



# FIVE YEARS ON

HOW EFFECTIVE IS THE KACC IN KENYA'S FIGHT AGAINST CORRUPTION?



*This brief is an extract from a forthcoming AfriCOG report which reviews the effectiveness of the KACC in the fight against corruption. The brief is published to mark International Anti-Corruption Day 2009. It discusses the investigation, prevention of corruption, asset recovery and public education functions of the KACC.*

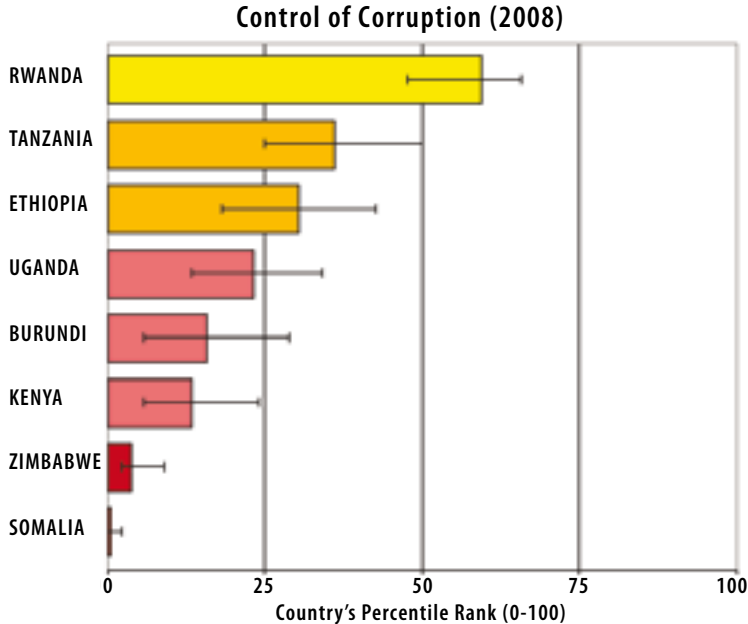
*December 2009*

This year marks 5 years of existence of the Kenya Anti-Corruption Commission (KACC) and the sixth International Anti-Corruption Day. This year also marks the end of the tenure of the KACC's first directorate. It is therefore an appropriate time to publish this brief overview assessing the performance of an institution in which much hope was originally placed. This brief is an extract from a forthcoming AfriCOG report.

### Introduction: Corruption in Kenya

Kenya achieves a low score of 2.2 on the TI Corruption Perception Index (CPI) conducted in 2009. The CPI Ranks Kenya at 36 compared to Uganda's CPI score of 27 and 25 for Tanzania. Kenya now ranks with Zimbabwe and Sierra Leone and well below Nigeria.

The World Bank Governance Indices measuring six governance indicators including Control of Corruption compares Kenya as follows to countries in the region:



The East Africa Bribery Index (EABI), conducted between April 16th and May 15th 2009 by Transparency International (TI) Kenya, indicates that Kenya has the highest incidence of corruption at 45 percent while the level of corruption in Uganda is 34 percent. According to the index, Tanzania is the least corrupt country in East Africa with a corruption incidence of 17.8 percent.

### The Fight Against Corruption in Kenya; A Challenge Spanning Over 50 Years

Corruption in Kenya has been a challenge since colonial times. Official attempts to fight corruption can be traced back to 1956 when the Prevention of Corruption Act was enacted, although there was little compliance with this law in the post-colonial period. The Act was amended in 1991 to enhance the penalties against offenders. However, no prosecution under the Act followed the amendments.

In 1993, the Government established the Police Anti-Corruption Squad which was disbanded in 1995. Earlier that year a mysterious fire had destroyed its headquarters and records. In 1997, another set of amendments were made to the Prevention of Corruption Act to establish the Kenya Anti-Corruption Authority (KACA).

---

KACA's work was hampered by a series of legal objections taken by defendants, the most successful of these being the *Mwai Gachiengo Case*, which in December 2000 resulted in the High Court declaring KACA's powers to prosecute as provided under the Act unconstitutional. Rather than do away with the offensive clauses, KACA was subsequently disbanded.

### **Enter the Kenya Anti-Corruption Commission**

The commitment to fight corruption was strongly articulated by the National Rainbow Coalition (NARC) in the electoral campaign that swept it to power in December 2002, and featured prominently immediately after the elections.

In May 2003, Parliament passed what is now Kenya's main anti-corruption legislation - *the Anti-Corruption and Economic Crimes Act and the Public Officer Ethics Act* with the former establishing the Kenya Anti-Corruption Commission. The speedy enactment of the legislation, the establishment of an anti-corruption department within the government (under the Permanent Secretary/ Presidential Advisor, Ethics and Governance) and Kenya being the first country to sign and ratify the United Nations Convention against Corruption (UNCAC) in December 2003, were all cited as evidence of renewed commitment to the fight against corruption.

- What the KACC does**
1. preventing corruption
  2. investigating allegations of corruption and economic crimes
  3. asset recovery
  4. public education

### **Investigations**

Although the Commission is often publicly criticised for the lack of progress on prosecutions, its mandate actually gives it the responsibility for investigating corruption and economic crime. Prosecution falls under the Attorney General's office. Therefore an assessment of KACC's performance should fairly focus on how well it conducts investigations. However, KACC only provides global figures on investigation cases. It is therefore difficult to assess its effectiveness or efficiency in carrying out this core function. For example, it would be interesting to know the amount of time investigations take in relation to the value of the case.

### **Proactive Investigations?**

KACC reports that it prevented economic crime by disrupting corruption networks through a proactive strategy. In 2007/08, KACC indicates that it disrupted a transaction at Kenya Sugar Board involving Sh2.2 billion. KACC lists four of the same cases in 2007/08 and 2008/09. Cases numbered from 5-7 are the only new ones in 2009. This is not indicated in the 2008- 2009 report.

**Table 1: Disruption of Corruption Networks by KACC**

	<b>Institution</b>	<b>Type of Offence</b>	<b>Estimated Amount in Kshs million</b>
1	Kenya Sugar Board	Irregular Approval	2200
2	Mombasa Old Port	Tax evasion	2
3	Kenya Ports Authority	Mis-procurement of cranes	1000
4	Ministry of Education	Irregular Payments	63
5	East African Portland Cement	Mis-procurement of clinker	1000
6	Youth Enterprise Development Fund	Embezzlement	300
7	Kenya Pipeline Company Ltd.	Irregular payment	12
	<b>Total</b>		<b>4,600</b>

## Prevention of Corruption

The KACC is mandated by the ACECA 2003 to provide technical and advisory services to both public and private sector organisations on preventing corruption and to educate the public on the dangers of corruption and economic crime. These functions are carried out by the Preventive Services Department. The department examines systems, policies and procedures of partner institutions and recommends corrective measures. In a press release dated 3rd August 2009 the KACC reports on a range of achievements in preventive activities over the previous 4 years as captured in the table below:

**Table 2: KACC's Prevention Services Activities 2005-2009**

<b>ACTIVITY</b>	<b>NUMBERS</b>	<b>IMPACT</b>
Conducted sector wide examinations into the roads sub-sector, KEMSA, TSC, Pensions Department, Civil Registration Department and National Registration Bureau, Local Authority Transfer Fund (LATF), Nairobi City Council, Department of Immigration, Motor Vehicle Registration and Licensing	10 exercises	Annual Report 2008/09 lists some follow up on recommendations but tracking is spotty and dispersed
Conducted corruption risk assessment of Mombasa Municipal Council and Kenya Maritime Authority	2	Not possible to assess impact as it is not indicated in the reports
Developed Corruption Prevention Guidelines on ICT as well as Corruption Prevention Guidelines on Public Procurement in collaboration with key institutions	Not known	Not known whether guidelines applied  The 2007/08 Annual Report says that there was marked improvement of structure but it is not possible to assess the impact



Provided advisory services to institutions through inclusion of anti-corruption targets in the public sector performance contracting framework. The targets include preparation of Codes of Conduct and Ethics, institutional corruption prevention policies, conduct of risk assessments and corruption baseline surveys; and preparation of corruption prevention plans	423 institutions advised	Not possible to assess impact as it is not indicated in the reports
Provided other advisory services on mainstreaming corruption prevention strategies to public and private sector institutions and extended services to other bodies in the region	Over 209 public and private sector institutions	Not indicated in press release
Conducted integrity training to integrity assurance officers in 251 public institutions, 163 Corruption Prevention Committees of public institutions	1930	In the 2007/2008 report, an assessment of the trained officers reveals non-committal of their organisation heads to implement the initiatives
Capacity building of members of tender committees from Local Authorities on corruption prevention in procurement	149	Not possible to assess impact as it is not indicated in the reports
Conducted capacity building Insurance Branch and Claims Manager on fraud prevention in the Insurance Industry; Good Governance programmes for members of professional associations; and corruption prevention in the construction industry for SMEs	76	Not possible to assess impact as it is not indicated in the reports

Source KACC Press Release 3rd August 2009

The press release, which attempts to highlight KACC's achievements, reports on the absolute number of activities without providing any information that would allow a judgement as to their impact. Follow up on implementation of KACC recommendations by target institutions is patchy and dispersed throughout various KACC reports, making it a laborious job to piece the information together. Indeed, KACC lacks the legal power to enforce the implementation of its prevention recommendations. Kenya's United Nations Convention Against Corruption (UNCAC)

---

Gap Analysis Report<sup>1</sup> notes that KACC's recommendations on sealing corruption loopholes are not always followed and that there are no sanctions for non-compliance with governance and anti-corruption policies. This makes such policies appear as an add-on, adopted to appease particular stakeholders but not incorporated into the core of government policy.

## Public Education

The public education function of Anti-Corruption Agencies (ACAs) often comes under criticism. Given the intractability of progress on investigations and prosecutions, the temptation is high to focus on the easier option of engaging in a multiplicity of outreach activities of unclear impact under the guise of educating the public. Typically, these will be radio jingles, billboards, signs, etc. In its 2008-2009 report, the Commission claims to have "sensitised" 42,831 people at various ASK shows around the country. Over the last four years, KACC says it has "sensitised" and educated 4.9 million Kenyans through the media and Information, Education and Communication (IEC) materials; a Bible Study Guide has been developed for use in religious organisations etc. Under its public education function, the KACC distributed in the 2008/9 period a total of 98,763 IEC materials to the public; these included Frequently Asked Questions (FAQ) Bulletins, leaflets promoting integrity to schools, and brochures about the Commission. The general assessment against the background of a decade and a half of intensive anti-corruption work is that, in societies with a high level of corruption, such activities are largely meaningless and scarce resources should be focussed elsewhere. Experience also teaches that an institution would be wise to be strategic in defining its focus to apply its resources effectively.

The cluttered institutional environment characteristic of anti-corruption effort in Kenya is also apparent here; a National Anti-Corruption Campaign Steering Committee (NACCSC) was formally appointed through a Gazette Notice No. 4124 of May 28th, 2004 to create awareness and mobilise Kenyans to stigmatise and eradicate corruption. Such activities could be removed from KACC and placed under the NACCSC. Alternatively, abolishing the NACCSC, which is almost unknown to the public, could save public resources. KACC could then focus its public education activities on providing expert technical backstopping to civic, educational and religious institutes, leaving them to spread the anti-corruption message nationwide.

## Recovery of Proceeds of Crime

There have been a number of highly publicised attempts to recover proceeds of economic crime (mainly corruption), mainly targeting locally-held assets including land. There have also been efforts to address the repatriation of assets held in foreign countries.

Since 2003, the KACC claims that it has filed 398 civil suits for the recovery of proceeds of corruption, valued at more than Sh5 billion. The Commission declares a large measure of success in the recovery of illegally/irregularly-acquired public land in several parts of the country, including land that belonged to local authorities and other public institutions.

The KACC asserts that in 2008/09 alone it recovered land valued at Sh144 million following the successful completion of 21 suits that it had filed in court. The land in question includes land belonging to the Kenya Agricultural Research Institute (KARI), the Nakuru Municipal Council, and property belonging to the City Council of Nairobi, which forms part of the Woodley Estate in

---

1 Kenya: UN Convention Against Corruption Gap Analysis Report and Implementation Plan, p.16 ff.

---

Nairobi. The Commission also has ongoing recovery efforts represented by a further 131 suits that are pending in court, valued at Sh1.5 billion. However, the recovered land is a minuscule proportion of the total identified by the Ndung'u Commission.

Locally, two high profile inquiries, both based on Commissions of Inquiry, stand out: the Goldenberg and Ndung'u Commissions of Inquiry<sup>2</sup> attempted to establish the facts surrounding two of the Kenya's grand corruption problems. The former probed the early 1990s financial scandal where up to U\$ 1 billion worth of public resources were stolen while the second probed the irregular allocation of land, largely for political patronage.

### ***KACC Attempted Recovery of Assets under the Goldenberg Inquiry***

Evidence given before the Goldenberg Inquiry identified Yaya Centre, an iconic shopping mall in uptown Nairobi, with proceeds of the Goldenberg scandal. Without waiting for the Commission of Inquiry to complete its hearings, the KACC commenced proceedings in the High Court for the recovery of the property on the basis that it was the proceeds of economic crime. The case failed on a legal technicality.

### ***KACC Recovery of Assets under the Ndung'u Inquiry***

In its report, the Ndung'u Inquiry provided a list of illegally-acquired titles and recommended that the government repossesses these<sup>3</sup>. Soon after the release of the Ndung'u Report, the KACC issued a notice that those who held illegal titles to land and did not take steps to surrender these would be prosecuted. The KACC commenced proceedings seeking the freezing of property valued at more than Ksh.1 billion to enable the completion of investigations into how the property was acquired.

### ***Recovery of Assets Held Abroad***

The details of attempts at recovery of assets held abroad are scanty due to some reporting weaknesses of the Commission. For instance, although some estimates are available, it is not clear how much money is held abroad as proceeds of crime, by whom this money is held and in which countries it is stashed away. There is also uncertainty as to what attempts have been made so far to repatriate this money and with what degree of success.

Former presidential advisor on governance and ethics, John Githongo, had provided frequent public briefings on the efforts being made to recover assets stolen from Kenya and held abroad. According to Githongo, there was evidence that a small number of prominent political families in Kenya had between them more than USD4billion in foreign bank reserves. He did not name the families or the countries where the money was held. The then minister for Justice and Constitutional Affairs, Kiraitu Murungi, repeated these claims several times. Kroll and Associates, a professional UK-based firm specialising in tracing assets, had been hired by the Kenya government to assist in this area.

The emerging Kroll Report published in 2003 claimed "at least USD1billion of illegal gains made

---

2 Officially referred to as *The Commission of Inquiry into the Goldenberg Affair* and *The Commission of Inquiry on Illegal and Irregular Allocation of Public Land*

3 cf. *Mission Impossible: Implementing the Recommendations of the Ndung'u Report*, Africa Centre for Open Governance, Nairobi, 2009



---

by former and serving politicians and civil servants in Kenya has been uncovered in a secret international investigation over the past six months...”<sup>4</sup>

In a press interview, then KACC Director Aaron Ringera painted a contrasting picture, claiming there was no actual evidence on the existence of proceeds of economic crimes in any foreign country, although the Commission, which is the sole asset recovery government agency, was doing its best to trace such assets. According to him, previous public information on the existence and amounts of money held in foreign bank accounts heavily relied on the contents of the Kroll Report submitted to the government which, in his view, did not contain any evidence at all and was merely a compilation of intelligence, rather than evidentiary information. He went on to discredit the report saying it did not name a single bank account as being possibly implicated with proceeds of crime held abroad and thus could not provide a basis for asset recovery. He further termed public expectations based on the report as unrealistic and was also unwilling to discuss the status of KACC investigations into assets held abroad for fear of tipping off those concerned and thus prejudicing investigations. According to him, the Commission does not release details of on-going investigations and only makes disclosures at the end of its investigations.

## **Challenges in the Recovery of Assets**

### ***Judicial and Legal Hurdles***

The Judiciary presents significant challenges to the KACC in the discharge of its work, with significant, unwarranted delays, often caused by the defendants’ legal teams in cases filed by the KACC, being one of the obvious challenges.

Regarding rulings, the courts have held that the KACC cannot seek or obtain orders freezing assets suspected to be proceeds of corruption, without first filing a suit in court. This decision has eliminated the element of surprise and urgency, on which freezing powers greatly depend for effectiveness.

The courts have further stopped investigations into the Anglo Leasing scandal, declaring that to allow such investigation would be a breach of the contracts between the government and the various Anglo Leasing companies, which also had the approval of the AG.

Courts have also outlawed attempts by the KACC to seek mutual legal assistance abroad, declaring that only the Attorney General can seek mutual legal assistance. The Mutual Legal Assistance Bill 2009, tabled in Parliament, is expected to remedy this challenge.

It is noteworthy that Justice Ringera chaired the Integrity and Anti-corruption Committee investigating corruption in the Judiciary, which led to the controversial “radical surgery” of the Judiciary in 2003. This engagement may have coloured attitudes among the Judiciary towards KACC and perhaps made Justice Ringera’s job more difficult.

### ***Challenges in International Cooperation***

According to former KACC Director Justice Ringera, a significant drawback in KACC attempts to conduct investigations abroad is lack of cooperation by a large number of the foreign authorities whose help is required. While the UN Convention Against Corruption requires signatories to

---

4 [http://wikileaks.org/wiki/KTM\\_report](http://wikileaks.org/wiki/KTM_report). See also Taiwan News, September 2 2007, “Moi stole billions”.

---

lend one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings under the relevant domestic laws, there still appear to be some gaps in achieving this. The Commission has experienced significant delays in processing requests for mutual legal assistance by some foreign authorities. Some foreign agencies that ought to help have internal constraints of their own including budgetary limitations. Opposing claims, among others by the British government, were made on the Kenya government's lack of seriousness and commitment in pursuing mutual legal assistance.

### ***Political Challenges***

It was expected that anti-corruption measures particularly the recovery of assets held abroad, would mainly be used in relation to old scandals like Goldenberg, as the new NARC government, which touted zero-tolerance for corruption, would largely be clean. However, after only two years in power the NARC government was implicated in a huge, 'new' financial scandal in the Anglo Leasing case<sup>5</sup>. Asset recovery, initially conceived as a necessity for dealing with old scandals, was now the primary means of addressing the Anglo Leasing scandal. It must be a considerable constraint on asset recovery attempts by the KACC, which claims to be probing the scandal, given that those implicated in the scandal have remained in positions of leadership even after the formation of the coalition government in 2008. Further, the controversial court decisions that have had the effect of setting back the anti-corruption drive have been most evident in relation to the Anglo leasing cases. Not surprisingly, this gave rise to public suspicion that the courts have come under political pressure to make these inexplicable decisions<sup>6</sup>.

## **Overall Challenges Facing the KACC / Limitations to Effectiveness**

The KACC has never enjoyed universal public support. Initial problems arose from the difficulties experienced when establishing the KACC, with sections of the public failing to support the leadership of the Commission. The appointment process of directors became the subject of controversy between Parliament, the President and the leadership of the KACC Advisory Board, leading to the resignation of its first Chairperson. Soon after, KACC was sucked into the controversies surrounding the Githongo fallout, with suggestions that the Commission was insincere in the discharge of its functions. Further, failure to ensure accountability in the Anglo Leasing scandal has partly been seen as a manifestation of the lack of independence on the part of KACC, further eroding public confidence. KACC has had to spend a considerable amount of time, effort and public resources in countering negative public perceptions<sup>7</sup>. As justified as these views may be, the limitations that the KACC faces in the discharge of its functions are largely unclear to the public.

### ***Poor Public Perception and Low Credibility***

Perceptions are an important part of public credibility in anti-corruption. One of the more significant credibility challenges that the KACC continues to face, is its management of information.

---

5 The Anglo Leasing scandal involves at least 18 security contracts where about 56.3 Billion Kenya shillings was misappropriated through fraudulent procurement, starting during the tenure of Daniel arap Moi and subsequently being revived and continued under President Mwai Kibaki.

6 For instance, the High Court declared Section 31 of the Anti Corruption and Economic Crimes Act, which allowed KACC to require surrender of travel documents by corruption suspects, unconstitutional and ordered the return of Anglo Leasing suspects', the Kamani brothers, passports to them. See also [http://www.marsgroupkenya.org/Reports/WebsiteJudicialDecisions/Saitoti\\_Judgment.pdf](http://www.marsgroupkenya.org/Reports/WebsiteJudicialDecisions/Saitoti_Judgment.pdf)

7 Check press releases on [www.kacc.go.ke](http://www.kacc.go.ke)

---

The KACC uses its website to provide some information to the public regarding cases it is pursuing, and also incorporates into the statutory reports some information which could form a basis for accountability. However, there is no mechanism for the public to know the cases that the KACC opts not to pursue, and the reasons for such a decision. In the absence of a method by which the public will be able to independently assess the decision-making processes within the KACC, the Commission will not receive unqualified public support<sup>8</sup>.

### ***Grand Regency: Asset Recovery or Shady Deal?***

The difficulties with the management of information were demonstrated in the sale of the Grand Regency Hotel. Although the KACC presented this as an unqualified success story, the public viewed the sale as a scandal. Other than the legal documents which the public gained access to, the sale was bereft of rationale and the public agencies involved, including the KACC, never considered it necessary to provide an explanation of the circumstances surrounding the sale. Quite clearly, a lengthy and undisclosed process of negotiation and planning went into the transaction outside the public view. The first time there was a public indication of the sale was at the time the CBK and the KACC triumphantly announced the transaction, which by then had been concluded. In the absence of an explanation as to why the option of selling the Hotel was preferred to any other possible options, the public was not enabled to ascertain that the best option had been exercised. The transaction failed completely to meet an acceptable threshold of transparency, which was at the heart of all the questions that were raised. In a press release, KACC thereafter denied involvement in the disposal of Grand Regency<sup>9</sup>.

### ***Regular Reporting but Low Accountability***

The KACC has made an annual report for each year between 2003 and 2008. In addition, the Commission has published a quarterly report for each of the four quarters for the years 2003 to 2008, effectively meeting its reporting requirements under the ACECA.

The available quarterly reports broadly indicate recommendations made to the Attorney General on prosecution or closure, and the actions taken, where known. The reports, however, are not expressed as being made under any statutory requirement, which points to an absence of a realisation that they are not merely promotional information, but a serious basis for accountability to the National Assembly.

It is not possible, from the information provided, to independently evaluate the claims contained in the reports by the Commission to the Attorney General. This scenario is replicated in the annual reports, whose format changes from year to year. That said, the 2007/08 and 2008/09 annual reports are more useful as they contain a large amount of information on the status of the cases that the Commission is handling in the various courts, including the outcomes of those that have been concluded.

Further, there is no mechanism within the reporting for updating information contained in previous reports. For example, the report for 2005/06 documents investigations contemplated by the Commission at the time, into “allegations of massive tax evasion by several private companies through use of secret bank accounts maintained at a local Bank. The investigations are being done in collaboration with the Kenya Revenue Authority and Central Bank of Kenya.” There is, however, no mention of the outcome of the investigations in subsequent reports, or in any other

---

8 In the Hong Kong Independent Commission against Corruption, this function is fulfilled by a citizen oversight committee. No investigation files, once opened, may be closed without the approval of this committee. Meagher, Patrick, *Anti-Corruption Agencies: Rhetoric versus Reality*, 2005 pg 92

9 [http://www.kacc.go.ke/archives/pressreleases/PRESS\\_STATEMENT\\_GRAND\\_REGENCY.pdf](http://www.kacc.go.ke/archives/pressreleases/PRESS_STATEMENT_GRAND_REGENCY.pdf)

place. Instead, the reports for subsequent years tend to emphasise new developments rather than reporting on developments affecting old cases<sup>10</sup>. In these circumstances, it is difficult to establish accountability on the basis of the reports. The reports risk becoming a forum for providing sensational information which may ultimately be of limited use.

**Table 3: Statistical summary of files forwarded to the Attorney General 2007/08**

<b>CASES</b>	<b>TOTAL NO. OF FILES 2007/2008</b>	<b>TOTAL NO. OF FILES 2008/2009</b>
No. of files forwarded to Hon. AG	111	122
No. of files recommended for prosecution	86	94
No. of files recommended for administrative action	4	9
No. of files recommended for closure	21	19
No. of files recommended to prosecute accepted	70	61
No. of files forwarded to the AG with recommendation to prosecute and cases are already lodged in court	70	76
No. of files where recommendation for administrative action not accepted	0	0
No. of files where recommendation for closure accepted	7	15
No. of files returned for further investigation	3	8
No. of files where recommendation to prosecute not accepted	1	2
No. of files where administrative or other action not accepted	0	0
No. of files forwarded in previous quarters and received this quarter	32	55
No. of files where closure not accepted	0	0
No. of files awaiting Hon. Attorney General's directions	27	20

Under ACECA, the KACC is obliged to submit quarterly reports to Parliament on cases under investigation, and an annual report on all its work. None of its reports makes any mention of foreign investigations. Whereas it is understandable that disclosure of information on foreign investigations related to asset tracing may possibly jeopardise those investigations, it can however be expected that a measure of general public information should be available on this activity on which considerable public resources are spent.

10 cf. [http://publications.marsgroupkenya.org/pubs/GAP3\\_Report\\_Web\\_Version.pdf](http://publications.marsgroupkenya.org/pubs/GAP3_Report_Web_Version.pdf)

---

In general, it would be more illuminating if information covering the whole anti-corruption chain were available; from KACC, to the AG, to the Judiciary. For instance, information from the Judiciary on the fate of the cases might allow the public to make better judgements, for example on the quality of investigations by KACC or on the value for money of investment of public resources in anti-corruption.

### **Legal Constraints**

In 2007, amendments to ACECA saw the introduction of a new sub-section which in effect significantly curtails KACC'S investigative process.

Through the Miscellaneous Amendment Statute 2007, a new Section (Section 25A) was introduced which became known as the 'Amnesty Clause'. The Section gives power to the Minister, AG and KACC Director to determine whether to terminate or continue investigations on cases already instituted. Since this far-reaching, substantive amendment was buried in numerous other amendments to various Acts, proper scrutiny was subverted. In the same context, Section 56B was introduced giving KACC the legal authority to negotiate a settlement with persons against whom it intends to bring or has already brought a civil claim or application in court. The unclear process of approving this amendment led to accusations of the entrenchment of impunity<sup>11</sup>.

### **Judicial Challenges**

Aside from the judicial challenges presented earlier relating to the recovery of assets of corruption, the Judiciary presents a profound challenge in the enforcement of anti-corruption laws generally.

The Commission has found itself on the receiving end of adverse judicial interpretation of its powers. The first assault on the Commission was the Judiciary's interpretation of the effect of the repeal of the Prevention of Corruption Act (Cap 65) with respect to offences committed before the ACECA came into force is still varied and the courts have not settled the law on the matter. Although Section 42(k) of Limitations of Actions Act has been introduced, it is unlikely to help the Commission in cases which were already before the courts before it was enacted.

The court held in *Nairobi High Court Petition No. 199 and 200 of 2007 Deepak Kamani vs. AG and Another* that citizens have freedom of movement and therefore Section 31 of ACECA is null and void as it impeded the citizen's right movement and was therefore inconsistent with Section 81 of the Constitution of Kenya.

### **Constitutional References**

KACC has often cited the multiplicity of constitutional references filed by corruption suspects as a hindrance to its work. In its view, Constitutional Courts, which should be the courts of last reference, are often misused by corruption suspects to delay and ultimately subvert justice. The 2007/08 Annual Report lists over 37 such applications. In 2008/09, the Commission reported 9 significant cases. Again, the poor presentation of information from year to year makes it difficult to make conclusive assessments on the numbers and impact of these challenges<sup>12</sup>.

---

11 <http://www.blog.marsgroupkenya.org>

12 The Daily Nation, March 8 2009, "Revealed, how graft courts block justice", reported that over 130 graft cases involving constitutional references were stuck in the Courts.



---

## Recommendations and Conclusion

Recommendations have been made from several quarters for the strengthening of KACC. Some of these recommendations are briefly discussed below:

1. **The Commission must be anchored in the Constitution and provided with the necessary independence and powers.** This would serve to immunise the KACC against the threat of disbandment such as those it experienced through a recent Bill presented in Parliament. The Harmonised Draft Constitution offers hope, if it were to be adopted, since it anchors an Ethics and Anti-Corruption Commission as an independent constitutional commission.
2. **The Commission should be granted power to prosecute the offences it investigates.** This recommendation has been discussed quite controversially. Supporters of this recommendation argue that, in practice, the Attorney General already does delegate his powers to prosecute to other bodies such as the Kenya Police, and the Kenya Revenue Authority (KRA), and that he should therefore do the same for KACC to increase its effectiveness. Concerns have been raised on separation of powers and the potential for abuse by the concentration of such powers in one institution. It would be necessary to hedge in such powers with appropriate safeguards. Some anti-corruption agencies (ACAs) like the Malawi Anti-Corruption Bureau have the power to prosecute so this is a possibility. On the other hand, Botswana's Directorate on Corruption and Economic Crime (DCEC), which has a similar mandate to the KACC, does not have powers to prosecute, and yet Botswana consistently tops governance performance rankings in Africa. Clearly, the explanation for better anti-corruption performance goes beyond mere powers to prosecute.
3. **Repeal the 2007 amendment of Section 23 (4) of ACECA.** Arguments have been advanced for the reinstatement of the Commission's powers of investigation which were curtailed under the 2007 amendment of Section 23 (4) of ACECA. The amendment should be repealed since it curtails the ability of KACC to undertake special investigations. This amendment deprives the Commission of the element of surprise necessary to anti-corruption investigations, particularly given the speed at which financial transactions which may involve corruptly-acquired assets can be effected.
4. **The entire wealth declaration system should be overhauled** and focused on senior officials and officers employed in extremely tempting positions such as revenue collection. The declarations should be administered by the KACC. This recommendation would rectify the present system which is so unwieldy as to be meaningless. Further, wealth declarations of all senior officials should be publicly accessible to enable enhanced scrutiny and accountability. These declarations should be digitised and stored electronically to facilitate monitoring and retrieval. The Harmonised Draft Constitution requires that wealth declarations be submitted to the Ethics and Anti-Corruption Commission.
5. **The call for new legislation to strengthen and underpin the anti-corruption struggle is also worthy of support.** These include laws on Anti-Money Laundering and Proceeds of Crime, Mutual legal Assistance, Witness Protection and Freedom of Information. The Harmonised Draft Constitution gives every citizen the right of access to information held by the State.

In conclusion, the most important element of any anti-corruption effort is political will. Without clear commitment and leadership on the issue from the top, an anti-corruption commission can never be effective or gain public confidence. The Harmonised Draft Constitution recognises this by anchoring the eradication of corruption and open transparent and accountable government in the national values, principles and goals.

Lessons learnt over the last decade show that while a specialised anti-corruption agency can help to focus and inform the fight against corruption, it cannot replace a non-performing AG, a compromised Judiciary and an endemically corrupt Police Force.

---

## Latest Developments

After a controversial attempt to prolong the tenure of the former director and assistant directors which met wide public protests and stiff parliamentary opposition<sup>13</sup>, the Advisory Board recently announced its nominees to the leadership of KACC. These nominees will now be debated in Parliament. Below is some background information on the nominees:

### Qualifications for Appointment as Director or Assistant Director of KACC:

The First Schedule of the Law provides that

a) The person **must** be knowledgeable about or experienced in at least one of the following:-

- Law
- Public Administration
- Accounting and Financial Matters
- Fraud investigation

b) The person **must** be of outstanding honesty and integrity.

According to the law, the Advisory Board **shall not** recommend a person who is not qualified under this paragraph.

### Nominees:

#### **PLO Lumumba (Director)**

An advocate of the High Court of Kenya and Tanzania, he has taught Law at the University of Nairobi for almost two decades and practiced law during the same duration.

He was the secretary to the Constitution of Kenya Review Commission. He unsuccessfully ran for political office in the 2007 General Elections.

#### **Mr. Pravin Bowry (Assistant Director)**

An Advocate of the High Court and before the International Criminal Tribunal in Rwanda that sits in Arusha, Tanzania. KACC's Advisory Board referred to his "unrivalled experience in court procedures and rules of evidence".

Some of Mr. Bowry's clients:

- Mr. Joshua Kulei in the Goldenberg case; a case where KACC has undertaken the responsibility of implementing the Commission of Inquiries report into recovering lost assets<sup>14</sup>.
- In addition, Mr. Pravin is defending Mr. Joseph Magari - Former Permanent Secretary who is being investigated by the KACC in connection with the Anglo-Leasing scam.

#### **Prof. Jane Onsongo (Assistant Director)**

An associate professor of education and deputy director of research at the Catholic University of Eastern Africa, she holds a PhD in Higher and Further Education and an M.A in Women and Higher Education from University College London. In addition she holds a MEd in Education Communication and Technology and a BEd in History and Religious Education from Kenyatta University.

Her background and publishing is on gender and education and religion in the context of the academy.

- The ACECA requires experience in either Law, Public Administration, Accounting and Financial Matters or Fraud Investigations.

---

13 See [www.parliament.go.ke/parliament/downloads/tenth\\_third\\_sess/REPORT\\_ON\\_THE\\_APPOINTMENT\\_OF\\_KACC\\_DIRECTORS\\_2.pdf](http://www.parliament.go.ke/parliament/downloads/tenth_third_sess/REPORT_ON_THE_APPOINTMENT_OF_KACC_DIRECTORS_2.pdf)

14 Page 27 of the 2005/2006 KACC Annual report.



Africa Centre for Open Governance (AfricOG) is a civil society organisation dedicated to addressing the structural and institutional causes of corruption and bad governance in Kenya.

Africa Centre for Open Governance  
Kasuku Road, Off Lenana Road next to CVS Plaza  
P.O. Box 18157-00100, Nairobi, Kenya  
t: +254 20 2723031 / 0737 463166,  
f: 2714675,  
email: [admin@africog.org](mailto:admin@africog.org)  
[www.africog.org](http://www.africog.org)