



Avid Readers' Forum

Kabarak University School of Law

AVID READERS FORUM WEBINAR SERIES ON POLITICAL AND FISCAL ACCOUNTABILITY

CONCEPT NOTE

Background

The Avid Readers Forum (ARF) is a forum run by the Kabarak Law School. It is a forum for reading and conversing on various legal issues in Kenya and beyond. ARF was initiated by Mr. Elisha Ongoya in 2019, to foster the acquisition of knowledge and intellectual engagements among students. Over time, it has grown to attract audiences from the academy, the wider legal fraternity, and the general public.

The forum has collaborated with Ms. Wanjiru Gikonyo, founder of The Institute for Social Accountability (TISA), to host a three-part webinar series on the subject of political and fiscal accountability in Kenya. Each of the webinars is intended to touch on different but related areas that are part of past and ongoing public interest litigation cases.

Objectives of the webinars

1. To discuss jurisprudence on fiscal accountability.
2. To serve as a platform for raising awareness and educating the public on fiscal accountability.
3. To contribute towards ongoing dialogues on increasing fiscal accountability.
4. To hear the perspective of experts in the field of governance and political and economic accountability.

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Target audience

- Members of the Law Society of Kenya.
- Legal practitioners, academics, and students.
- The general public.

THE WEBINARS

The first webinar

The first Webinar discussed the judgment issued by the Supreme Court of Kenya in *Institute for Social Accountability & another v National Assembly & 3 others & 5 others (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment)*. The judgment was about the Constituency Development Fund.

It took place on **19 June 2024**, from **2-4:30 PM EAT**.

The discussants were: Mr. Wachira Maina, Mr. Elisha Ongoya, Mr. Ochiel Dudley, and Ms Wanjiru Gikonyo. The moderator was Ms. Marion Joy.

The session's recording is available on Kabarak Law School's YouTube Channel. The link is <https://www.youtube.com/live/SAc9cz4aVmE?si=pz-kYe-O69YL9Npz>.

The second webinar

The second webinar will discuss accountability in Kenya's proposed debt swaps, with a focus on the case of *In the Matter of the Treaty for the Establishment of the EAC: Eugenia Wanjiru Gikonyo v The Attorney-General of the Republic of Kenya* (EACJ Debt Swaps Case). The case was recently filed at the East African Court of Justice, by Ms. Gikonyo and Afronomics Law. **(N/B- A summary of the petitioner's arguments in the EACJ Debt Swaps case is available at the end of this concept note.)**

The Webinar will take place on 3 July 2024, from 2:30 PM to 5: 00 PM, EAT. The Webinar will take place on Zoom (<http://tiny.cc/debtswap>) and the session will also be live-streamed on Kabarak Law School's YouTube page (<http://tiny.cc/Kenyadebt>).

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The panelists will be Prof James Gathii, Dr. Harrison Mbori, Prof Atiya Waris, and Ivy Gikonyo. The moderator will be Marion Joy.

Prof. James Gathii is the Wing-Tat Lee Chair of International Law at Loyola University Chicago School of Law. Founding Editor of Afronomicslaw, and Co-Editor-in-Chief of the African Journal of International Economic Law.

Prof. Atiya Warris is the United Nations Independent Expert on Debt and Human Rights.

Dr. Harrison Mbori is a postdoctoral researcher at the University of Luxembourg and an adjunct lecturer at Kabarak Law School.

Ms Ivy Gikonyo is a project officer at the Centre for Human Rights, and a PhD Candidate at the University of Pretoria, studying Kenya's foreign debts.

Ms Marion Joy is a lawyer and resident moderator of the Avid Readers Forum.

The third webinar

Details of the third webinar will be discussed in a separate concept note.

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SUMMARY OF THE CASE

- ***In the Matter of the Treaty for the Establishment of the EAC: Eugenia Wanjiru Gikonyo v The Attorney-General of the Republic of Kenya (judgment awaited)***

The case concerns the debt for nature swaps, and other debt swaps, proposed by the Government of Kenya to fund the budget deficit for Kenya's financial year 2024/2025.

A debt swap is a transaction where the obligations or debts of a debtor are exchanged for something of value.¹ For countries, debt swaps would involve the reduction of a country's debt, in exchange for an agreement that the debtor country would invest the freed-up resources in specified areas, such as health, climate, the environment, food, education, etc.² A debt-swap-for-nature/ debt-for-climate/ green debt swap involves an investment in climate, the environment, and/or related fields.³

In the present case, the Government of Kenya proposed to have sovereign debt swap arrangements via its National Treasury and Economic Planning 2023 Medium Term Debt Management Strategy (MTDMS) and its 2024 Budget Policy Statement.⁴ Therein, the Government noted that there were opportunities for 'debt climate/nature swaps' to be pursued with eligible creditors, under the proposed water dams investment/funding program. The Government stated that the aim of the measures, was to reduce the accumulation of public debt stock, so as to have public debt sustainability.⁵

In March 2024, the Government, in its National Treasury and Economic Planning 2024 Medium Term Debt Management Strategy (MTDMS), stated that it was considering debt

¹James Chen, 'What Is a Debt/Equity Swap? How It Works and Who Benefits', (Investopedia, 2023) <https://www.investopedia.com/terms/d/debtequityswap.asp#:~:text=A%20debt%2Fequity%20swap%20is,exchange%20of%20bonds%20for%20stock>

² *In the Matter of the Treaty for the Establishment of the EAC: Eugenia Wanjiru Gikonyo v The Attorney-General of the Republic of Kenya*, statement of reference, page 6.

³ Olabisi D Akingube & Morris Odeh, 'Debt-for-Climate Swaps and Illicit Financial Flows: A Call for Caution in Designing Climate Finance Infrastructures' (Afronomics Law, December 2023) <https://www.afronomicslaw.org/category/analysis/debt-climate-swaps-and-illicit-financial-flows-callcaution-designing-climate>

⁴ *In the Matter of the Treaty for the Establishment of the EAC: Eugenia Wanjiru Gikonyo v The Attorney-General of the Republic of Kenya*, statement of reference, page 4.

⁵ *Ibid.*

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swaps, especially the debt for nature swaps and debt for food swaps as a source of funding. Further, that some debt swaps were under consideration between itself and the United Nations Development Partners.⁶ Additionally, the Government stated that it would consider the issuance of blue, green, and sustainability-linked bonds to finance its climate-related or environmental projects. The Government would also consider exploring the issuance of Panda (Chinese renminbi-dominated) and Samurai (Japanese yen-dominated) bonds, to diversify its debt instrument.⁷

Besides these, the ministry submitted to the two houses of Parliament, its Medium-Term 2024 Budget Policy Statement named ‘Sustaining Bottom-Up Economic Transformation Agenda for Economic Recovery and Improved Livelihoods.’ Therein, the Government mentions its plans for debt swaps, including those stated in the above paragraphs. However, the Government does not provide details on the same. It is these details that are sought in this case.⁸ Note that the documents have been approved by Parliament and are set for implementation.⁹

The applicants in the case (Afronomicslaw, with Wanjiru Gikonyo) allege that when conducting and planning to conduct the debt swaps, the Government of Kenya did not observe transparency, accountability, public participation, the rule of law, good governance, and democracy. The applicants argue that this is a violation of the provisions of the Treaty for the Establishment of the East African Community (EAC) Treaty, the Constitution of Kenya, and the African Charter on Human and People’s Rights (ACHPR).¹⁰

The Applicants are asking the Court to compel the Government of Kenya to publicise information on: procedures put in place to ensure public participation of communities that will be affected by the debt swaps; contracts/indentures on debt swap arrangements; the type of debt swap arrangements; the nominal value of debt, if any, that would be reduced by the debt

⁶ *In the Matter of the Treaty for the Establishment of the EAC: Eugenia Wanjiru Gikonyo v The Attorney-General of the Republic of Kenya*, statement of reference, page 5.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ These provisions include Articles 6(d), 7(2) of the Treaty for the Establishment of the East African Community; Articles (8) (1) (c), and Articles 10, 35, 201 (a) of the Constitution of Kenya; and Articles 1,8,9,14,17,21, 22, 5 (2), 5 (3) (c), 111 (1) (b), 111 (1) (d) , 111 (2) (a),(b), (c), 112 (1), 114 (1) (1) (a) (b), 24 of the African Charter on Human and People’s Rights.

swap; how much debt cancellation will occur (if any) in the debt swap; how the proceeds of the debt swap would be put to use; the legal entities that would act as legal advisors, investment bank or other financial advisory firms and how much they would be paid; what nongovernmental conservation of organisations are involved in the debt-for-nature swaps and how much their services would the cost; which bank(s) would act as bond issuance arrangers and how much their services would cost.¹¹

The case was filed in April 2024 and is yet to be determined by the Court. The Applicants' pleadings are available at Afronomicslaw.org.

¹¹ *In the Matter of the Treaty for the Establishment of the EAC: Eugenia Wanjiru Gikonyo v The Attorney-General of the Republic of Kenya*, statement of reference, pages 18 and 19.

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