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**ANALYSIS OF THE VIABILITY OF LIFESTYLE AUDIT AS AN  
ANTI-CORRUPTION TOOL IN KENYA**

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## **ANALYSIS OF THE VIABILITY OF LIFESTYLE AUDIT AS AN ANTI-CORRUPTION TOOL IN KENYA**

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### **Abstract**

**Purpose:** The main objective of this paper was to assess whether lifestyle audit as an anti-corruption tool is viable.

**Methodology:** The study was based on a desk review of existing studies and documented statistics. Further, legal framework and case laws were cited. A narrative analysis was performed and at this point the information was interpreted by comparing the results with the results of other empirical studies. This information was interpreted using the “stories in the stories” and linked to the existing literature.

**Results:** The study found that lifestyle audit is a viable tool for fighting corruption. However, there are challenges in the legal framework, particularly on the implementation. The study noted that the viability of lifestyle audits depends on judicial interpretation, political will and more importantly addressing of the current software and hardware issues existing in the current legal framework.

**Recommendation:** The study calls for political will to ensure the Lifestyle Audit Bill 2019 is not watered down by judicial interpretation. It further recommends that the political will should be accompanied by executive action to fight corruption through wealth declaration.

**Key Words:** *Lifestyle Audit, Corruption, Political Will, Wealth Declaration.*

## 1.0 Introduction

Corruption is a global problem. Worse, it is not new phenomenon, but has been infamously dated to be as old as government itself.<sup>1</sup> The global and recalcitrant nature of corruption has attracted the attention of international bodies like the United Nations (UN), which enlists combatting it among the sustainable development goals.<sup>2</sup> Besides, regional and international instruments have been developed to fight corruption, further reflecting the breadth of the problem. Crucially, corruption negatively affects the economy at the macro level, distorts public expenditure, undermines that rule of law, and hinders good governance. Ngumbi defines corruption as the abuse of public office for personal gain.<sup>3</sup> The vice may take many forms, including petty or grand. Whatever its forms, the effects of corruption are undeniable regionally and locally. Sihanya and Ngumbi observe that the amount of money lost through corruption in Africa annually is sufficient to lift 1.4 billion people from poverty.<sup>4</sup> Separately, Ngumbi argues that the problem is so prevalent in Kenya that the country has earned a “pride of place” when the most corrupt countries in the world are mentioned.<sup>5</sup> Apparently, corruption is a problem of global, regional, and local significance, frequently described as a pandemic. Kenya faces to herculean task of slaying the monster if it is to experience its sustainable development goals.

In response to the corruption pandemic, various tools have been developed to fight the problem in Kenya. Key among them are lifestyle audits. According to Sihanya and Ngumbi, a lifestyle audit is a process used to ascertain whether an individual’s lifestyle matches their known legitimate sources of income.<sup>6</sup> Under the *Lifestyle Audit Bill, 2019*, a lifestyle audit has been defined as “an investigative audit of a person's living standards to ascertain consistency with a person’s lawfully obtained and reported income”.<sup>7</sup> The proposed definition in the draft Bill suggests that lifestyle audits compare the living standards of an individual to the income they have lawfully obtained and reported. Much has been written on the potential of lifestyle audits to help combat corruption in the public sector. However, there has been little critical examination of both the hard and soft elements of lifestyle audits in Kenya to determine their viability as anti-corruption tools. Thus, this paper explored the viability of lifestyle audit as a tool/strategy of fighting corruption. The paper has four sections. First section unpacked the legal, policy and administrative framework for lifestyle audit in Kenya. Second section analyzed problems inherent of the framework (software) for lifestyle audit. Fourth section discussed the implementation/hardware issues facing lifestyle audit in Kenya. Finally, the paper concluded by answering whether lifestyle audits are a viable anti-corruption tool.

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<sup>1</sup>A Shah, *Performance Accountability and Combating Corruption* (World Bank 2007).

<sup>2</sup>ibid.

<sup>3</sup>Eric Ngumbi, ‘Viability of Lifestyle Audits as an Anti-Corruption Strategy in Kenya: A Critical Assessment of the Policy, Legal and Administrative Framework’.

<sup>4</sup>Ben & Sihanya and Eric Ngumbi, ‘Lifestyle Audits as an Emerging Anti-Corruption Tool: Concept, Essentials and Prospects in the Public Sector’, (2020) 4 *Journal of Anti-Corruption Law* 80.

<sup>5</sup>Ngumbi (n 3).

<sup>6</sup>Sihanya and Ngumbi (n 4).

<sup>7</sup>*Lifestyle Audit Bill, 2019* s.2.

## **1.0. The legal, Policy, and Administrative Framework for Lifestyle Audits in Kenya**

In Kenya, as is the case in many countries, lifestyle audits are embedded in the broader anti-corruption framework. Thus, to understand and adequately describe the regulatory regime of lifestyle audits, one must put together a number of tools scattered in different laws, institutions, and policy statements. Crucially, lifestyle audits can be located within the following schemes: wealth declaration systems, income tax administration systems, asset forfeiture regimes, integrity vetting of public officials, and monitoring of public officers' financial transactions. A brief layout of each of the elements is as follows:

### **1.1. Wealth Declaration Schemes**

Public officials' declaration of wealth have been widely accepted as a measure for public accountability. Member states are usually required by the *United Nations Convention against Corruption (UNCAC)* to establish institutions and frameworks for public officials' asset disclosure.<sup>8</sup> The same acts as an accountability mechanism which is aimed at enhancing good governance and combating corruption across the African continent and within African countries. As a matter of fact, Africa has taken the lead when it comes to the ratification of the United Nations Convention against Corruption (UNCAC) and the establishment of wealth declaration systems around the world. Despite the constant application of these frameworks towards the goal of enhancing public accountability, corruption still continues to be a social monster, thus leading to a lack of trust of governments by the general public.

In Kenya, specifically, institutions such as the Teachers' Service Commission (TSC) have adopted wealth declaration schemes within their framework of operation.<sup>9</sup> As per the novel guidelines issued in the Kenya Gazette, all instructors must fill out government asset disclosure forms beginning November 1, 2021. In compliance with the Public Officer Ethics Act, 2003, a Kenya Gazette Notice signed by TSC CEO Dr. Macharia on July 30, 2021, spells out new conditions for filling out wealth forms. The Ethics and Anti-Corruption Commission may lawfully punish those who do not comply with the given directives. As such, teachers and members of the Commission's secretariat are mandated to report their assets every two years under the Act, which applies to every government employee. The salaries of over 3,000 teachers and secretariat workers who missed the declaration deadline in the year 2020 were withheld for two months, after which, the Commission subsequently released the salaries owing to the fact that the guidelines intended for the declaration processes were yet to be published.

### **1.2. Income Tax Administration Regimes**

Tax audits and examinations can detect if an individual is involved in corruption activities.<sup>10</sup> This occurs when a review is carried out in an individual's financial record by verifying the

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<sup>8</sup>United Nations Convention against Corruption (UNCAC).

<sup>9</sup><https://www.tsc.go.ke/index.php/media-centre/downloads/category/114-wealth-declaration>.

<sup>10</sup>C Rose, M Kubiciel and O Landwehr, *The United Nations Convention Against Corruption: A Commentary* (OUP Oxford 2019).

sources of their income and flagging any untaxed income. The review may present suspicious activities like business transactions with unusually low or high profit margins.<sup>11</sup>

The Kenya Revenue Authority requires persons to submit information about their lifestyle and conducts audits on the taxpayers to confirm if the declared income is consistent with their expenditure.<sup>12</sup> The audit can raise questions about one's lifestyle, how they maintain their lifestyle and their sources of income. Incorrect tax returns, suspicious transactions which can be obtained from third parties like data from banks, and unexplained wealth can be used to institute investigations.<sup>13</sup>

Taxpayer information obtained from third parties helps in marching the lifestyle trends, income streams, and asset base of a taxpayer against what is declared in the income tax form. Through a revenue collection agency, information about taxpayers' wealth is used and made available when carrying out lifestyle audit.<sup>14</sup>

### **1.3. Financial Monitoring of Public Officials' Transactions**

Monitoring systems are another crucial facet of lifestyle audits. This encompasses systems that help to detect and report unusual, suspicious, complex and other forms of transactions that may be subject to regulation. In Kenya, a monitoring regime is established under the *Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), 2017*. Section 21 of the Act establishes a Financial Reporting Center (FRC) whose principal objective is to assist in the identification of the proceeds of crime and the combating of money laundering.<sup>15</sup> The FRC also makes information collected by it available to investigating authorities, supervisory bodies and any other bodies relevant to facilitate the administration and enforcement of the laws of Kenya, exchanges information with similar bodies in other countries regarding money laundering activities and related offences and ensures compliance with international standards and best practice in anti-money laundering measures.<sup>16</sup>

Some of the functions of the FRC include receiving and analyzing reports of unusual or suspicious transactions made by reporting institution, sending reports to law enforcement authorities, intelligence agencies, and any other supervisory body for further handling.<sup>17</sup> Under section 44 of the POCAMLA, a reporting institution shall monitor on an ongoing basis all complex, unusual, suspicious, large or such other transactions as may be specified in the regulations, whether completed or not, and shall pay attention to all unusual patterns of

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<sup>11</sup>OECD, *Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors* (OECD Publishing 2013).

<sup>12</sup>Ngumbi (n 3).

<sup>13</sup>Sihanya and Ngumbi (n 4).

<sup>14</sup>ibid.

<sup>15</sup>Proceeds of Crime and Anti-Money Laundering Act, 2017.

<sup>16</sup>ibid.

<sup>17</sup>ibid.

transactions, and to insignificant but periodic patterns of transactions which have no apparent economic or lawful purpose as stipulated in the regulations.<sup>18</sup>

Financial monitoring of public officials can go a long way in ensuring the auditing of the financial transactions of public officers therefore it's a viable tool for fighting corruption but the big question is how far after the reports are other institutions like the anti-corruption commission, the judiciary playing their part.

#### **1.4. Integrity Vetting of Public Officials**

Vetting processes established under Chapter Six of the 2010 constitution are also a part of the lifestyle audit system in Kenya. Vetting entails assessing an individual's character to determine if they are suitable for public office. Inquiries are made into the past conduct of an individual to determine if they are likely to have issues with reliability, trustworthiness, and loyalty.<sup>19</sup> By looking into an individual's past, inevitably, the vetting body conducts a lifestyle audit of the candidate. A good illustration of this includes parliamentary vetting of Cabinet nominees, which is often undertaken before their appointment is confirmed.

#### **1.5. Asset Forfeiture Regimes**

Asset forfeiture is a form of confiscation of assets acquired in an unexplained manner by the government.<sup>20</sup> Asset confiscation takes either one of the two court proceedings approaches; criminal or civil. In civil asset forfeiture proceedings, the state is only focused on the property acquired, and thus the owner only appears as a third party. Justice Hedwig Imbosa Ong'udi in *The Assets Recovery Agency v Quorandum Limited & 2 others* stated;<sup>21</sup>

*"...Civil forfeiture proceedings are proceedings in rem (against the property) and it involves a civil suit being brought in court against the property which is reasonably believed to be proceed of crime"*.

The evidential burden falls on the respondent to show that they acquired the assets lawfully. In *Assets Recovery Agency v Phylis Njeri Ngirita & 2 others; Platinum Credit Limited (Interested Party) & another*,<sup>22</sup> the court in ordering and listing the properties to be forfeited by the government, relied on the Jamaica supreme court case of *Assets Recovery Agency v Fisher, Rohan and Miller, Delores*,<sup>23</sup> with regard to the evidential burden placed on the respondent to demonstrate how they lawfully came into possession of the assets at issue.<sup>24</sup>

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<sup>18</sup>ibid.

<sup>19</sup>Sihanya and Ngumbi (n 4).

<sup>20</sup>TS Greenberg, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (World Bank 2009).

<sup>21</sup>*The Assets Recovery Agency v Quorandum Limited & 2 others* [2018] eKLR.

<sup>22</sup>*Assets Recovery Agency v Phylis Njeri Ngirita & 2 others; Platinum Credit Limited (Interested Party) & another* [2020] eKLR.

<sup>23</sup>*Assets Recovery Agency –vs- Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica, Claim No 2007 HCV003259.*

<sup>24</sup>*Assets Recovery Agency v Phylis Njeri Ngirita & 2 others; Platinum Credit Limited (Interested Party) & another* [2020] eKLR. (n 23).

In contrast, criminal asset forfeiture proceedings occurs when an individual in a corruption or economic crime case is convicted, and among the orders given by the court include confiscation of the assets acquired from the proceeds. Since corruption has also taken an international perspective thus making it a complex phenomenon, the United Nations Convention against Corruption requires member states to adopt necessary measures in recovery of assets from proceeds of corruption and economic crimes without a criminal conviction. However, the convention only requires civil approach to be taken where it is impossible to charge a suspect by reason of death, absence, flight or in any other convenient case. Kenya is a signatory to this convention since 2003. Further, by virtue of article 2(6) of the constitution of Kenya 2010, the state is obligated to honor the provisions of the convention.

On regional level, the African Union Convention on Preventing and Combating Corruption (AUCPCC) under article 1 provides that illicit enrichment constitutes an instance where a public official or private citizen assets increase significantly and the person is not in a position to reasonably explain the assets in relation to their income.<sup>25</sup> The Kenya Anti-Corruption and Economic Crimes Act (ACECA) adopted a more similar definition on unexplained assets under section 2, where it provides that the assets in possession of the suspect are in a disproportionate in value to the known income, and the owner cannot in a satisfactory manner give an explanation on the asset.

Generally, Asset forfeiture in Kenya under the ACECA is said to take a civil approach. This is based on the provision of section 55(4) where it provides that asset recovery proceedings are civil in nature. However, there is a close linkage to criminal proceedings. Under section 55(8), the act provides that evidence in a civil asset recovery case is admissible in any other proceeding which include criminal prosecution cases under the anti-corruption court.

In *Registered Trustees of the Sisters of Mercy (Kenya) T/A “Mater Misericordiae Hospital” v John Muriithi & 2 others* the court stated that sections 54 the ACECA deals with compensation under criminal proceedings.<sup>26</sup> This only takes place when there is a conviction. Under section 55-56A ACECA there is an express procedure for forfeiture by the EACC. Such proceedings are of a civil nature and are filed in the High court & in this case in the Anti-Corruption and Economic Crimes division.

## **2.0.Critical Analysis of Lifestyle Audit as an Anti-Corruption Tool/Strategy**

### **Part 1: Analysis at the Software Level**

There are challenges inherent of the laws, policies and the administrative framework providing for lifestyle audit in Kenya. These are what we have referred to as “software issues” as they deal with the regulatory regime itself. These issues can only be addressed through legislation and taking of proper policy/administrative steps. However, there are also some good prospects which we also briefly describe as evident in the current framework. First, we address the issues:

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<sup>25</sup>African Union Convention on Preventing and Combating Corruption (AUCPCC).

<sup>26</sup>*Registered Trustees of the Sisters of Mercy (Kenya) T/A “Mater Misericordiae Hospital” v John Muriithi & 2 others [2019] eKLR.*

### a) Ineffective Wealth Declaration Regime

The United Nations Convention against Corruption (UNCAC) gives the framework for wealth declaration systems among the signatory countries even though it does not provide for universal application standards.<sup>27</sup> Different signatory countries provide for different standards. In Kenya, the law applicable to wealth declaration has several loopholes. In this section we will discuss about three of these and do a comparative analysis with the countries with one of the most successful wealth declaration systems in the world, Ukraine.

**First**, there is lack of defined scope of declaration content, with part IV of the *Public Officer Ethics Act* of 2003, which deals with declaration of assets and liabilities, lacking clarity of the kind or type of assets to be declared. The effect of this has been that public officer's end up declaring mundane assets like clothing. Law with enough efficacy on wealth declaration would provide for the nature of assets and liability to be declared.

**Secondly**, the wealth declaration regime requires all public officers to declare their wealth, this unnecessarily large scope and lack of focus group makes it difficult to monitor and detect any anomalies in wealth declarations of individuals. An example of an effective focus approach would be in Rwanda where only top level public officers which includes the cabinet ministers, the president, legislators and high ranking civil servants and their families (including minors) are the only ones required to declare their wealth.

**Thirdly**, Kenya's wealth declaration regime offers long intervals for declaration of wealth which is basically within a month from the date of appointment, thereafter after every two years and within a month upon exit of the public services, either way it means law enforcement agencies (LEAs) have to wait for a minimum of two years to detect any disparity in income of a public officer, which beats the very objective of fighting corruption.

### b) Lack of a clear investigative threshold

There is need to establish a framework on who can be subjected to lifestyle audit and why. Relying on opulence to determine potential targets won't work as some of the reasons of change of life style could also be inheritance, winning a lottery etc. Most corrupt public officials can steal and hide in plain sight by continuing to live modestly despite their newfound wealth.<sup>28</sup>

Crucially, Kenya's mega corruption occurs mostly in capital intensive infrastructural projects and procurement departments, and thus it is imperative that special attention be provided for individuals working in these areas. The corruption hotspots should be closely targeted in anti-corruption efforts. However, there is need to balance this focus with individuals' right to privacy which is provided for under the constitution. Lifestyle audit is mainly 'a fishing ground' type, of investigation, and the courts too should develop the law in this area so as to avoid individuals seeking injunctions from courts barring investigative agencies from conducting any kind of lifestyle audit which may in the course of the process provide valuable evidence that may assist in criminal prosecution. Thus, investigative threshold needs to be established both through

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<sup>27</sup>Eric Ngumbi and Patrick Owiny, 'From Paper to Practice: Enhancing Public Sector Accountability in Africa through Reform of Wealth Declaration Systems' [2020] Political Economy: Structure & Scope of Government eJournal.

<sup>28</sup>Sihanya and Ngumbi (n 4).



focusing on corruption hotspots and judicial/legislative shaping of lifestyle audits beyond merely being “fishing expeditions”.

**c) Lack of a dedicated law on Lifestyle Audit**

Kenya, like the majority of the world's countries, lacks a unified legislative framework governing lifestyle audit, as the country's existing laws are insufficient in combating graft-related offenses. However, the current applicable law for conducting lifestyle audits includes Chapter Six of the Constitution, which deals with integrity and leadership, Article 10 of the Constitution, the *Leadership and Integrity Act (LIA)* of 2012,<sup>29</sup> the *Public Officer and Ethics Act (POEA)* of 2003,<sup>30</sup> the *Public Service Act* of 2015,<sup>31</sup> and the *Anti-Corruption and Economic Crimes Act*<sup>32</sup> (*ACECA*) of 2003. More precisely, Section 30 of the *Public Officer and Ethics Act* compels state or public officers to file a statement of wealth upon appointment to the public service and every two years thereafter. The public officer's wealth declaration should disclose or reveal the officer's list of assets/properties and liabilities, as well as the dates on which they were obtained. Additionally, Kenyan law provides for various types of lifestyle audits, including those conducted by investigative agencies into public officers' possession of unexplained wealth, those conducted through declaration and verification of income, assets, and liabilities, those conducted through monitoring of bank accounts held by public servants outside Kenya, and those conducted through vetting of public officers.

**d) Prospects of the Lifestyle Audit Bill, 2019.**

To address weaknesses in the legal framework for lifestyle audits of public employees, the proposed Lifestyle Audit Bill 2019 by the Senate should be approved into law and signed into law by the President. It is hoped that if the Bill is passed, it will serve as a viable tool or strategy in the fight against corruption-related offenses because it sets out clearly defined procedures for conducting lifestyle audits in the spirit of the 2010 constitution, which gives effect to Chapter 6 and Article 10 respectively. The Bill proposes a required lifestyle audit for all state officers, and it has entrusted government institutions such as the Kenya Revenue Authority (KRA), Ethics and Anti-Corruption Commission (EACC), and others with the authority to put the Bill into effect upon its enactment.

**Part 2: Analysis of the Hardware/Implementation**

“Hardware” issues are those that entail the implementation part of the legal, policy, and administrative framework for lifestyle audits in Kenya. Implementation is the most important facet of any framework, as no matter how elegant a legal, administrative or policy blueprint is, it is of no use absent implementation. Thus, it is important to look at some of the issues around the implementation of the overarching framework for lifestyle audit in Kenya.

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<sup>29</sup>Leadership and Integrity Act (LIA) of 2012.

<sup>30</sup>Public Officer and Ethics Act (POEA) of 2003.

<sup>31</sup>Public Service Act of 2015.

<sup>32</sup>Anti-Corruption and Economic Crimes Act (ACECA) of 2003.

### **i. Lack of Political Will**

In Kenya there is no political will to tackle corruption through lifestyle audit. Political will exists both individually and collectively and is a complex concept, which involves intangible phenomena like intent and motivation.<sup>33</sup> Political will is even more complex due to the fact that it is only revealed in actions and not documentation that could be challenged through legal action.<sup>34</sup> The political actors must commit to undertake actions through the objectives they set.<sup>35</sup> Sustainable actions undertaken to reduce corruption, for example, performing anti-corruption programs, and in the long term finding ways of sustaining the costs of those actions, lead to a clearer picture of what political will looks like. These classic features of political will have been conspicuously absent from the legal framework meant to fight the vice.

Relatedly, parliament has been unwilling to enact stiffer measures against corruption. Anti-corruption programs are always stalled through lack of political good will. Judges have on many occasions made rules to aid in corruption cases. This is usually encouraged by those against judge made laws. Another way of enforcing lifestyle audit is through wealth declaration as a government directive for civil servants. Despite these undertakings most civil servants have not been fully forthcoming with the true state of financial affairs. The heads of the anti-corruption enforcement bodies' appointment has a political bearing negating the purpose of their appointment. These appointees usually end up serving political interest and the presence of parliamentary committees that probe their work does not deter them from corruption.

The EACC is mandated with the task of legally enforcing anti-corruption laws through prevention, investigation, public education among other measures that are used to fight corruption. It does this in collaboration with other bodies like the Asset Recovery Agency, Kenya Police, Kenya Revenue Authority etc. The Anti-corruption body investigates and prevents corruption, economic crimes and it educates the public on the dangers of corruption. The EACC has the role of promotion of the lifestyle audit bill, and will be tasked with its implementation. But even with the EACC in place, corruption has continued to thrive because the political class has continued to interfere with its activities.

### **ii. Legal-Constitutional Challenges**

The challenges to the effective operationalization of lifestyle audits appears in form of infringement of private rights which are protected by the constitution. If the audit process is not properly aligned to the constitution, then the person being investigated upon may seek to protect the privacy of his individual and commercial affairs. Article 27 of the COK 2010 and Article 17 of the ICCPR prevents anyone from arbitrarily or unlawfully interfering with the privacy of an individual. Kenya is a signatory to the Universal Declaration of Human rights and has ratified the International Convention on Civil and Political and Rights (ICCPR).<sup>36</sup> Article 2 of the Kenya

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<sup>33</sup>Thomas Nelson, 'Policy Goals, Public Rhetoric, and Political Attitudes' (2004) 66 *Journal of Politics* 581.

<sup>34</sup>Linda L Fowler, 'The Art of Political Manipulation. By William H. Riker (New Haven, CT: Yale University Press, 1986. Xi, 152p. \$18.95, Cloth; \$6.95, Paper).' (1987) 81 *American Political Science Review* 982.

<sup>35</sup>Samuel Ankamah and S Khoda, 'Political Will and Government Anti- corruption Efforts: What Does the Evidence Say?' (2017) 38 *Public Administration and Development*.

<sup>36</sup>International Covenant on Civil and Political Rights (ICCPR).

Constitution makes the general rules of international law part of Kenyan Laws and Article 31 of the Constitution of Kenya among others protects the rights to privacy. The fragmented implementation of all these laws provides a lacuna in law enabling corrupt individuals to exploit legal loopholes to avoid accountability and conviction. In *Director of Public Prosecution v Prof. Tom Ojienda & others* the Court said that EACC had infringed on the petitioners rights by breaking the law that entitled the petitioner to be notified in advance of the intention to access and investigate his bank account.<sup>37</sup>

The EACC argued that it had power to search without issuance of notice to suspect from perspective of the Evidence Act. However, the court rejected that argument, holding that the EACC must notify any suspect it intends to investigate.

### **iii. Challenges with Asset Recovery**

On criminal forfeiture, the standard applicable for conviction is beyond reasonable doubt. The Kenya Proceeds of Crime and Anti-Laundering Act provides for confiscation of property or money as part of the sentence upon conviction of a defendant. The statute compliments the Penal Code provisions for punishment and consequences of crimes.

Forfeiture is the non-compensatory loss of property to the relevant quarters due to an illegality in its acquisition, its usage in criminal activities and or a breach of contract.

There are two types of forfeitures

- (i) Criminal forfeiture
- (ii) Civil forfeiture

Criminal forfeiture involves government taking over property upon conviction of a defendant as part of the sentence. While civil forfeiture involves the government seizure of property by proving through incontrovertible evidence that the property was used for crime facilitation, Illegal acquisition or failure to prove its manner of acquisition. Conviction of the accused party may not be necessary in civil forfeiture. Forfeiture can be for specific properties as a sum of money in a matter involving money and it may also involve replacement of property of the same value or for the same purpose. Forfeited property may be used, sold or destroyed by the government based on its assessment. Seizure of property may be as a result of

- (a) Legal proceeding before court, government agencies, government authority and tribunals.
- (b) Consequences of a breach of contractual obligations.

Constance Gikonyo states that the laws put in place like the Anti-money Laundering Act of Kenya are underutilized because:<sup>38</sup>

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<sup>37</sup>*Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR.*

<sup>38</sup>Constance Gikonyo, 'The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions' (2020) 64 *Journal of African Law* 27.

- (i) The statute is highly technical
- (ii) The procedures appertaining the ACT are very systematic.

The technical nature leads to interpretation disputes while the procedural systems make its implementation difficult because of the rigidity involved. The panacea to this involves technical clarification by experts, simplification of the statutes and reduction in the perceived rigidity of the procedural requirements of this statute. It is effective use can discourage potential offenders because of the non-incentivizing high possibility of conviction upon application of the statute.

#### **iv. Complexity of Corruption**

Despite lifestyle audits holding good potential in fighting corruption, the complex nature of the latter renders them ineffective. Corrupt persons, for instance, stash their monies in foreign accounts Public officers and policymakers mostly are the perpetrators of corruption. Most of their proceeds being stashed in offshore accounts makes the task to declare their wealth a daunting task because most of those accounts are not public for scrutiny.<sup>39</sup>

Diversion of public funds is also rampant in most public entities which deny citizens crucial services. Due to this, most public funds are not accounted. In the year 2020, Kenya was position 124/180 in the annual corruption index by the transparency index on corruption.<sup>40</sup> Many state corporations have been deliberately weakened by a system designed to protect the corrupt making it hard to implement lifestyle audits.

Those state corporations that are mandated to fight corruption should protect the public trust because they have the true power and the future of the society. They have to make the fight against corruption through lifestyle audits successful.

### **3.0. Conclusion**

The analysis above reveals that there are challenges in the framework of lifestyle audits in Kenya as well as the implementation thereof. While lifestyle audits may be a viable tool for fighting corruption, much of that really depends on how the software and hardware issues are addressed. Notably, the Lifestyle Audit Bill, 2019 has been passed at the Senate level and at the time of writing had been relayed to the National Assembly for concurrence. Whether the bill correctly present software issues in the legal, administrative, and policy framework for lifestyle audits is a matter of wait and see. This is because the Bill, even if passed into law, will still be subject to judicial interpretation and political will in order to be effectively implemented. In the past, Chapter Six provisions of the Constitution have been watered down by judicial interpretation, and the same fate may befall the new law. Political will is also a major factor as administrative and policy guidelines that may not be justiciable before a court depend on it to work. Indeed, lifestyle audits taking the form of wealth declarations can only work if executive action is accompanied by the political will to fight corruption. Parliament and EACC equally

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<sup>39</sup>Oyesola Animashaun and Howard Chitimira, 'The Reliance on Lifestyle Audits for Public Officials to Curb Corruption and Tax Evasion in Nigeria' (2021) 24 Potchefstroom Electronic Law Journal 1.

<sup>40</sup>[https://www.transparency.org/en/cpi/2020/index/ken#.](https://www.transparency.org/en/cpi/2020/index/ken#)

need political will to execute their mandates where needed. The bodies can easily slack and operate below par undisturbed. Therefore, viability of lifestyle audits as an anti-corruption tool depends on judicial interpretation, political will, and most importantly, addressing the current software and hardware issues in the existing framework. If the status quo is maintained, lifestyle audits will be of little if any impact in the war against corruption. However, with radical change and political will, they can be a game changer in public sector anti- corruption efforts.

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