

## AFRICA RISK CONSULTING Kenya Monthly Briefing March 2016

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### Kenya Summary 11 March 2016

*The International Criminal Court (ICC) case against deputy president William Ruto appears near collapse after a legal ruling favours Ruto in respect of recanted evidence. International backers of the \$150m Kinangop Wind Project (KWP) withdraw following tension with local communities and local politicians. Local politicians are increasingly seeking to benefit financially from similar projects. The Capital Markets Authority (CMA) warns that TransCentury Ltd is at risk of defaulting. The Kenya Defence Forces (KDF) claim to have killed al Shabaab intelligence chief Mahad Mohammed Karate.*

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### Ruto International Criminal Court case on verge of collapse

Deputy president **William Ruto** and co-accused **Joshua Sang** on 12 February won a significant **International Criminal Court (ICC)** ruling that increases the possibility of the crimes against humanity case against Ruto collapsing.<sup>1</sup> If the case collapses, Ruto will almost certainly run in 2017 as running mate to current president **Uhuru Kenyatta** (2013- present) and may himself stand for president in 2022. ICC judges have ruled that prosecutor **Fatou Bensouda** cannot use testimony from five witnesses who subsequently recanted their evidence.<sup>2</sup> This reverses a previous ruling issued in August 2015 that allowed the use of recanted evidence. The earlier decision was based on a November 2013 change in ICC rules that permitted the use of recanted testimony in some instances. Ruto's legal team argued that the ruling should not apply retrospectively, and that the contested testimony was heard before Ruto's trial commenced in September 2013.

The ICC judges ruled that Ruto's defence team had no opportunity to cross-examine the witnesses who submitted their evidence before the trial started.<sup>3</sup> There are persistent allegations that witnesses have recanted their testimony due to bribery and intimidation.<sup>4</sup> ICC investigators are currently investigating whether Kenyan officials have placed undue pressure on witnesses. However, the ICC judges ruled that these allegations are insufficient to permit use of the disputed evidence. Ruto's legal team argues that there is no case against him following the ruling.<sup>5</sup> The separate case against Kenyatta collapsed in December 2014 following the similar withdrawal of witness testimony.

*"The witness testimony was the leg of the stool on which Kenyatta's case rested; when you removed it, the stool could not stand."<sup>6</sup>*

While Bensouda is unlikely to drop the case willingly, trial judges are separately considering Ruto's "no case to answer" petition to drop the case. This is based on the premise that prosecutors have failed to prove the existence of the network that Ruto allegedly mobilised in the **Rift Valley** during the 2007-2008 post-election violence. If the case collapses, it will curb momentum amongst **African Union** member states to withdraw from the **Rome Statute** that established the ICC.

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1 Daily Nation, 13 Feb 2016.

2 Daily Nation, 13 Feb 2016.

3 Source, senior western diplomat, East Africa

4 Source, senior western diplomat, East Africa

5 Daily Nation, 13 Feb 2016.

6 Source, former member of Kenyatta legal team, Nairobi

If the ICC case continues, it will become an issue ahead of the 2017 election. However, exactly how significant an issue is uncertain. The merger of Kenyatta's **The National Alliance (TNA)** and Ruto's **United Republican Party (URP)** into the **Jubilee Party** in April reduces the risk of the governing coalition fracturing along ethnic lines when it becomes a single party with one leadership responsible for all appointments and strategy. The ICC trial appears to have had little impact on Ruto's popularity in the Rift Valley. On 7 March, **Jubilee Alliance Party** (the precursor to the Jubilee Party) candidate **Aaron Cheruiyot** won the **Kericho** senatorial by-election with a sizeable majority after Ruto led campaigning in the **South Rift**.<sup>7</sup> The result was indicative of Ruto's continued firm hold on the Rift Valley vote. Ruto explicitly made the by-election into a referendum about his possible 2022 presidential bid.<sup>8</sup> However, the continued ICC case may prove a distraction as the government enters a busy few months amid increased criticism that it has failed to deliver on its 2013 election promises. Parliament must still pass approximately 20 bills related to the 2010 constitution before the 27 August deadline, after it last extended the original deadline by 12 months. Key laws include those related to land use, natural resources and mining, energy and petroleum.

### **Kinangop Wind Project stalls as international investors withdraw**

The withdrawal of international backers from a 60MW energy wind farm in central Kenya on 22 February highlights the risk to investors of poor community relations. The cancelled project will undermine the government's ambitious plans to add 5,000MW to the national grid before the end of 2017. Investors including **Norfund**, **Old Mutual** and **Macquarie** "lost patience" over the \$150m **Kinangop Wind Project (KWP)** after negotiations with local communities, as well as county and national-level officials, continued for over two years.<sup>9</sup>

*"Trouble started in 2014 after politically-incited protests rocked the project, there was interference during negotiations between the project's promoters and the affected land owners. The main issues were compensation to affected landowners (mostly farmers) and the adverse effects on the environment. The latter issue was entirely unfounded because the **National Environment Management Authority**, the state agency whose mandate is to look at the impact of such projects on the environment, had approved it."<sup>10</sup>*

Enquiries suggest that local politicians are increasingly seeking to benefit financially from similar projects.

*"KWP is not alone in being held to ransom by politicians who in reality are not looking at their constituents' interests but are shaking down investors. **United Kingdom [UK]-based Tullow Oil** and state-owned **Kenya Electricity Generating Co (KenGen)** have also suffered politically-incited protests and investors are worried about how brazen politicians are becoming at asking to be bribed, awarded tenders and jobs for relatives."<sup>11</sup>*

Investors in some projects have alleged that politicians are even asking for equity stakes in the project.

*"A project in **Limuru** had to cede an equity stake to a local politician as protection fees, the politician had threatened to disrupt the project unless he got shareholding. For power projects that are financed by the government there has been headway when such problems arise. The agencies normally lobby county governors and MPs, which normally irons out the issues. But for projects such as KWP which are promoted by investors that have to adhere to the **United States Foreign Corrupt Practices Act** and similar laws, the option of ceding ownership, money or other incentives to politicians is not on the table."<sup>12</sup>*

<sup>7</sup> Daily Nation, 8 Mar 2016.

<sup>8</sup> Daily Nation, 8 Mar 2016.

<sup>9</sup> Source, journalist, Nairobi

<sup>10</sup> Source, journalist, Nairobi

<sup>11</sup> Source, journalist, Nairobi

<sup>12</sup> Source, journalist, Nairobi

There is particular attention on the energy sector at the moment. **Jersey** authorities in February seized the accounts of **Windward Trading**, a company that former **Kenya Power and Lighting Co** managing director **Samuel Gichuru** used to launder money from corrupt tenders.<sup>13</sup> In Kenya, privately funded projects do not have the same political clout that state-sponsored projects do, which complicates successful negotiations. Local sources however say KWP's misfortunes should not scare off other investors eyeing Kenya's renewable energy sector.

*"Despite obstruction from politicians Tullow has managed to navigate the turbulent and murky waters by investing heavily in communities. Tullow has successfully done this by hiring locals who then act as liaisons with the community where the explorer operates."*<sup>14</sup>

Meanwhile the government's response to the cancellation of the project has not proved helpful and in fact may reduce the incentive to invest in Kenya's energy sector. Local media has quoted the **Energy Regulatory Commission (ERC)** as saying that it cannot intervene in KWP since it did not guarantee the project nor was it involved in land negotiations and other agreements.

### CMA warns of possible TransCentury default

The **Capital Markets Authority (CMA)** has warned that **Nairobi Securities Exchange (NSE)**-listed infrastructure investor **TransCentury Ltd** is at risk of defaulting on its dollar debt.<sup>15</sup> The warning signals the difficulties companies face in meeting their dollar debt obligations due to Kenya's recent currency difficulties. TransCentury has approximately \$75m worth of convertible bonds due on 25 March.<sup>16</sup> TransCentury is the guarantor of the bonds that its **Mauritius**-based subsidiary **TransCentury Mauritius Holdings Ltd** issued.<sup>17</sup> Shareholders have refused to allow TransCentury to convert the bonds into equity.<sup>18</sup> In January, TransCentury CEO **Gachao Kiuna** resigned due to increasing investor uncertainty about the company.<sup>19</sup> Bondholders include UK-based **Charlemagne Capital Ltd**.<sup>20</sup> TransCentury's founders included influential bureaucrats and prominent business people including **Nat Kangethe** chairman of **Saatchi and Saatchi Kenya**; former KenGen chairman **Eddy Njoroge**; and **Jimnah Mbaru**, former head of the NSE.<sup>21</sup> They formed part of the **Kikuyu** establishment, and the **Muthaiga** group acted as advisors to former president **Mwai Kibaki** (2002-2013).<sup>22</sup> It is suspected that TransCentury served as the financial arm of the **Gikuyu, Embu, and Meru Association (GEMA)**, a body established in the 1970s to protect the interests of the Kikuyu elite.<sup>23</sup>

### Kenya claims death of senior al Shabaab commander

The **Kenya Defence Forces (KDF)** on 18 February claimed to have killed **al Shabaab** intelligence chief **Mahad Mohammed Karate** (a.k.a **Abdirahim Mohamed Warsame**), in an airstrike in southern **Somalia**.<sup>24</sup> The death of Karate, if proven, will undermine al Shabaab's capacity to conduct regional terrorist attacks, including in Kenya. The KDF claim that they killed Karate and other al Shabaab commanders in an air strike on a training camp between **Buale** and **Sukow** on 8 February.<sup>25</sup> Karate was the head of al Shabaab's **Amniyaat** (special cells) wing. The Amniyaat wing is responsible for internal discipline, as well as intelligence gathering, complex attacks and assassinations. The

13 Daily Nation, 25 Feb 2016.

14 Source, journalist, Nairobi

15 Bloomberg, 7 Mar 2016.

16 Bloomberg, 7 Mar 2016.

17 Bloomberg, 7 Mar 2016.

18 Bloomberg, 7 Mar 2016.

19 Business Daily, 18 Jan 2016.

20 Bloomberg, 7 Mar 2016.

21 Source, political analyst, Kenya

22 Africa Intelligence, 15 Nov 2011.

23 Africa Intelligence, 15 Nov 2011.

24 AFP, 18 Feb 2016.

25 AFP, 18 Feb 2016.

Amniyaat wing provides logistics and support for al Shabaab terrorist attacks in the **Horn of Africa**. Karate is allegedly responsible for planning the attack on **Garissa University College** in **Garissa** that killed 148 people in April 2015.<sup>26</sup> Karate was under a \$5m US **Rewards for Justice** bounty.<sup>27</sup> Al Shabaab has denied Karate's death.<sup>28</sup>

### Implications

Although the case against Ruto continues, a successful prosecution is unlikely. It is increasingly likely that the trial chamber will rule that there is insufficient evidence to proceed. This will raise questions about the capacity of the ICC to hold African political leaders to account. If the ICC does terminate the case, the end of proceedings will allow Kenyatta and Ruto to focus their attention on the 2017 election. Nevertheless, turf wars between the national assembly and the senate, and between central government and the counties, will make the August legislative deadline challenging.

It is still too early to see if government officials will intervene to save the proposed wind farm but the messy project has increased caution amongst would-be investors. Companies can mitigate risks through community liaison strategies and effective community engagement.

The CMA warning will increase speculation that bondholders are set to engineer a takeover of TransCentury. The CMA is increasingly looking to improve corporate governance in Kenya. The CMA notably plans to seek powers to vet executive appointments and members of audit committees at NSE-listed companies to increase accountability and protect investors.

The death of Karate, if proven, will curb al Shabaab's capacity and willingness to conduct attacks in northern Kenya.

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<sup>26</sup> AFP, 18 Feb 2016.

<sup>27</sup> AFP, 18 Feb 2016.

<sup>28</sup> AFP, 18 Feb 2016.

### About Africa Risk Consulting:

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