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The Judicial Service Commission recommends investigation into bribery allegations involving Supreme Court justice Philip Tunoi. The opposition Coalition for Reforms and Democracy (CORD) calls on the Supreme Court to nullify the ruling that upheld President Uhuru Kenyatta's (2013- present) election victory. The finance ministry publishes its medium term budget policy statement, detailing both lower expenditure and domestic borrowing, as the treasury looks to improve public financial management at county level. A United Kingdom (UK) court orders Smith & Ouzman Ltd to pay \$3.2m in fines and forfeiture payments for bribery offences in Kenya.

Government to investigate Supreme Court justice allegations

Supreme Court justice **Philip Tunoi** faces allegations that he accepted a \$2m bribe from **Nairobi County** governor **Evans Kidero**.¹ The allegations are sufficiently serious to undermine the authority of the Supreme Court regardless of their veracity.

*"It threatens to bring down the entire judiciary."*²

Tunoi allegedly accepted the bribe in 2014 to rule in favour of Kidero in a case challenging his March 2013 election victory.³ Defeated candidate **Ferdinand Waititu**, the current **Jubilee Alliance Party (JAP)** member of parliament for **Kabete** – brought the original case, seeking to nullify the election.⁴ A five-judge panel including Tunoi dismissed the petition against Kidero. Former journalist **George Kiplagat**, who allegedly brokered the original deal, made the allegations against Tunoi.

*"Kiplagat came forward in a television interview earlier in the month, allegedly out of fear of his life but critics say that there are is more to the story in light of his admission that he was shortchanged by the senior judge, only receiving \$200 and not the \$300,000 facilitation fee that had been agreed upon... Justice Tunoi is accused of personally collecting the bribe from the governor, an exchange that took place at a petrol station, like a scene from a mafia movie."*⁵

The **Judicial Service Commission (JSC)** appointed a six-member committee to investigate the allegations. The committee's chair is **Public Service Commission** chair **Margaret Kobia**.⁶ The other members are attorney general **Githu Muigai**, justice **Aggrey Muchelule** and magistrates **Emily Ominde**, **Winifred Guchu** and **Kipkorir Bett**.⁷ The JSC – which appoints and oversees judges and magistrates – on 5 February found the allegations had sufficient substance to recommend a tribunal investigate further.⁸ President **Uhuru Kenyatta** (2013- present) will appoint the tribunal to investigate Tunoi. The **Ethics and Anti-Corruption Commission (EACC)** is considering a possible investigation into the allegations against Tunoi.⁹

There are also allegations of corruption against Kidero, who has a poor reputation for governance.

¹ East African, 30 Jan 2016.

² Source, journalist, Nairobi

³ East African, 30 Jan 2016.

⁴ East African, 30 Jan 2016.

⁵ Source, journalist, Nairobi

⁶ East African, 30 Jan 2016.

⁷ East African, 30 Jan 2016.

⁸ Daily Nation, 5 Feb 2016.

⁹ Source, journalist, Nairobi

“Wastefulness and apparent extravagance have also infected Nairobi’s government.”¹⁰

In January, EACC officials detained his personal assistance for allegedly attempting to bribe Nairobi senator **Mike Sonko** to stop his investigation into allegations that city officials were involved in land grabbing.¹¹

The corruption allegations against Tunoi have undermined public confidence in the judiciary.

*“As Kenyans wait to see whether Tunoi will resign or face the tribunal, the accusations have eroded faith and goodwill in the only arm of government that has been perceived to be clean and honest. [Chief justice **Willy**] **Mutunga** is on record as saying that the country is being held hostage by corrupt cartels and is seen by pundits as losing the war against graft at the law courts despite a spirited effort to clean the judiciary.”¹²*

Transparency International released its global **Corruption Perceptions Index (CPI)** in January showing the persistence of corruption in both Kenya and the **East Africa** region.¹³ This leading international corruption study measures perceived levels of public sector corruption and ranks countries based on a ‘corruption perception’ scale ranging from 0 (highly corrupt) to 100 (very clean).¹⁴ ‘Perception of corruption’ is important as it identifies a general culture of distrust under which the practice of corruption flourishes.¹⁵

	2015	2014	2013	2012
Kenya	25	25	27	27
Uganda	25	26	26	29
Ethiopia	33	33	33	33
Somalia	8	8	8	8
Djibouti	34	34	36	36

The investigations into the judiciary will have political implications. Senior members of the opposition **Coalition for Reforms and Democracy (CORD)** are lobbying for the nullification of the Supreme Court ruling that upheld Kenyatta’s presidential election victory following allegations of electoral fraud.¹⁶ A rerun is highly unlikely.

*“The **Independent Electoral and Boundaries Commission (IEBC)** is cash-strapped and would find it hard to run another poll ahead of the main general elections in 2017.”¹⁷*

The investigation does, however, increase uncertainty in the Supreme Court ahead of the general election. **Law Society of Kenya** chair **Eric Mutua** has said the government should reconstitute the Supreme Court should the commission find any basis to the allegations.¹⁸ Mutunga is due to retire in June and his deputy **Kalpana Rawal** faces statutory retirement this year, raising the possibility that the supreme court will lack leadership ahead of the election.

“The creation of mistrust in the judiciary will not augur well as Kenyans go to the polls in 2017. It is key to note is that one of the reasons for the post-election violence of 2008 was due to Kenyans not trusting that they could get an honest ruling if they appealed at the courts. How the accusations

¹⁰ Source, political analyst, Nairobi

¹¹ Source, journalist, Nairobi

¹² Source, journalist, Nairobi

¹³ Transparency International, Corruption Perceptions Index 2015

¹⁴ Transparency International, Corruption Perceptions Index 2015

¹⁵ Source, Transparency International officer, UK

¹⁶ Source, journalist, Nairobi

¹⁷ Source, journalist, Nairobi

¹⁸ East African, 30 Jan 2016.

against Justice Tunoi are handled and hopes that this is an isolated case and not the norm could determine how the general elections are held come 2017.”¹⁹

Government commits to lowering expenditure

The finance ministry on 27 January published its medium term budget policy statement, which is predicated on both lower expenditure and domestic borrowing as the government looks to demonstrate greater fiscal discipline ahead of the 2017 elections.²⁰ The policy statement signals a tightened 2016/2017 budget that will likely result in increased tensions between the central and county governments. The budget policy statement includes a downward revision to the 2015/2016 budget deficit, from 8.7% to 8.1%.²¹ The government has cited challenges in budget execution for the downward revision to the current budget deficit. This papers over the government’s revenue collection problem. The **Kenya Revenue Authority (KRA)** on 1 February acknowledged that it had failed to meet its half-year collection target by 47.6 billion Kenya shillings (KSh) (\$466m) due to a KSh26 billion (\$255m) shortfall in pay-as-you-earn (PAYE) income tax receipts and a KSh15.9 billion (\$156m) shortfall in value added tax (VAT).²² The KRA also acknowledged that the delayed implementation of the **Excise Duty Act 2015**, which only took effect on alcohol and tobacco products in December, had negatively impacted its revenues. The finance ministry in the medium term budget policy statement revised downwards revenue for the year 3.5% of KSh1.31 trillion (\$12.8 billion) and expenditure 4.7% to KSh1.91 trillion (\$18.7 billion).²³

Tightened national government spending will create tensions with county governments. The treasury announced on 31 January that the 2016/2017 budget will only allocate KSh307 billion (\$3.01 billion) to county governments, 20% less than the **Commission on Revenue Allocation** recommended in January.²⁴ The treasury additionally announced increased scrutiny of county government borrowing. The treasury requested commercial banks immediately recover all loans advanced to county governments without its prior approval.²⁵ The **Public Financial Management Act** requires county governments to secure central government consent before borrowing, but many omit this step to reduce delays to obtaining funds.²⁶ The treasury announced that it would launch an audit of all county loans, which will increase the risk of contract alterations and delayed payments. Kenyatta in October enacted the **National Constituencies Development Fund (NCDF) Act 2015** to ensure that financial problems at county level do not jeopardise the construction of strategic public infrastructure. The NCDF will hold no less than 2.5% of all the national government’s revenue to protect the financing of infrastructure projects at county level thereby reducing non-payment risks for contractors.

The finance ministry acknowledged that poor performance in the government securities market had further undermined government revenue.²⁷ The government is looking to offset decreased domestic borrowing with increased international borrowing. Treasury cabinet secretary **Henry Rotich** said on 14 January that the government is considering alternative debt raising mechanisms.²⁸ The shift in portfolio flows towards developed economies has increased the yield on most emerging-market non-concessional debt issues in recent months. Rotich said options include **China Development Bank (CDB)** soft loans, Islamic financing, export credit arrangements, and samurai bonds denominated in **Japanese yen**.²⁹ Rotich confirmed the government is already in discussions with the CDB over a \$600m budget support loan, at a rate of 3.65% above the Libor.³⁰ Prices for Kenya’s five and 10-year bonds have dropped, increasing the yield on its 2024

¹⁹ Source, journalist, Nairobi

²⁰ Finance ministry, 27 Jan 2016.

²¹ Finance ministry, 27 Jan 2016.

²² Finance ministry, 27 Jan 2016.

²³ Finance ministry, 27 Jan 2016.

²⁴ Daily Nation, 1 Feb 2016.

²⁵ Business Daily, 1 Feb 2016.

²⁶ Business Daily, 1 Feb 2016.

²⁷ Finance ministry, 27 Jan 2016.

²⁸ Financial Times, 14 Jan 2016.

²⁹ Financial Times, 14 Jan 2016.

³⁰ Financial Times, 14 Jan 2016.

bond from 5.97% in April 2015 to 9.45%.³¹ Rotich said the government would consider 15, 20 or 30-year maturities if it decides to launch another Eurobond.³²

Rotich says the government will target a current account deficit of 6.5%, and fiscal deficit of 4.5%.³³ **Central Bank of Kenya (CBK)** data shows a third quarter current account deficit of 5.7%, compared to 8.9% in the second quarter.³⁴ The current account deficit stood at \$2.37 billion in the third quarter.³⁵ The improvement was due to a decline in the merchandise trade shortfall due to higher exports and lower imports. The surplus in invisible trade also increased from \$1.46 billion in the second quarter to \$1.58 billion in the third quarter.³⁶ Rotich also forecast that growth will reach 6.1% in 2016 compared to 5.8% in 2015, but that the major risks to growth are external, including **United States (US)** interest rates, low international oil prices, and a slowdown in **China**.³⁷

Smith & Ouzman faces \$3.2m in financial penalties

A **United Kingdom (UK)** court in January ordered UK-based printing company **Smith & Ouzman Ltd** to pay \$3.2m in fines and forfeiture payments following convictions for bribing officials in Kenya and **Mauritania**.³⁸ The case marked the first UK convictions for foreign bribery offences under the **Prevention of Corruption Act 1906**.³⁹ In February 2015, a court handed down prison sentences to Smith & Ouzman employees, rejecting their defence that the payments were for hospitality and facilitation. The allegations relate to the awarding of concessions from the **Kenya National Examination Council** and the **Kenya Electoral Commission**.⁴⁰ The so called "*chicken gang*" scam, a reference to the name that Smith & Ouzman gave to Kenyans in internal correspondence, allegedly involved paying "*commissions*" to Kenyan officials and covering the officials' travels costs during their regular visits to **London**.

The case marks a more aggressive stance by the UK **Serious Fraud Office (SFO)** which previously had entered into settlements with companies rather than pursuing prosecutions. In November 2015, the SFO secured its first deferred prosecution agreement with **ICBC Standard Bank Plc**. However, the Smith & Ouzman case may not mean an increase in convictions. Under UK law, it is necessary to prove corporate attribution, which means that the company's ultimate board or owners knew about the corruption. This is easier to do in a small family-owned company like Smith & Ouzman.

Implications

If the government does not effectively handle the allegations against Tunoi, they will diminish the authority of the Supreme Court. The Supreme Court carefully dealt with the allegations of corruption in the 2013 election, and all candidates respected its rulings in a boost for the judiciary's credibility. The Tunoi allegations threaten to undermine this progress ahead of the 2017 election, when candidates may again call on the Supreme Court to rule on its conduct.

Kenya's macro-economic outlook is broadly positive with its decreased budget surplus, decreasing current account deficit and solid growth. This will prove attractive for emerging market investors looking for investment opportunities in African states that are net energy importers. Reduced government expenditure will, however, increase tensions at county level ahead of the election, especially in the heartlands of the opposition and members of the deputy president **William Ruto's United Republican Party** opposed to the JAP merger.

³¹ Financial Times, 14 Jan 2016.

³² Financial Times, 14 Jan 2016.

³³ Standard, 14 Jan 2016.

³⁴ CBK monthly economic bulletin, Jan 2016.

³⁵ CBK monthly economic bulletin, Jan 2016.

³⁶ CBK monthly economic bulletin, Jan 2016.

³⁷ Standard, 14 Jan 2016.

³⁸ Independent, 9 Jan 2016.

³⁹ www.sfo.gov.uk

⁴⁰ Business Daily, 10 Nov 2014.

The Smith & Ouzman penalty should serve as a reminder of the costs of corruption: it can lead to criminal prosecution or regulatory censure both at company and senior management levels, as well as exclusion from bidding processes, and damage to reputation, brand and share prices.

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