

MAKING OUR DEMOCRACY WORK BY MAKING OUR JUSTICE SYSTEM WORK BETTER; A STATEMENT BY DR. GIBSON KAMAU KURIA SC, PAUL MUIITE SC, AHMEDNASIR ABDULLAHI SC AND NELSON HAVI- PRESS STATEMENT

20th December 2024

1. We, the above Senior Counsels, have all practiced law for two to more than five decades each in this country and know the following things about our justice system:
 - a. every citizen is under a civic duty to make our democracy work in accordance with the Constitution which was promulgated on 27th August 2010; we make this statement in discharge of that civic duty; we know that they have made contributions in the past but have yet more to make as no doubt our posterity would do, so that we may have one of the best democracies in the world; through our proposed action, we seek to make our democracy work;
 - b. as advocates, we are obliged by our profession to contribute to an enlightened opinion of public affairs in our country;
 - c. the organs of justice under Article 159 of the Constitution namely: mediators, arbitrators, tribunals and courts are functioning reasonably well and reforms can be made to make them do a better job;
 - d. however, we have now reached a point where we are worried about the weakening of the rule of law; we have never been here before; we are equally worried about the threat to title to any property because of the level of forgeries and either corrupt or incompetent legitimization of them by the High Court and lower courts; no one's title is secure anymore and we even worry for the banks which hold title documents to secure funds availed to grow our economy; the worry is of every title holder is that if other valid titles have been invalidated, when will ours be invalidated? And where shall we go?
 - e. we are all overwhelmed in our task of assisting clients to seek remedies against decisions which are illegal, despite the fact that they might have been or were made honestly and in exercise of judicial independence by judicial officers, irrespective of the courts concerned, and of late many other rulings, judgments which are products of corruption and incompetence on the part of magistrates and judges below the Court of Appeal; we just cannot cope with the work load; it is becoming increasingly difficult to adhere to court timelines for seeking remedies because the demand for reliefs are becoming increasingly

unmanageable; numerous applications for judges and magistrates to recuse themselves are being made because judicial officers have decided to ignore the law as laid down in the constitution, statutes and precedents of the Supreme Court, The court of Appeal and other jurisdictions; these Courts are turning blind eyes to the law;

- f. we are greatly troubled by numerous decisions where judicial officers have through corruption or incompetence delivered judgments and made rulings whose effect is to put in question of the very purpose of a title deed or certificate of title or any other form of ownership document. We have been horrified to see courts upholding as valid, forged documents and assisting crooks to take away other peoples properties, the logic of all this is clear. This legitimization has taken place after High Court judges and lower court magistrates have dishonestly refused to apply the law as stated by the Court of Appeal and the Supreme Court. In various cases in courts, the decisions of the Supreme Court and Court of Appeal ignored have been described by the advocates handling various matters. The documents of title of ownership you hold do not mean anything because documents manufactured by public officers in the Ministry of Lands, land Registrars in the country and Registrar of Companies have been dishonestly or illegally upheld and eviction of owners being ordered; in virtually every county, there are to be found corrupt Land Registrars who manufacture fake titles for a fee; as Justice Baghwati of the Supreme Court of India has observed, the right to life which has been protected by Article 26 of the Constitution includes the right to protection of property and other means of livelihood. We have no reason to believe that the other advocates in the republic are not overwhelmed by instructions to have corruptly given and honestly but incompetently given judgments set aside and in the short run, execution stayed; we expect to be in the Court of Appeal and the Supreme Court a crisis when the appeals reach there; in the immediate future, the question is must owners of property die because of poverty after they have been robbed of their property through corrupt rulings and judgements? As senior counsel we say that this is not an option the Country has
- g. the problem with forging of title documents has been with us since 1990s as Prof Ato Kwamna Onoma has described in his book **"The Politics of Property Rights Institutions in Africa"** in Chapter 5 which he traces corrupt or fake titles to the period after 1990; for about eight

(8) years, the land registries had worked without corruption or much corruption; corruption in the land registries has grown progressively worse over the last three decades, invasions of farms, homes and other immovable properties has origin in the false assumption that a fake title when sanitized by a corruptly given judgment will turn a crook into an owner of a prime property. As Senior Counsel, we are talking about cases which we are handling and not fiction in all parts of the country as from time to time we get instructions to act for clients from every part of the country. Judges of the Supreme Court and Court of Appeal mainly, and also some in the High Court, have come up with jurisprudence to have declared null and void fake titles. We commend all the judges who have done this and do so daily. We hasten to add that there are others who are busy aiding and abetting crooks. One of us Dr. Gibson Kamau Kuria had his home invaded on 14.4.2023 and the police from Hardy Police Station, Karen, when called feigned inability to provide assistance. If a senior counsel cannot get protection from a state, who can?

- h. Our experience is that either the Judicial Service Commission is as overwhelmed as we are with complaints against judicial officers or it is not functioning as it should. We are seeing judicial officers who are arrogant in disregarding the law in apparent view that the Judicial Service Commission will do nothing to them; no doubt because they know that the Judicial Service Commission will not take action against them before they have made considerable money and assisted crooks to acquire other people's property. The law does not allow us to name such judicial officers through the medium of a statement like this one. However, we are taking up the matter with the relevant authorities. We are aware of cases of holders of fake titles who have evicted owners of properties who have been kept out of their property for two or more years; it is a tribute to our judicial system that such people have been able to return to their properties; we know of others who are fighting cat and mouse games with crooks and the police are not doing enough to protect owners of properties; it is virtually impossible to kick out the arrogant land grabbers who disobey Court orders with impunity, our Courts are yet to obtain, as did the Supreme Court did in the US in **William G. Cooper –v- John Aaron (1958) 353, US, 1** an order executed by the federal military to force universities to admit African Americans into classrooms; President Abraham Lincoln and

President Eisenhower used the military to enforce the Constitution, this should be done in Kenya if the police are not capable of executing Court Orders; ours is slowly becoming a country where wealth is acquired through thuggery; we shall be happy to supply evidence to any doubting Thomases.

2. We know from our study of law, philosophy and mankind's history that states that human beings must grow from childhood to adulthood and pain comes in the course of growth. This will happen with our republic. We also know from the same that there are ways of avoiding the pain. We now give **three** illustrations from ancient Greece, ancient Rome and USA of 20th century. We give these because human nature does not change throughout the ages and hasten to add that human beings are capable of learning from good governance practices from many parts of the world; the **first one** is Plato's essay titled **Crito in the Dialogues of Plato** the latter describes how Socrates was sentenced to death through an unfair trial and executed in 399BC and refused the assistance of people who bribed everyone in Greece to secure his release, the **second illustration** comes from the selected works of Cicero who describes how grand corruption operated in ancient Rome; the practitioner of grand corruption steals enough to bribe every institution of the state; it still operates in the same way in the modern world the **third illustration** comes from USA whose Supreme Court in **Olmstead v The United States 2777 US 438(1928)** Justice Brandis of that court gave memorable advise to governments all over the world although what he said pertained to America of his day but is of general application in the world as a whole. He stated as follows:

"Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

3. When one is admitted as an advocate of the High Court to practice law, he/she takes an oath to assist in the administration of law without fear or favour. He/she as Lord Mc Millan declared owes **five duties** namely: **to his**

client, to his opponent, to the court, to himself and to the state. In present day Kenya, some judicial officers, advocates and court staff only recognize duty to themselves! Any advocate or judicial officer who engages in corruption violates his duty to the state to ensure that Kenya remains as stated in Article 4 of the Constitution; a multi-party democracy state founded on the national values and principles of government referred to in Article 10 namely patriotism, national unity, sharing and devolution of power, rule of law, democracy, participation of the people, human dignity, equity, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development. The participants in corruption in the justice organs as far as the courts are concerned are judicial officers, advocates of the High Court, Deputy Registrars, Executive and other officers and court clerks, all work together when somebody is deprived of his investment.

4. To be a member of a bar is to be under a duty to do his/her part and as a member of the recognized bar, to use the words of Chief Justice T Vanderbilt of the Supreme Court of New Jersey, to improve his/her profession, the courts and the law. The Supreme Court in its decision of 2017 in **Presidential Petition No. 1 of 2017 Raila Amolo Odinga & Another versus Independent Electoral Boundaries and Commission & Others** in which it nullified the election of the president made this sterling decision and underlined what Plato in Crito and Justice Brandis said about the importance of the rule of law. It stated as follows in paragraphs 394 and 395 of that judgment;

[394]It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the Constitution.

[395]And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law

"is the heritage of all mankind"

and

"a salutary reminder that wherever law ends, tyranny begins."

Cast the rule of law to the dogs, Lutisone Salevao once observed and government becomes a euphemistic government of men...

He adds:

"History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith."¹²³

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Lutisone Salevao, 'Rule of Law, Legitimate Givernance and Development in the Pacific'(ANU Press, 2005)page 2.

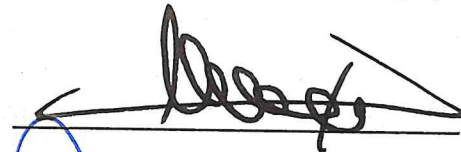
The moment we ignore our Constitution the Kenyans fought for decades, we lose it.


5. The stage has been reached when the cancer on our justice system must be uprooted constitutionally through the exercise by the members of the bar under Article 251 of the Constitution and under the Advocates Act to seek a removal from the Judicial Service Commission, both corrupt and incompetent judicial officers and also such members of the Judicial Service Commission who are not discharging their constitutional duties under the constitution and from the roll of advocates all those who have betrayed the oath of office. We are therefore putting all **on notice** that we shall be inviting support of all those advocates and patriotic Kenyans who share our view to join us in making our justice system work better than it is doing now. We realize that this just a small task in making our democracy work. Since 1950s when Kenyans took arms against colonial rule, Kenyans have told others who love democracy that we cherish it. It is worthy of note that Kenyans were the first people in the African continent to take up arms against their colonial rulers like the Americans did after 1776 when a declaration of independence was made and also the Irish as from the 2nd decade of the 20th Century.
6. Through this statement, we are calling upon advocates and members of the public to send to the President of the Law Society their experiences in the wheels of justice if any and all the evidence of wrong doing, be it incompetence or corruption which are available under both Article 251 of the Constitution and the Advocates Act. The Law Society will establish a data bank which is going to be used in cleaning up the organs of justice in our republic. We shall not allow our nation to go under as has happened in less happier countries of Africa,

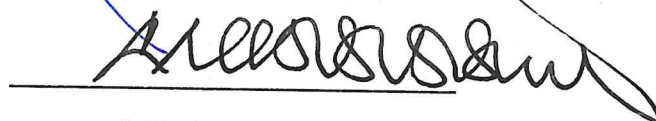
7. As is evident from this statement, we are much interested in justice because of the challenges posed to our health, to the livelihoods of Kenyans and a determination to ensure that our country remains one of the leading democracies in Africa and the world at large.
8. God bless Kenya and God bless Africa.

DATED AT NAIROBI 20th December 2024


DR. GIBSON KAMAU KURIA, SC


PAUL MUTE, SC


AHMEDNASIR ADULLAHI, SC


NELSON HAVI