

KEY NOTE LECTURE AT THE 3RD CB MADAN PRIZE AT STRATHMORE UNIVERSITY

DECEMBER 9th, 2015

JAMES MWORIA

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Chief Justice Willy Mutunga;

Honorable members of the Judiciary;

Hon. Mr Justice John Michael Khamoni, now retired judge of the High Court of Kenya and who is the recipient of the award this afternoon;

Our Host, Gitobu Imanyara the publisher and editor of the Platform For Law, Justice & Society;

Dean Luis Francheschi of the Strathmore Law School who are our hosts and joint co-sponsors of this event;

Mr. Jerim Otieno, UAP Old Mutual Life Insurance CEO;

Mr. Apollo Mboya Representing the Law society of Kenya;

Dr Gibson Kamau Kuria SC;

Our guests this afternoon.

It is a pleasure to be at my alma mater, Strathmore University on this very auspicious occasion.

I would like to thank and appreciate Hon Gitobu Imanyara for conceiving and organizing the annual CB Madan Award Ceremony & Memorial Lecture.

I would also like to congratulate Hon Mr Justice John Michael Khamoni who is this year's recipient of the C B Madan Award for his significant effort to advancing the cause of constitutionalism and the Rule of Law in Kenya.

It is a unique honor and privilege for me to be invited this afternoon to hand over the award of the 3rd C B Madan prize to a very deserving recipient, Mr Justice Richard Khamoni.

Although I am an Advocate of the High Court of Kenya and the law is my first love the focus of my career has been in the field of Finance and Investments and I have since 2008 served as the Chief Executive Officer of Centum Investments Limited, the largest listed investment Company in the region.

Many of you may wonder what interest or relevance would a finance and investment professional find on the subject of constitutionalism and the rule of law.

I would like this afternoon to address myself to the question of the link between constitutionalism and economic development and the important role we as young professionals can and ought to play in enhancing it and expanding opportunities for a majority of Kenyans.

The link between the Rule of Law and Economic Development

In my view constitutionalism and the rule of law is not an end in itself but it is the foundation upon which economic development and prosperity takes place. This in turn enables society to develop and expand economic

opportunity to a majority of its citizens. Indeed, the stability of society is wholly dependent to the extent to which it can extend economic opportunity to a majority or a significant minority of its citizens.

The link between the rule of law, constitutionalism and economic prosperity is well established. The origins of modern economic prosperity can be traced to the development of property rights and individual rights in England, beginning shortly after the start of the second millennium. In 1215 the Barons whose property had been seized by John 1 forced the signing of the Magna Carta. For the first time the King and the ordinary citizens were equal under the law. With the certainty that ones property, liberty and life would not be subject to arbitrary confiscation by the King the flood gates of the economic prosperity that extended in the Western Hemisphere were opened.

I assumed the leadership of Centum in 2008 at the ripe old age of 30 years and in that period I have had the good fortune to preside over an organization that has recorded an average annual return of more than 30% increasing the value of assets under management from Kshs 6 Billion to just shy of Kshs 200 Billion and recording a cumulative growth of more than 550% in shareholder value. Contrary to reports in the local media Kenya is today on the cross hairs of global investors and there is significant investment taking place by international investors from across the globe. This cannot be said of the Kenya of the 80's and 90's.

The question that arises is what is unique about Kenya today that has made it a magnet for capital and that enables that capital to be deployed productively and to then consistently generate high returns. If I go around the room we may hear many answers ranging from availability of economic opportunities, a stable macro economic environment, political stability, investment acumen, sheer luck, hard work, and the management team. While many of these answers may to a certain extent be true it is my submission that the entrenchment of the rule of law and the protection of

property rights has played a critical role to the improved economic environment that we enjoy today.

The World Economic Forum publishes an annual report that ranks 144 countries across the world on various measures of competitiveness. The forum defines competitiveness as the set of institutions, policies and factors that determines the level of productivity of a country. Competitiveness is linked to productivity and productivity is the most important driver of economic growth. Economic growth is in turn the principal driver of enhancement of incomes, reduction of poverty and improvement of most aspects of human quality of life.

It is interesting to note that of the twelve pillars of competitiveness that the World Economic Forum considers the one with the highest weighting is the institutional pillar. The components of the institutional pillar which are related to constitutionalism and the rule of law and which the World Economic Forum measures include a) property rights, b) judicial independence c) Efficiency of the legal framework in settling disputes and d) Efficiency of the legal framework in challenging regulations.

It is very encouraging to note that whereas Kenya was ranked position 90/144 on its overall competitiveness metrics in the 2014/2015 global competitiveness report it fared much better on the specific metrics that relate to constitutionalism and the rule of law. It is ranked position 65 in protecting property rights, number 52 in judicial independence, number 47 in efficiency of legal framework in settling disputes and number 42 in efficiency of legal framework in challenging regulations. The results speak for themselves and I congratulate the Hon Chief Justice Willy Mutunga for his commendable leadership of the judiciary.

Having said that there is still room for significant improvement. Capital, technology and talent are globally mobile and these triumvirate of factors that drive output and productivity enhancement find a home where the

risk is lowest, the environment is most predictable and where they can earn the highest rate of return. Kenya is in competition with the rest of the world for these scarce resources and it is not enough that we have improved since the 80's and 90's we need to be competitive relative to our peer African countries. On the same metrics South Africa is ranked position 20 on enforcement of property rights, position 24 on judicial independence, position 15 on efficiency of the legal framework in settling disputes and position 9 on the efficiency of the legal framework in challenging regulations.

It is without doubt that we today enjoy a significantly improved constitutional environment and by extension an improved economic environment. This would not have been possible were it not for the hard work and personal sacrifice of those who have fought for the entrenchment of constitutionalism, the rule of law, the independence of the judiciary, the protection and preservation of civil liberties and property rights. Great men and women like Justice John Khamoni who we honor today. Justice C. B Madan who in criminal application number 271 of 1985 in Stanley Munga Githunguri versus the Republic fired a legal shot for the rule of law and independence of the judiciary that still reverberates three decades later. The ruling closed thus, "Stanley Munga Githunguri you have been beseeching the Court for the Order of Prohibition. Take the order. This Court gives it to you. When you leave here raise your eyes up unto the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the judicial system of Kenya". Men and women like Gitobu Imanyara, Paul Muite, Martha Karua, Joyce Khaminwa who paid the price of the freedoms we today enjoy with many years when their liberty was denied. The Chief Justice who has spent a career fighting the cause of the rule of law and who in his tenure as the Chief Justice has further entrenched the independence of the judiciary. We owe this men and women a huge debt and I am thankful that I have the opportunity to express my gratitude on behalf a generation that has come of age at a time

of greater freedom.

The link between economic development and development of democratic institutions

Laureano Lopez Rodo one of Franco's economic ministers was asked when Spain would be ready for democracy; he famously replied that democracy would arrive in Spain when the average income exceeded \$ 2,000 per year. When Franco's dictatorship fell in 1975 the average income in Spain was \$2,446.

Economic development and the prosperity that flows from it is what empowers citizens and an empowered citizenry is what is essential to the strengthening of democratic institutions such as protection of property rights, civil rights, an independent judiciary and a representative democracy.

I recently read in the press the lament by Chief Justice Mutunga on the state of ethnicity in this country. Like Franco's Economic Minister before me I wish to make a prediction that ethnicity shall be a thing of the past in this country when the income of the median person exceeds \$2,000 per year.

This view is supported by a study by Ronald Inglehart and Christian Welzel who performed a study in 2000 to determine the link between survival/self expression (S/SE) and democracy. Respondents were asked questions such as whether they had ever signed a petition, yes answers indicated a high S/SE scores and vice versa. They found a high correlation between a nation's average S/SE score and the vigor of democracy. The real question was, which is the chicken and which is the egg. It is easy to imagine that greater democracy leads to increased self-expression. The data revealed a very interesting relationship: the link between the two is wealth itself.

They determined that the correlation of S/SE in 1995 with the democracy index in 2000 was much higher than the correlation of the S/SE in 2000 with the democracy index in 1995. In other words present democracy correlates well with prior S/SE scores while prior democracy does not correlate nearly as well with the present S/SE score. They then correlated the S/SE score with wealth and they found a very strong correlation. Using the same lagging correlation technique they found out that it was wealth that produced a high S/SE and therefore led to a stronger democracy. The study also found that as individuals became wealthier they became more trusting of strangers and they gave up some of their traditional beliefs such as tribalism.

In summary property rights lead to enhanced economic prosperity which enhances the self expression of individuals and these individuals in turn strengthen the democratic institutions by participating and holding the leaders to account. It is no surprise that in many developed economies people organize themselves around their economic livelihoods (i.e. owners of labor and owners of capital) while in less economically developed societies the tribe is the primary source of identity.

The Road Ahead

I believe that my generation has a different challenge from that of past generations in reinforcing the rule of law and democratic ideals. We must reinforce the constitutional gains that have been made by creating wealth through legitimate enterprise and expanding economic opportunity to as many of our citizens as we can.

To protect democracy and the rule of law it is important to grow the economy so that a significant proportion of our citizens become property owners so that they have a personal interest in the political process: the “stakeholder effect.” It is important that we transition our country from an agricultural society into an industrial and a post industrial society where

the bulk of the society can participate as owners of non real property and capital, both of which are unlimited. The biggest risk to constitutionalism and democracy in Kenya is the fact that there are too few stakeholders and those who have a stake have it in the form of land ownership, which on average is deployed in a very unproductive manner. This may explain why as a society we are generally accepting of corruption perhaps because many citizens do not consider the resources that are squandered or stolen as theirs. Modern capital ownership offers an opportunity to satisfy a much wider proportion of the population than can ever be achieved with land holdings which is the primary store of value in our society today. Land ownership is finite and capital ownership is limitless.

As students of the Law who are committed to the strengthening of the rule of law in our country, the traditional view has been that the opportunity to do so has been primarily through service in the bench or in the bar. Students of law and especially students of law in Strathmore University whose heritage is as a business institution are uniquely placed to serve this society in numerous ways that will enable the Kenyan society to create wealth and expand economic opportunity. I therefore encourage you to look beyond the traditional fields of study and venture further afield. I also wish to assure you that in doing so you shall not have abandoned your first love, the promotion of the rule of law in your country, rather you shall have pushed new frontiers in your quest to serve your first love.

Each generation has to deal with the challenges of its time. At the turn of the millennium the nobility took a monarch head on and thanks to their efforts and courage they gave the world the beautiful gift of the Magna Carta, which is the constitutional ancestor of virtually all modern democracies and by extension the global economic prosperity and high standards of living enjoyed across the world. Over the centuries successive monarchs, Presidents and Parliaments have attacked property rights and the rule of law with varying degree of vigor and cunning. In each age and place different heroes have emerged. One of my personal heroes is Edward

Coke who in 1606 set the precedent for Justice Madan when he faced down royal power and he refused to cower before James 1. When pressed he insisted that he would fulfill his charge as a judge. Coke told parliament that the Magna Carta is such a fellow that he will have no sovereign. In the 20th Century the frontier of this battle in Kenya was in the courtrooms, in parliament, on the streets and in the press where our finest and bravest lawyers and judges eloquently and courageously made their stand. In the 21st Century I believe that the new frontier is on the economic front and that responsibility falls squarely on my generation.

As I reflect on the lives of the heroes that we celebrate and our responsibility I am reminded of the words of George Bernard Shaw, who wrote, “this is the true joy of life, to be used for a great purpose. To be a force of nature rather than a selfish clod of ailments and grievances complaining that the world will not devote itself to making you happy. I am of the opinion that my life belongs to the whole society and as long as I live it is my privilege to do for it all that I can do. I want to be thoroughly used up by the time I die for the harder I work the more I live. I rejoice in life for its own sake. Life is no brief candle for me but it is a sort of brilliant torch that I have a hold of for the moment and which I intend to burn as brightly before handing over to future generations.”

My dear students, we have been handed over a brilliant torch the question that confronts us is whether we shall be relevant to our times and apply ourselves to make it burn as brightly as we can so that when a roll call of those who have been used for a great purpose is called we shall be among the number.

I once again proffer my deep congratulations and admiration to the Hon Justice Mr John Khamoni.

God bless you, God bless Kenya and may the rule of law never depart from our land.

Thank you ladies and gentlemen.

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