn with Darwen BC*[30], the court held that both the employer's and contractor's delays were on the critical path and contributed concurrently to the overall project delay even though they began and ended at different times. As a result, the Contractor was awarded a 119-day Extension of Time but was only awarded compensation for 27 days excluding periods of concurrent delay attributable to the Contractor. This marked the first instance in English legal history where only a portion of an Extension of Time was deemed compensable. The decision also refined the definition of the critical path shifting away from the broader interpretation in *Mirant Asia-Pacific*

[25] [2008] B.L.R 79.
[26] [2009] EWHC 3140 (TCC).
[27] De Beers (n 12).
[28] Adyard (n 1).
[29] Jerram Falkus Construction (n 19).
[30] [2022] EWHC 2598 (TCC).

Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd[31] and limiting it to activities that are essential for constructability. Additionally, the decision challenged the "first in time" approach introduced in *Adyard*[32] signaling a shift in how concurrency is assessed. A key aspect of this case was the judge's independent evaluation of critical delays which was divergent from the expert witness testimony and contemporary project records (Liubymyi, 2024).

Coulson LJ in the Court of Appeal case of *North Midland Ltd v Cyden Homes Ltd*[33] found that English law on the consequences of concurrent delay remains somewhat uncertain summarising the different approaches into two categories. One approach, the Malmaison approach, holds that a contractor is entitled to an extension of time for concurrent delays. The other approach, the "Critical Path" approach, asserts that the prevention principle does not apply because the delay would have happened regardless of the employer's delay event meaning the contractor is not entitled to an extension of time for such cases (Germain, 2024). In *Thomas Barnes*[34], HHJ Davies followed the Malmaison approach determining that the contractor was entitled to an Extension of Time for concurrent delays. However, it is important to note that while HHJ Davies referred to the law on concurrent delay as settled, it is not conclusive law as the appellate *Cyden Homes*[35] case takes precedence over the first instance cases cited by HHJ Davies. Furthermore, as Coulson LJ pointed out, the Malmaison approach is just one of the several ways to address concurrent delay (Germain, 2024).

[31] [2007] EWHC 918 (TCC).
[32] Adyard (n 1).
[33] [2018] EWCA Civ 1744.
[34] Thomas Barnes (n 31).
[35] Cyden Homes (n 34).

Impact of *Thomas Barnes* on dealing with concurrent delay

In *Thomas Barnes*[36], both the Malmaison approach and the Critical Path approach lead to the same conclusion. The Malmaison approach establishes, as a matter of law, that the contractor is entitled to an Extension of Time for concurrent delay. The Critical Path approach, which focuses on causation, identifies the primary cause of delay as the repairs to the deflected structural steel beam, which is a cause of delay under the responsibility of the employer. Conversely, the contractor's late installation of the roof coverings had no impact on the completion date. Consequently, both approaches conclude that the contractor is also entitled to an Extension of Time. HHJ Davies ignored the Critical Path Approach which had been advanced by the expert witness of both parties (Germain, 2024). He also did not define concurrent delay beyond stating that an effective cause of delay must be attributable to the employer (Germain, 2024).

Furthermore, HHJ Davies also did not address the specific interpretation of concurrent delay established in cases like *Adyard*[37] nor did he consider whether proving true concurrent delay is necessary to justify an Extension of Time. He also did not conduct a detailed analysis of when a delay event qualifies to be an effective cause of delay (Germain, 2024).

The decision in *Thomas Barnes*[38] seems to reduce the disparity between the approaches in England, Wales, and Scotland even though the apportionment approach was rejected in England and Wales. Under the *Thomas Barnes*[39] approach, the contractor is granted a full Extension of Time for the period of concurrent delay. However, the compensation is only awarded for the period where the "but for" test can be satisfied. By contrast, under the apportionment

[36] Thomas Barnes (n 31).
[37] Adyard (n 1).
[38] Thomas Barnes (n 31).
[39] Ibid.

approach, the contractor receives the Extension of Time and compensation for one portion of the delay, however, they remain liable for liquidated damages for another portion (Liubymyi, 2024).

Both of these approaches differ significantly from the "first in time" approach that was followed in England and Wales until 2022 (Liubymyi, 2024). Under the "first in time" approach, the contractor would only be denied prolongation costs in cases of true concurrent delays. However, if the contractor's delays were slightly shorter than those caused by the employer, they were deemed to be neither critical nor operative, entitling the contractor to both an Extension of Time and full prolongation costs (Liubymyi, 2024).

In conclusion, this decision offers a different approach from the Malmaison test which had been a mainstay of the English approach to concurrent delay. The Malmaison test offered an all or nothing approach towards claiming prolongation costs once the contractor was awarded an Extension of Time *de jure*. The novel approach by HHJ Davies allowed for apportionment of prolongation costs even when a contractor has been granted an Extension of Time for the first time in English legal history. There is criticism, though, that HHJ Davies did not define concurrent delay or true concurrency which would have gone a long way in rectifying this principle in this case.

List of Cases

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm).

Royal Brompton Hospital NHS Trust v Hammond [2001] EWCA Civ 2006; 76 Con LR 131 at [31].

Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] A.C. 350

City Inn Ltd v Shepherd Construction Ltd [2007] CSOH 190.

H Fairweather & Co Ltd v Wandsworth LBC (1987) 39 B.L.R 106.

Walter Lily & Co Ltd v Mackay [2012] EWHC 1733 (TCC).

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con L.R. 32.

De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC).

Henry Boot Construction Ltd v Central Lancashire New Town Development Corp (1980) 15 B.L.R. 1.

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007] EWHC 447 (TCC).

Jerram Falkus Construction Ltd v Fervice Investments Inc [2011] EWHC 1935 (TCC).

Percy Bilton Ltd v Greater London Council [1982] 1 WLR 794

Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 B.L.R. 111.

SMK Cabinets v Hili Modern Electrics Pty [1984] VR 391 at 398.

Great Eastern Hotel Co Ltd v John Laing Construction Ltd [2005] EWHC 181 (TCC).

Steria Ltd v Sigma Wireless Communications Ltd [2008] B.L.R 79.

Costain Ltd v Charles Haswell & Partners Ltd [2009] EWHC 3140 (TCC).

Thomas Barnes & Sons Plc (In Administration) v Blackburn with Darwen BC [2022] EWHC 2598 (TCC).

Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd [2007] EWHC 918 (TCC).

North Midland Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744.

Bibliography

Burr, A. (2016). *Delay and Disruption in Construction Contracts* (5th ed.). Informa Law From Routledge.

Furst, S., Ramsey, V., & Keating, D. (2023). Keating on Construction Contracts (11th ed.). Sweet and Maxwell.

Germain, L. J. (2024). Concurrent delay: A critique of Thomas Barnes v Blackburn. *Construction Law Journal*, 40(4), 210-219.

Grewal, G. (2012). A leading new authority? *Construction Law Journal*, 23(8).

Liubymyi, O. (2024). Concurrent delay: Is England and Wales moving towards the apportionment approach? The novelty of the Thomas Barnes case. *Construction Law Journal*, 40(8), 461-472.

A Proposal for Legislation to Tackle Fake Gold Scammers, "Wash Wash" Cartels and Other Organized Crime Syndicates in Kenya: Lessons from the American RICO Act

Michael Sang [*]

Abstract

This paper advocates for the introduction of RICO-style legislation in Kenya to combat the growing threat of organized crime syndicates such as fake gold scammers and "wash wash" cartels. The current legal framework is insufficient in addressing the complexity and interconnectedness of these criminal enterprises. Drawing on the American Racketeer Influenced and Corrupt Organizations (RICO) Act, the paper argues that adopting a RICO-like approach, which focuses on prosecuting entire criminal enterprises rather than isolated crimes, would provide a more comprehensive tool for Kenyan law enforcement. The paper further discusses the benefits of enhanced penalties, asset forfeiture, and civil remedies under such legislation. It concludes by highlighting the importance of adapting RICO's enterprise rationale to Kenya's unique context to dismantle sophisticated criminal networks and safeguard the country's legal and economic systems.

Key Words: *RICO Act, organized crime, racketeering, Kenya, criminal enterprises, legal reform, Wash Wash*

1. Introduction

Kenya is grappling with a surge in sophisticated organized crime syndicates, including fake gold scams and "wash wash" cartels, which thrive by exploiting

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gaps in the legal framework.[1] These criminal enterprises, which engage in diverse activities such as money laundering, fraud, and extortion, have evolved to operate with a level of complexity that current laws are ill-equipped to address.[2] Kenya's existing legal provisions, including the Proceeds of Crime and Anti-Money Laundering Act and the Anti-Corruption and Economic Crimes Act target individual offenses but lack the capacity to prosecute the entire enterprise behind these crimes.[3] This limitation has allowed organized crime syndicates to persist, often evading justice even when individual members are arrested or prosecuted.[4]

A legislation similar to the United States Racketeer Influenced and Corrupt Organizations Act[5] (hereafter RICO Act) may offer a compelling solution to this challenge. The key merit of RICO, and what makes it particularly relevant for Kenya, is its ability to deploy the "enterprise rationale" to connect seemingly unrelated crimes under a single prosecutable pattern of racketeering.[6] This approach not only targets the individuals committing the crimes but also the entire criminal organization.[7] Under the RICO Act, a person can be prosecuted for engaging in a pattern of racketeering activity that includes various predicate offenses, ranging from fraud and money laundering to murder and extortion.[8] Crucially, RICO allows prosecutors to pursue both the underlying criminal acts and the overarching conspiracy, thereby

[1] Sang, M. A Proposal for Legislative Reform of Kenya's Prevention of Organised Crimes Act–A Comparative Analysis By: Michael Sang. *Journal of Conflict Management and Sustainable Development*, *3*(7), 195.
[2] ibid
[3] Anti-Money Laundering Act; Anti-Corruption and Economic Crimes Act.
[4] ibid
[5] Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. § 1962)
[6] Pierson P.B. (2013) RICO Enterprises: The Mob and Fraud. 85 *Temple Law Review*.
[7] Ibid
[8] Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. § 1962)

providing a more holistic framework for dismantling organized crime.[9]
Kenya stands to gain significantly from such a legal framework. A RICO-style law would enable the country to address the multifaceted nature of criminal syndicates, prosecute not only individual crimes but also the broader criminal enterprise, and impose more severe penalties, including asset forfeiture and civil remedies.[10] Given the challenges in prosecuting organized crime in Kenya, adopting RICO-like provisions would be a game-changer, offering a much-needed tool to effectively combat and dismantle criminal syndicates.

2. The Rise of Organized Crime in Kenya and the Inadequacy of Current Legislation

Organized crime in Kenya has significantly evolved, growing in both scale and sophistication.[11] The country faces a wide range of criminal activities, including drug trafficking, human trafficking, money laundering, and racketeering, driven by both local and transnational criminal networks.[12] These criminal syndicates, often working with corrupt officials, have infiltrated various sectors such as the gold trade, real estate, and even politics, making it difficult for current legal frameworks to contain them.[13]

2.1 Rapid Evolution of Organized Crime in Kenya

In recent years, Kenya has become a hub for organized crime, ranking 16th globally in 2023.[14] The criminal landscape is dominated by smaller, highly corrupt groups engaged in various illegal activities like drug trafficking,

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[9] ibid
[10] ibid
[11] Sang, M. A Proposal for Legislative Reform of Kenya's Prevention of Organised Crimes Act–A Comparative Analysis By: Michael Sang. *Journal of Conflict Management and Sustainable Development*, *3*(7), 195.
[12] ibid
[13] ibid
[14] Tonui C. (2023). Kenya Ranks 16th Globally for Organized Crime – Report. *The Star*.

extortion, and money laundering.[15] The rise of cybercrime, driven by Kenya's digital transformation, has added a new dimension to organized crime.[16] Moreover, networks tied to politicians and law enforcement have been accused of facilitating operations like smuggling and financial fraud.[17] Despite some efforts to enhance resilience against organized crime, such as anti-corruption campaigns, the legal and political structures have largely failed to mitigate the impact of these criminal syndicates.[18]

Current legislation, including anti-money laundering laws and anti-gang regulations, has proven insufficient. These laws do not capture the organized and multifaceted nature of crimes, which often involve complex networks that operate both locally and internationally.[19] Therefore, a RICO-style law, focusing on dismantling entire criminal enterprises, could be a significant legislative advancement for Kenya.

2.2 Gaps and Inadequacies of the Current Legislation in Kenya

The Prevention of Organised Crimes Act (Cap. 59) of Kenya provides a framework for combating organized crime, yet several gaps and inadequacies make it less effective in curbing complex, interconnected criminal enterprises:

- **Narrow Definition of Organized Crime**: Section 2 defines an "organized criminal group" as a structured group of three or more persons aiming to commit serious crimes.[20] However, this definition is

[15] ibid

[16] Sang, M. A Proposal for Legislative Reform of Kenya's Prevention of Organised Crimes Act–A Comparative Analysis By: Michael Sang. *Journal of Conflict Management and Sustainable Development*, *3*(7), 195.

[17] Tonui C. (2023). Kenya Ranks 16th Globally for Organized Crime – Report. *The Star*.

[18] ibid

[19] ibid

[20] Prevention of Organised Crimes Act (Cap. 59). Sec 2

relatively narrow as it focuses on group structure but lacks emphasis on the broader enterprise rationale, which would allow the prosecution of interconnected activities that are part of larger criminal networks, akin to the Racketeer Influenced and Corrupt Organizations (RICO) Act in the U.S.

- **Limited Scope of Offenses**: While Section 3 criminalizes various forms of organized criminal activity,[21] it does not encompass the full range of financial crimes, such as complex money laundering schemes, which are often central to organized crime syndicates like "wash wash" cartels. This is a significant shortcoming, as modern organized crime relies heavily on financial manipulation to launder illegal profits.
- **Weak Asset Forfeiture Mechanisms**: Though Part IV allows for the confiscation and forfeiture of property,[22] the provisions are limited by procedural delays and judicial discretion. Unlike RICO, which emphasizes civil forfeiture proceedings that do not require a criminal conviction, Kenya's law mandates a criminal conviction for forfeiture, which can be time-consuming and easily manipulated by criminal entities.
- **Absence of Enterprise-Based Liability**: The Act does not effectively connect seemingly unrelated offenses into a coherent pattern of criminal activity that can be prosecuted together under a single charge. The RICO Act in the U.S. allows for the prosecution of various crimes committed by an enterprise, offering a more comprehensive approach to dismantling entire criminal syndicates.

The Proceeds of Crime and Anti-Money Laundering Act (Cap. 59A) provides a foundation for combating financial crimes, particularly money laundering,

[21] Ibid, sec 3
[22] Ibid, Sections 15-18

in Kenya. However, several gaps and limitations affect its overall effectiveness in dealing with sophisticated organized crime syndicates:

- **Limited Definition and Coverage of Financial Crimes**: While the Act defines key offenses such as money laundering,[23] its scope is somewhat limited in addressing the growing complexity of modern financial crimes, such as cryptocurrency-related laundering or advanced digital fraud. These emerging forms of crime often fall outside the direct purview of the current legislation, which focuses more on traditional financial instruments and crimes.
- **Challenges in Asset Recovery and Confiscation**: The Act establishes the Assets Recovery Agency[24] and provides for both criminal and civil forfeiture mechanisms.[25] However, the asset recovery processes are often delayed by the requirement to obtain formal court orders for the seizure, preservation, and forfeiture of assets. This time-consuming process gives criminals the opportunity to hide or move illicit assets, reducing the effectiveness of the legislation.
- **Underutilized Civil Forfeiture Mechanisms**: While the Act allows for civil forfeiture without requiring a criminal conviction,[26] this provision is underutilized. This could be due to either inadequate awareness among law enforcement or practical enforcement challenges. Civil forfeiture should be a more agile tool for recovering assets linked to organized crime, yet it has not been fully operationalized in many cases .

[23] Proceeds of Crime and Anti-Money Laundering Act (Cap. 59A), Sections 3-7
[24] Ibid, Section 53
[25] Ibid, Sections 81-99
[26] Ibid, Section 81

- **Weak Oversight and Enforcement**: Although the Act creates the Financial Reporting Centre (FRC) to monitor suspicious transactions and provide oversight,[27] its effectiveness is compromised by challenges in coordination with law enforcement agencies. Additionally, the FRC's capacity to enforce compliance is limited, particularly in addressing large-scale financial crimes involving politically connected individuals.
- **Inadequate Provisions for International Cooperation**: Given the transnational nature of organized crime and money laundering, the Act includes provisions for mutual legal assistance.[28] However, there are challenges in securing international cooperation, particularly in countries where legal and financial frameworks differ significantly from Kenya's. This limits the Act's ability to tackle crimes with cross-border dimensions.

The **Anti-Corruption and Economic Crimes Act (Cap. 65)** provides a legal framework for combating corruption and economic crimes in Kenya. However, it presents several gaps and inadequacies that undermine its effectiveness in addressing sophisticated and evolving forms of organized crime, including those perpetrated by "wash wash" cartels and other syndicates:

1. **Limited Definition of Corruption and Economic Crime**: The Act provides definitions for corruption and economic crime under Section 2 and Section 45,[29] focusing on traditional forms of corruption like bribery, embezzlement, and abuse of office. However, these definitions do not fully encompass modern financial crimes that rely on complex

[27] Ibid, Sections 21-24
[28] Ibid, Part XII
[29] Anti-Corruption and Economic Crimes Act (Cap. 65)

digital systems, such as cryptocurrency fraud or advanced financial manipulation schemes used by organized syndicates. These emerging crimes may fall outside the purview of the current provisions, reducing the Act's ability to tackle evolving criminal networks.

2. **Inadequate Enforcement Provisions**: Section 23 grants investigators authority to carry out investigations similar to police powers, but it does not fully address the complexity of financial crimes involving international actors or intricate financial instruments. The Act does not have sufficient mechanisms to ensure swift action against criminal enterprises that operate across borders or use complex laundering systems.[30]

3. **Weak Asset Recovery and Forfeiture Provisions**: Although Section 55 provides for the forfeiture of unexplained assets, the process is often lengthy and prone to legal challenges. The requirement for court orders and the high burden of proof for demonstrating that assets were acquired through corrupt means makes it difficult to swiftly recover illicit gains from organized crime syndicates. Additionally, the Act's asset recovery framework lacks strong civil forfeiture mechanisms, which are essential for tackling economic crimes that do not result in immediate criminal convictions.

4. **Challenges in Prosecuting Organized Crime**: While Section 47 criminalizes dealings with suspect property, the Act does not adopt an enterprise-based liability approach similar to the U.S. RICO Act. Without a provision that connects seemingly unrelated offenses into a cohesive pattern of racketeering or enterprise criminality, the prosecution of organized crime syndicates remains fragmented. The Act is more focused on individual acts of corruption rather than the

[30] Ibid, sec 23

criminal enterprise as a whole, leaving loopholes for organized criminal groups to exploit.[31]

5. **Limited Provisions for International Cooperation**: The Act contains provisions for addressing offenses committed outside Kenya,[32] but it does not adequately provide for seamless international cooperation, particularly with jurisdictions that may have differing legal and financial frameworks. Given the transnational nature of modern organized crime, particularly in areas such as money laundering and illicit financial flows, this limitation hinders efforts to track and prosecute criminals operating across borders.

2.3 Pointers to the Need for Legal Reform

Kenya's current legal framework, including the Proceeds of Crime and Anti-Money Laundering Act and the Anti-Corruption and Economic Crimes Act, highlights several issues that necessitate legal reforms, particularly to address the evolving and sophisticated nature of organized crime:

- **Emerging Financial Crimes and Digital Fraud**: Kenya is experiencing a rise in complex financial crimes, including cryptocurrency-related fraud and advanced digital money laundering schemes.[33] These emerging crimes are inadequately addressed under the current laws, which focus on more traditional forms of corruption and money laundering.[34] A legal reform should broaden the scope to cover new

[31] Ibid, sec 47
[32] Ibid, Section 67
[33] ENACT Africa (2024). Organised Crime in Africa/ Organised Crime Index.
[34] ibid

digital financial instruments, making it easier to prosecute these crimes and seize illicit digital assets.[35]

- **Need for Enterprise-Based Liability**: The absence of an enterprise-based liability approach, akin to the RICO Act in the U.S., prevents the effective prosecution of organized crime syndicates operating as enterprises. Current legislation, such as the Anti-Corruption and Economic Crimes Act, targets individual offenses but fails to capture the collective actions of criminal enterprises.[36] Legal reform is needed to incorporate provisions that connect seemingly unrelated crimes into patterns of racketeering, allowing for more comprehensive prosecution of crime syndicates.[37]

- **International Cooperation and Transnational Crime**: Organized crime, particularly money laundering and smuggling, often involves cross-border operations.[38] Kenya's existing laws, including the Proceeds of Crime and Anti-Money Laundering Act, do not sufficiently facilitate international cooperation, making it difficult to track and prosecute criminal activities that span multiple jurisdictions. Legal reform should include clearer frameworks for mutual legal assistance and international asset recovery to combat transnational organized crime.

- **Streamlining Asset Recovery and Civil Forfeiture**: Current asset recovery mechanisms, particularly those under the Proceeds of Crime and Anti-Money Laundering Act, are bogged down by lengthy legal processes and high burdens of proof. This allows criminals to hide or

[35] Musau, S. (2019). Kenya: Organised Crime, Political Linkages and Violence. In *Handbook of Organised Crime and Politics* (pp. 276-286). Edward Elgar Publishing.
[36] Anti-Corruption and Economic Crimes Act (Cap. 65), sec 47
[37] ibid
[38] ENACT Africa (2024). Organised Crime in Africa/ Organised Crime Index.

move illicit assets. Reforms should strengthen civil forfeiture provisions, allowing for quicker asset recovery without the need for a criminal conviction, especially in cases of financial crimes and organized crime syndicates.[39]

- **Addressing Corruption and Political Interference**: Corruption, particularly within law enforcement and political structures, undermines the enforcement of existing laws. Despite the Anti-Corruption and Economic Crimes Act's attempts to curtail corruption, political interference and systemic corruption continue to shield high-profile criminals.[40] Legal reforms should introduce more stringent measures for ensuring the independence of anti-corruption agencies and reducing political interference in legal processes.[41]

3. A Case Study of Fake Gold Scammers and "Wash Wash" Cartels: The Need for Racketeering Offences

3.1 The Case Study of Fake Gold Scammers

3.1.1 Mode of Operation and Connected Crimes

Fake gold scams in Kenya are highly organized schemes, often involving a network of criminals posing as legitimate gold traders.[42] These scammers typically target foreign investors seeking to purchase large quantities of gold, luring them with offers of below-market prices.[43] The scammers use elaborate setups, including forged documentation, fake gold bars, and high-end offices that appear professional. For example, in a 2023 case, two Malaysian nationals

[39] ibid
[40] ibid
[41] ibid
[42] Maina, S. N. (2019). *A Critique of the Anti-money Laundering Legal and Institutional Framework in Kenya* (Doctoral dissertation, University of Nairobi).
[43] ibid

were defrauded of Ksh 2.85 billion after being convinced to purchase 500kg of fake gold.[44] The syndicate involved smelting tools, fake gold-coated bars, and international company documents, all meant to convince victims of the scam's legitimacy.

Additionally, the scammers often use trusted intermediaries, such as law firms or banks, to create the appearance of legitimacy.[45] These intermediaries may unknowingly assist in facilitating the transactions. The criminals also engage in other connected crimes such as money laundering, document forgery, and smuggling.

3.1.2 Challenges in Effective Prosecution

The prosecution of fake gold scammers in Kenya faces numerous challenges. One of the main issues is the involvement of influential figures, including politicians and law enforcement officers, who are either complicit or offer protection to the syndicates.[46] For instance, several fake gold scams have been linked to members of parliament, police officers, and other influential figures, complicating investigations and legal proceedings.[47]

Another challenge is the complex, cross-border nature of these operations.[48] Many of the syndicates collaborate with international networks, making it difficult for Kenyan authorities to trace and recover assets or prosecute

[44] Star Reporter (2024). Trader in Sh2.8 billion Gold Scam Case Charged in Court. *The Star*.
[45] Directorate of Criminal Investigation (2024). DCI's Resolute War on Fake Gold Scammers.
[46] ibid
[47] Maina, S. N. (2019). *A Critique of the Anti-money Laundering Legal and Institutional Framework in Kenya* (Doctoral dissertation, University of Nairobi).
[48] ibid

suspects abroad.[49] The lack of effective international cooperation frameworks exacerbates this problem.[50] Furthermore, victims are often reluctant to report these scams due to embarrassment or fear of retribution, leaving the crimes unreported or under-investigated.[51]

The current legal framework is also inadequate to tackle the complexity of these scams, as existing laws do not provide comprehensive tools to prosecute entire criminal enterprises, which consist of numerous actors performing various roles in the fraudulent schemes.[52] This points to the need for racketeering offences similar to the U.S. RICO Act, which would allow prosecutors to target the entire criminal organization rather than just individual actors involved in isolated incidents.

3.2 The Case Study of "Wash Wash" Cartels

3.2.1 Mode of Operation and Connected Crimes

"Wash wash" cartels in Kenya are deeply entrenched in money laundering schemes and fake currency production.[53] These cartels often operate in posh Nairobi estates, where they establish high-end offices furnished with fake gold, counterfeit documents, and other props to maintain the illusion of legitimacy.[54] They frequently target wealthy individuals and businesses, both local and international, luring them with promises of high returns on investments or

[49] ibid
[50] ibid
[51] ibid
[52] ibd
[53] Joseph Wangui (2022) 'Wash-wash' paradise: Where fraudsters thrive, roam freely' *Nation* available at https://nation.africa/kenya/news/-wash-wash-paradise-where-fraudsters-thrive-roam-freely--3861930 accessed 14 October 2024
[54] ibid

gold deals.[55] In some cases, they claim to have access to large sums of money disguised in black ink (to avoid detection) and offer to "clean" the money using special chemicals, with victims paying for these "cleaning solutions".[56]

The cartels are also involved in other criminal activities such as the production of fake currencies and fraudulent government tenders.[57] They often present counterfeit banknotes as legitimate, using fake documents, stamps, and machinery to convince their victims.[58] Notably, in 2019, authorities found a large sum of fake currency—Sh32 billion—hidden in metal trunks, along with tools used to produce counterfeit money.[59]

3.2.2 Challenges in Effective Prosecution

The prosecution of "wash wash" cartels is fraught with difficulties. One major challenge is the involvement of influential figures, including politicians and law enforcement officers, who provide protection for the syndicates.[60] This interference hampers investigations and results in delays or dismissals of cases.[61] Additionally, the cartels are highly sophisticated, using fake documents and professional setups that make it difficult for law enforcement to gather sufficient evidence for successful prosecutions.[62]

Another challenge is the reluctance of victims to come forward.[63] Many

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[55] ibid
[56] ibid
[57] ibid
[58] ibid
[59] ibid
[60] Kiage N & Otieno S. (2025). Ugandan Minister, Distressed US Tycoon and Kenyan Ties to Sh81 Million Fake Gold Scam. *Daily Nation*.
[61] ibid
[62] ibid
[63] ibid

victims, embarrassed by their involvement in such fraudulent schemes or fearing retaliation, choose not to report the crimes. Even when cases are reported, the prosecution process is slow and expensive, and many criminals are released on bond, allowing them to continue their illegal activities.

These factors highlight the need for more robust legal frameworks that can dismantle these organized crime networks effectively. Strengthening laws to incorporate enterprise-based liability and increasing penalties for money laundering and counterfeit schemes would significantly improve the ability to combat "wash wash" cartels.

3.3 The Urgent Need for Racketeering Offences in Kenya

Kenya's current legal framework is inadequate to address the complex and evolving nature of organized crime syndicates, such as fake gold scammers and "wash wash" cartels.[64] These groups operate sophisticated, multi-layered criminal enterprises that exploit gaps in the law to avoid prosecution. The need for racketeering offences, akin to those found in the U.S. Racketeer Influenced and Corrupt Organizations (RICO) Act, has become urgent for several reasons: Both fake gold scammers and "wash wash" cartels engage in interconnected crimes involving multiple actors performing various roles in the criminal network.[65] These crimes include fraud, money laundering, forgery, and document falsification. Current Kenyan laws, such as the Proceeds of Crime and Anti-Money Laundering Act, focus on individual crimes rather than criminal enterprises, leaving these syndicates intact even when some members are arrested.[66] A racketeering law would enable authorities to prosecute the

[64] Musau, S. (2019). Kenya: Organised Crime, Political Linkages and Violence. In *Handbook of Organised Crime and Politics* (pp. 276-286). Edward Elgar Publishing.
[65] ibid
[66] Hübschle, A. (2011). From theory to practice: Exploring the organised crime-terror nexus in Sub-Saharan Africa. *Perspectives on Terrorism*, *5*(3/4), 81-95.

entire criminal enterprise as a single entity, thereby dismantling these networks more effectively.

The complicity of influential figures, including politicians and law enforcement officers, in these crimes is a significant challenge to prosecution.[67] The current legal framework does not adequately address how to prosecute individuals who use their positions of power to protect criminal organizations.[68] Racketeering offences would allow for the prosecution of these individuals as part of a broader conspiracy, targeting both the perpetrators and their enablers within the system.

Many victims of fake gold scams and "wash wash" cartels are reluctant to report these crimes due to fear of retaliation or embarrassment. With racketeering laws in place, authorities could pursue cases based on a pattern of criminal behaviour rather than relying solely on individual complaints. This would reduce the burden on victims to come forward while enabling law enforcement to build stronger cases against organized crime groups.

Many of these syndicates operate transnationally, moving assets and conducting scams across borders.[69] The RICO Act in the U.S. has provisions that allow for cooperation between countries in dealing with international criminal organizations.[70] Kenya would benefit from similar provisions to tackle cross-border crimes effectively, particularly when dealing with foreign investors targeted by local criminal enterprises.[71]

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[67] Kiage N & Otieno S. (2025). Ugandan Minister, Distressed US Tycoon and Kenyan Ties to Sh81 Million Fake Gold Scam. *Daily Nation*.
[68] ibid
[69] ibid
[70] ibid
[71] ibid

Racketeering laws would also strengthen asset forfeiture provisions, allowing authorities to confiscate the proceeds of crime more swiftly. Under a RICO-like framework, both civil and criminal forfeiture can be pursued, making it harder for syndicates to retain their ill-gotten gains while waiting for lengthy court processes.

4. Lessons from the American Racketeer Influenced and Corrupt Organizations (RICO) Act

4.1 Prohibitions

4.1.1 The Position under the RICO Act

The RICO Act (18 U.S.C. § 1961-1968)[72] was enacted to target organized crime by allowing the prosecution of individuals who participate in ongoing criminal enterprises through a pattern of illegal activity. The statute prohibits engaging in or conspiring to engage in racketeering activities, which involve a wide range of criminal acts, known as "predicate acts," such as fraud, bribery, money laundering, and violent crimes. Specifically, Section 1962 outlines the core prohibitions under RICO:

- **Section 1962(a)** prohibits using income derived from a pattern of racketeering activity to invest in or acquire an interest in any enterprise.
- **Section 1962(b)** prohibits acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity.
- **Section 1962(c)** makes it unlawful for any person associated with an enterprise to participate in the conduct of the enterprise's affairs through a pattern of racketeering activity

[72] RICO Act (18 U.S.C. § 1961-1968)

- **Section 1962(d)** criminalizes conspiracies to violate the other subsections of the Act, broadening its scope by allowing the prosecution of individuals who conspire to engage in racketeering activities, even if they did not personally commit a predicate act

  Case law under RICO has further clarified the application of these provisions. For example, in *Boyle v. United States*, the U.S. Supreme Court emphasized that a RICO enterprise need not have a formal structure; instead, it can be an association of individuals working together with a common purpose, and the pattern of racketeering can be proved by at least two predicate acts committed within ten years.[73]

4.1.2 Lessons for Kenya

Kenya can draw several critical lessons from the RICO Act when crafting its racketeering laws:

✓ **Enterprise-based Liability**: One of RICO's key strengths is its focus on dismantling entire criminal enterprises.[74] Kenyan laws currently focus on individual crimes, making it difficult to target interconnected syndicates like "wash wash" cartels and fake gold scammers.[75] Adopting provisions similar to Section 1962(c), which allows for the prosecution of those involved in the management of a criminal enterprise, would enable Kenya to address the collective activities of organized crime groups.

✓ **Incorporating Predicate Acts**: The broad range of predicate acts listed under RICO, including fraud, bribery, and money laundering, can serve as a model for Kenya to include in its legislation. These predicate acts are critical in establishing a pattern of racketeering activity and could be essential in

[73] *Boyle v. United States*, 556 U.S. 938 (2009).
[74] Pierson P.B. (2013) RICO Enterprises: The Mob and Fraud. 85 *Temple Law Review*.
[75] ibid

targeting Kenya's organized criminal syndicates, which are often involved in similar illegal activities.

✓ **Civil Remedies and Asset Forfeiture**: Kenya can benefit from RICO's provision for civil actions under Section 1964, which allows victims of racketeering to sue for damages, including treble damages (three times the actual harm). Additionally, asset forfeiture mechanisms under RICO are powerful tools that Kenya could adopt to confiscate assets derived from racketeering activities.[76]

✓ **Targeting Conspiracies**: Kenya could also introduce provisions similar to Section 1962(d), which criminalizes conspiracy to engage in racketeering. This would allow the prosecution of individuals involved in planning or facilitating organized crime, even if they did not commit the actual predicate crimes themselves.[77]

4.2 Enhanced Penalties and Sanctions

4.2.1 The Position under the RICO Act

The **Racketeer Influenced and Corrupt Organizations (RICO) Act** provides for both severe criminal and civil penalties designed to dismantle organized crime operations. Under 18 U.S.C. § 1963, those convicted of RICO violations can face up to 20 years in prison per racketeering count, along with hefty fines that can amount to $250,000 or double the gross profits or other proceeds from the crime. Additionally, the convicted individual must forfeit any proceeds and interests gained from the criminal enterprise, including property, businesses, and other assets. These forfeiture provisions aim to strip criminal organizations of their financial power.[78]

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[76] (RICO) Act 18 U.S.C. § 1964
[77] (RICO) Act 18 U.S.C. § 1962(d)
[78] (RICO) Act 18 U.S.C. § 1963

In RICO cases, defendants may also face civil penalties, where victims of racketeering activities can file lawsuits seeking treble damages—meaning victims can recover three times the damages they suffered due to the racketeering activities. This combination of criminal and civil penalties makes RICO a particularly powerful tool for law enforcement and private parties affected by organized crime.[79]

Notable case law includes *RJR Nabisco, Inc. v. European Community*, where the U.S. Supreme Court upheld the broad application of RICO, even allowing it to be applied in cases involving international criminal activities.[80]

4.2.2 Lessons for Kenya

Kenya can learn several key lessons from the RICO Act regarding penalties and sanctions:

✓ **Stronger Criminal Penalties**: Kenyan legislation could benefit from introducing enhanced penalties similar to RICO's structure. Criminals involved in syndicates like "wash wash" cartels and fake gold scams should face not only lengthy prison sentences but also significant fines tied to the financial gains from their crimes. Such penalties would act as stronger deterrents and diminish the financial capacity of these criminal networks.

✓ **Asset Forfeiture Provisions**: Kenya's current legal framework could be strengthened by incorporating robust asset forfeiture mechanisms, as seen in 18 U.S.C. § 1963. The requirement for defendants to forfeit all proceeds from illegal activities ensures that criminal organizations cannot retain the financial

[79] ibid

[80] *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325 (2016).

benefits of their crimes. This could be particularly impactful in dismantling the financial operations of organized crime groups in Kenya.

✓ **Civil Remedies**: Kenya could also introduce civil remedies allowing victims of organized crime to sue for damages, as provided under 18 U.S.C. § 1964 in the RICO Act. By permitting private individuals to seek treble damages, the law would not only offer restitution but also hold criminal enterprises financially accountable.[81]

4.3 Double Conviction for Underlying Offence and for Substantive Violation of the Act

4.3.1 The Position under the RICO Act

Under the **Racketeer Influenced and Corrupt Organizations (RICO) Act** (18 U.S.C. §§ 1961-1968), it is possible for a defendant to be convicted both for the underlying criminal offenses (called predicate acts) and for the substantive violation of RICO itself. The key feature of the RICO statute is that it allows prosecutors to bundle multiple criminal offenses committed by an individual as part of an enterprise into a single charge of racketeering.[82] The underlying offenses could be any of the predicate crimes listed in 18 U.S.C. § 1961(1), which include offenses like bribery, fraud, extortion, or money laundering.

A notable element of RICO is that the statute does not require that the defendant personally commit the predicate offenses to be convicted. For example, under 18 U.S.C. § 1962(c), a person may be found guilty of participating in the conduct of an enterprise through a pattern of racketeering activity, even if they only conspired or aided in the commission of the underlying crimes. This means that defendants can face a double conviction: one for the substantive RICO violation and another for the underlying offenses.

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[81] Pierson P.B. (2013) RICO Enterprises: The Mob and Fraud. 85 *Temple Law Review*.
[82] (RICO) Act (18 U.S.C. §§ 1961-1968)

In cases such as *United States v. Turkette*, the U.S. Supreme Court confirmed that a RICO enterprise can be prosecuted separately from the specific criminal acts it engages in, meaning that both the underlying offenses and the broader racketeering charge can lead to separate convictions.[83]

4.3.2 Lessons for Kenya

Kenya could adopt a similar framework to the U.S. RICO Act to enhance the prosecution of organized crime syndicates like "wash wash" cartels and fake gold scammers. By allowing for double convictions—one for the specific crimes committed and another for participation in an organized criminal enterprise—Kenyan prosecutors would have a more powerful tool to dismantle entire criminal networks.

✓ **Addressing Complex Criminal Enterprises**: In Kenya, criminal enterprises often involve multiple actors operating across various crimes. Introducing provisions similar to 18 U.S.C. § 1962(c) would allow Kenya to hold individuals accountable not only for the specific acts they commit but also for their broader role in facilitating the enterprise.

✓ **Deterring Organized Crime**: The possibility of facing double convictions would act as a stronger deterrent. Criminals would face harsher penalties for both their involvement in specific offenses and their role within a criminal organization. This approach would reduce the ability of criminal networks to shield themselves by distancing key members from direct criminal acts.

4.4 Remedies (Injunctive Relief)

4.4.1 The Position under the RICO Act

The RICO Act allows for injunctive relief under certain circumstances.

[83] *United States v. Turkette*, 452 U.S. 576 (1981).

Specifically, 18 U.S.C. § 1964(a) provides district courts with the authority to issue injunctions to prevent and restrain violations of the RICO Act. This injunctive relief can include divestment of interests, restrictions on future activities, and even the reorganization or dissolution of enterprises involved in racketeering.

However, the scope of injunctive relief is mostly limited to actions brought by the government. The Attorney General is specifically empowered under Section 1964(b) to institute proceedings for injunctive relief. While Section 1964(c) allows private parties to sue for damages, there is a long-standing debate regarding whether private plaintiffs can seek injunctive relief. Courts have typically held that private litigants are not entitled to injunctive remedies under RICO.

In cases like *Chevron Corp. v. Donziger*,[84] courts have sometimes granted injunctive relief in RICO cases, but this remains an exception rather than the rule, and the issue continues to spark legal debate.

4.4.2 Lessons for Kenya

Kenya can learn several important lessons from the RICO framework regarding injunctive relief:

✓ **Empowering Authorities to Act**: The ability of the Attorney General or other government bodies to seek injunctive relief should be explicitly integrated into Kenyan legislation. This would enable Kenyan authorities to take swift action to restrain organized criminal activities, such as shutting down operations of criminal enterprises or seizing assets to prevent further harm.

[84] *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016).

✓ **Clarifying the Scope for Private Plaintiffs**: While the RICO Act does not allow private plaintiffs to seek injunctive relief, Kenya could consider adopting a more inclusive approach. Allowing private plaintiffs, particularly victims of organized crime, to seek injunctive relief could serve as an additional deterrent to criminal enterprises, preventing them from continuing their illegal activities while legal proceedings are underway.

✓ **Broader Remedies for Organized Crime**: Kenya could benefit from RICO's flexible approach to remedies, including the dissolution or restructuring of enterprises engaged in criminal conduct. This would allow the state to dismantle criminal organizations more effectively by targeting both their operations and financial structures.

Conclusion

The rise of complex and sophisticated criminal syndicates in Kenya, such as fake gold scammers and "wash wash" cartels, has exposed significant gaps in the country's legal framework for combating organized crime. Despite efforts through existing legislation, such as the Proceeds of Crime and Anti-Money Laundering Act and the Anti-Corruption and Economic Crimes Act, the persistence of these criminal enterprises reveals the need for a more robust and comprehensive legal approach. The introduction of a RICO-style legislation in Kenya offers a powerful solution by providing the capacity to prosecute entire criminal enterprises rather than focusing solely on individual offenders.

The key merit of RICO lies in its ability to connect seemingly unrelated crimes into a pattern of racketeering that can be prosecuted together, dismantling the entire enterprise behind these crimes. This enterprise rationale would not only strengthen Kenya's ability to combat organized crime but also ensure that criminals are stripped of their financial power through enhanced penalties, including asset forfeiture and civil remedies. Additionally, by allowing for double convictions—both for the underlying offenses and for the broader racketeering activities—RICO-style legislation would offer a more

comprehensive legal tool for Kenyan prosecutors.

Ultimately, the adoption of such legislation in Kenya would be a significant step toward addressing the growing threat of organized crime, protecting victims, and safeguarding the country's economic and social systems. By learning from the U.S. RICO Act and adapting it to Kenya's specific context, the country can enhance its legal arsenal against the evolving landscape of organized criminal syndicates.

References

Anti-Corruption and Economic Crimes Act (Cap. 65)

Boyle v. United States, 556 U.S. 938 (2009).

Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016).

Hübschle, A. (2011). From theory to practice: Exploring the organised crime-terror nexus in Sub-Saharan Africa. *Perspectives on Terrorism*, *5*(3/4), 81-95.

Joseph Wangui (2022) 'Wash-wash' paradise: Where fraudsters thrive, roam freely' *Nation* available at https://nation.africa/kenya/news/-wash-wash-paradise-where-fraudsters-thrive-roam-freely--3861930

Maina, S. N. (2019). *A Critique of the Anti-money Laundering Legal and Institutional Framework in Kenya* (Doctoral dissertation, University of Nairobi).

Maureen Njeri (2023) 'DCI Detectives Trail and Arrest 7 Linked to Ksh 2.85B Gold Scam in Kileleshwa' available at https://www.kenyans.co.ke/news/95992-dci-trails-and-arrest-security-guards-among-7-involved-ksh-285b-gold-scam

Musau, S. (2019). Kenya: organised crime, political linkages and violence. In *Handbook of Organised Crime and Politics* (pp. 276-286). Edward Elgar Publishing.

Prevention of Organised Crimes Act (Cap. 59).

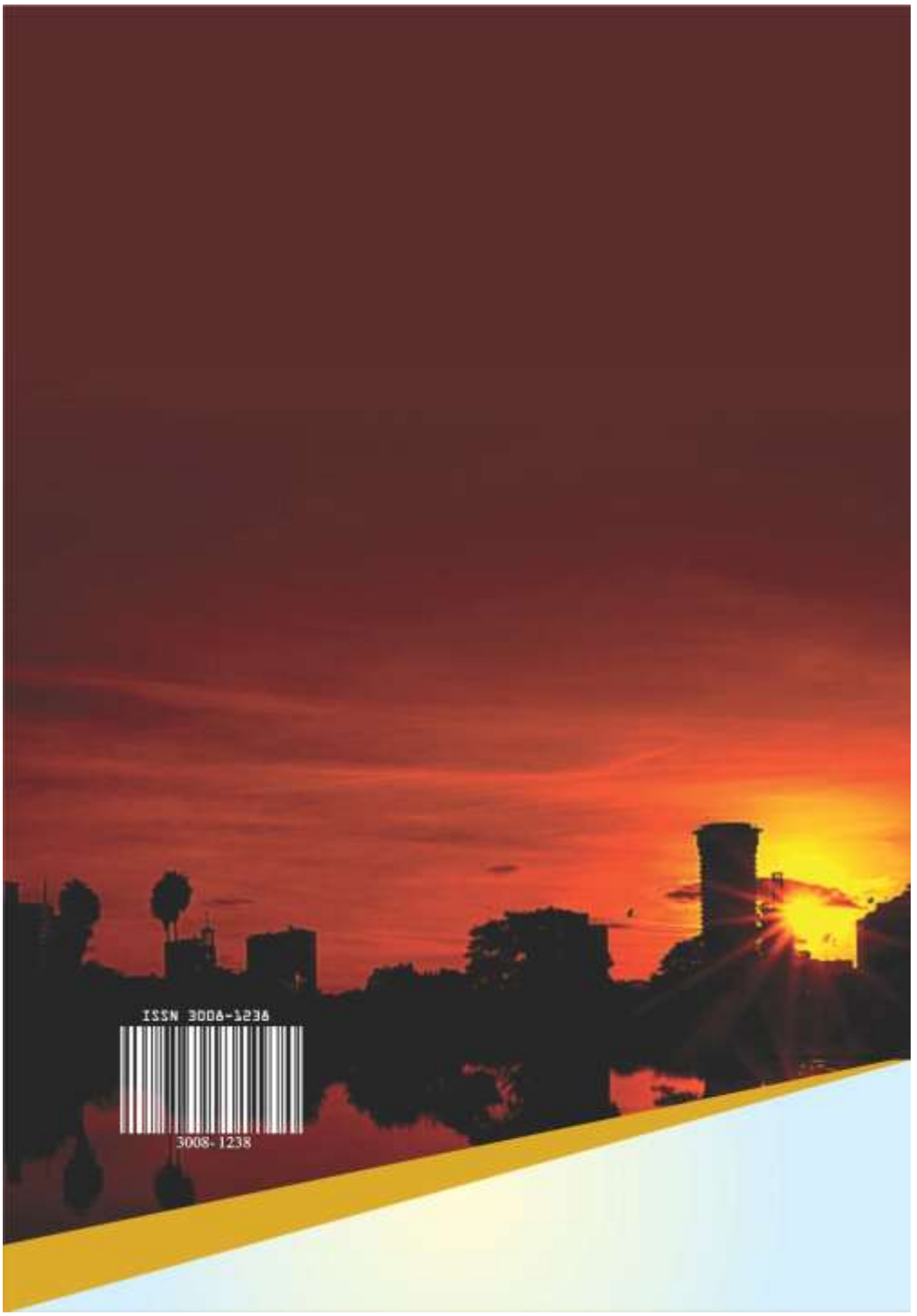
Proceeds of Crime and Anti-Money Laundering Act (Cap. 59A)

Racketeer Influenced and Corrupt Organizations (RICO) Act

RJR Nabisco, Inc. v. European Community, 579 U.S. 325 (2016).

Sang, M. A Proposal for Legislative Reform of Kenya's Prevention of Organised Crimes Act–A Comparative Analysis By: Michael Sang. *Journal of Conflict Management and Sustainable Development*, *3*(7), 195.

United States v. Turkette, 452 U.S. 576 (1981).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