Sovereign Debt News Update No. 136: Behind Kenya’s Odious Debt Reckoning

By:

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A long-ignored debt crisis which has gripped Kenya has now been brought into sharp focus. Much of this debt is alleged to be "odious" – incurred illegitimately, without parliamentary approval, for non-national benefit or to oppress citizens. This forms the basis of a High Court petition by activist and now Senator Okiya Omtatah against former president Uhuru Kenyatta, the President, William Ruto, as well as other government bodies and persons. The petition alleges that the respondents played a role in plunging Kenyans into a colossal 13.1 trillion Ksh (USD$ 100.48 billion) debt crisis over the last decade through flagrant constitutional and legal breaches, fraudulent financial activities, and systemic oversight failures. By examining this petition and key respondents, and particularly the principle of odious debt as it pertains to the situation, this update will consider the potential implications of its outcomes for the Kenyan people.

Highlights of the Petition

The petition in question was filed on April 15th 2025 in the Kenya High Court by Senator Okiya Omtatah and eight other co-petitioners against former president Uhuru Kenyatta, President William Ruto, as well as other government bodies and persons such as the Governor of the Central Bank of Kenya, the Attorney-General, Auditor- General, National Assembly, and even the International Monetary Fund. According to the petition, each of these parties has had a role to play in the 13.1 trillion Ksh (USD$ 100.48 billion) which Kenyan taxpayers will now be inevitably forced to bear. The petition alleges that Kenyatta borrowed and misused huge sums of public money outside the law, thereby burdening Kenyan taxpayers with odious debts, including the Eurobond loans. The petition further alleges that during his administration, public debt stock was unlawfully raised from approximately Ksh. 2.370 trillion (USD$ 18.37 billion) (which was accumulated over fifty years following Independence up to 30th June 2014); to Ksh. 8.579 trillion (USD$ 66.50 billion) (amounting to a 300% accumulated increase of Kshs. 6.208 trillion (USD$ 48.12 billion) over an eight-year period culminating on 30th June 2022. It has been pointed out this is in contravention of express provisions of both the Constitution of Kenya, 2010, and the Public Finance Management Act.

The suit also invokes Articles 2(6) and 143(4) of the Constitution of Kenya, 2010, and Article 30 of the United Nations Convention Against Corruption (UNCAC) which was ratified by Kenya December 9, 2003. The petition alleges that the National Executive oversaw the corrupt acquisition of additional Eurobond loans amounting to approximately Ksh 208.8 billion (USD$1.48 billion), ostensibly to buy back Eurobond notes which were maturing in June 2024. According to the petition, however, the Constitution already designates the (odious) public debt as a direct charge on the Consolidated Fund. Furthermore, it claims the corrupt borrowing of Ksh 2.25 trillion (USD$17.4 billion), exceeded the Ksh 884.38 billion (USD $6.84 billion) in loans authorized by the Appropriation Acts of 2022, 2023, and 2024 (for borrowings up to November 31, 2024, or the budgets for Financial Years 2022/2023, 2023/2024, and 2024/2025). Additionally, it alleges the corrupt acquisition of an ‘On-lent loan’ of Ksh 50 billion (USD$ 386.9 million) from the IMF. An ‘on-lent loan’ may be defined as a loan which has been borrowed by a party such as a national government from a financier for onward lending to another party.

The Cabinet Secretary for the National Treasury, the Principal Secretary for the National Treasury, and the Director General, Public Debt Management Office are the third, fourth, and fifth respondents to the suit. As these parties do not have authority to raise and receive loans outside of the ambit of the appropriation Act under Article 109(1) of the Kenyan Constitution, the petitioners allege their involvement in the illegitimate borrowing of loans, including Eurobonds unauthorized by the national budget, and handling the proceeds of the Eurobonds in the Financial Years 2014/2015, 2017/2018, 2018/2019, 2020/2021, and 2023/2024. The suit argues that the borrowing therefore is contrary to the Constitution of Kenya 2010, the Public Finance Management Act 2012, the Fair Administrative Action Act 2015, the Leadership and Integrity Act 2012, and the Public Officer Ethics Act 2003.

Other respondents to the petition include the Controller of Budget who the petitioners argue that by authorizing withdrawals from the Consolidated Fund to repay odious loans acquired by the Executive, failed to fulfill its constitutional responsibility to ensure lawful budget implementation. The Governor of the Central Bank of Kenya has also been sued for colluding with the Cabinet Secretary for the National Treasury in opening Central Bank of Kenya accounts at JP Morgan Chase and Citibank in New York. These two holding accounts, according to the petitioners, were fraudulently used to divert USD 2.75 billion Eurobond loan proceeds, intentionally circumventing constitutional safeguards designed to protect public funds. This alleged bypass facilitated the transfer of Eurobond proceeds offshore to fraudulent actors. Moreover, the Central Bank has reportedly been unable to account for Ksh 6.16 trillion (USD$ 47.7 billion), the discrepancy between the Central Bank's records of outstanding debt and those of the National Treasury. This discrepancy, according to the petition, suggests that the Central Bank is incurring debt that is undocumented by the National Treasury. In turn, the Ethics and Anti-Corruption Commission has been sued for failing to investigate the Eurobond loans.

Lastly, the International Monetary Fund is listed as the 22nd respondent to the petition, and the allegations against the IMF stem mostly from its disbursement of an ‘On-lent loan’ which was hidden under the disbursements from the General Resource Account (GRA) of Special Drawing Rights (SDRs) 538,310,000 of the IMF. Furthermore, this contravened Kenyan laws such as the Public Finance Management Act whereby redemptions were rolled over in 2023/2024

and 2024/2025 of Kshs. 10 billion (USD $77.38 million) for each financial year, and forward budgeted (redemption rollover) for 2025/2026, 2026/2027 & 2027/2028 of Kshs.10 billion (USD $77.38 million) for each financial year, aggregating to Kshs. 50 billion (USD $386.92 million).

The Context of the Invocation of the Principle of Odious Debt in Kenya

The petitioners describe the subject debt as 'odious'. This leads to the question of what exactly makes sovereign debt 'odious'. The notion of 'odious debts' has gained increasing legal and political prominence since the early 21st century. In the petition, the concept of 'odious debt' is described as pertaining to a legal doctrine referring to debt that is incurred by a government without the consent of the people and for its own benefit. The modern concept of odious debt was first described by jurist Alexander Nahun Sac, in his 1927 book 'The Effects of State Transformations on their Public Debts and Other Financial Obligations', wherein he considers odious debt to be those contracted and spent against the interests of the population of a State, without its consent, and with full awareness of the creditor. In his words, *"...if a despotic power incurs a debt not for the needs or in the interest of the State, but to strengthen its despotic regime, to repress its population that fights against it, etc., this debt is odious for the population of the State...The debt is not an obligation for the nation; it is a regime's debt, a personal debt of the power that has incurred it, consequently it falls within this power...."*. Consequently, some have iterated that there is a need to recognize a country's sovereign right to cancel an illegal loan agreement in international law through this doctrine. Consequently, a failure to adhere to established international and legal norms in the loan acquisition process should provide a robust legal basis for the nullification of the resultant loan agreement, particularly in such cases. How then, did this situation play in Kenya's case?

According to the petition, Kshs. 13.1 trillion (USD$ 100.48 billion) of Kenya's debt is odious. This amount is made up of a USD$7.1 billion Eurobond debt borrowed in the financial years 2014/2015, 2017/2018, 2018/2091, and 2020/2021., and other concealed odious borrowings from the financial years 2014/2015 to 2024/2025 (i.e., up to 30th November 2024) amounting to Kshs. 6.95 trillion (USD $53.78 billion). In both cases the petitioners argue that the rationale for considering these debts 'odious' and thus not binding on Kenyans

rests on their alleged failure to satisfy a key condition for the legality of state debt: that such debt must be incurred and its proceeds utilized for the needs and in the interest of the populace, as stipulated within the national budget (i.e. the annual Appropriation Act).

In respect of the USD $ 7.1 billion Eurobond debt, it was asserted that it was not one of the items under the external loans and grants provision captured under the development expenditure budget for the financial years 2014/2015, 2017/2018, 2018/2019 and 2020/2021. Moreover, Paragraph 42 of the petition asserts that expenditure was entirely covered by budgeted tax revenues, external loans, and grants. Consequently, the petition argues that there were no development projects requiring financing through Eurobond borrowing proceeds, contrary to the stipulations of Section 15(2)(c) of the Public Finance Management Act (PFMA).

Hence, some of the reliefs sought include an order compelling former president Uhuru Kenyatta, the National Executive, the Cabinet Secretary for the Treasury, Principal Secretary for the Treasury and other specified respondents to refund the National Treasury the principal Kshs.4.6 trillion (USD $35.6 billion) odious debts plus costs and interest incurred. Additionally, an order to compel The National Executive, and other respondents such as the former Cabinet Secretaries Ukur Yatani and Njuguna Ngunu to refund the National Treasury the principal Kshs. 2.25 trillion (USD$ 17.4 billion) of odious debts plus costs and interest incurred on same is also being sought. Also sought is an order compelling the Central Bank of Kenya to repay the Ksh 6.16 trillion (USD$ 47.7 billion) difference between the Central Bank’s records and those of the National Treasury.

Conclusion

Senator Omtatah demonstrates how Kenya's crippling debt was procured and frames the borrowing to have arisen from unconstitutional government conduct and breach of public trust. The petition's outcome carries the potential to establish a crucial precedent regarding the judicial enforcement of the "odious debt" doctrine, potentially reshaping transparency and accountability in borrowing. Furthermore, the petition's reliance on Article 226(5) of the Kenyan Constitution, holding public officials personally liable for unlawful use of public

funds, adds another layer of significance.

The inclusion of the IMF as a respondent could amplify global awareness, advocating for reforms in the international financial system to hold financiers accountable for their role in odious debt. Promoting transparent financing norms could foster greater accountability in sovereign borrowing. Conversely, a successful declaration of debt as "odious" might lead to increased borrowing costs for Kenya and other nations, as lenders factor in the heightened risk of loan cancellation on similar grounds. This might prove to be challenging to developing countries navigating an international financial system which already charges a risk premium based on a perception of higher risk. Overall, the sought relief of compelling respondents to refund the "odious debt," if granted, could establish a groundbreaking precedent.

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