

# Lukewarm implementation of the life style audit law perpetuates indifference in the anti-corruption campaign platform in Kenya



**Stephen Nduvi**

## Abstract

Corruption remains one of the greatest impediments to economic growth as Kenya loses one third of her national budget to it annually. Even though the fight against corruption is ongoing through a number of legislations, the lukewarm implementation of the Lifestyle Audit Act No.2 (2019) (LSAA) downgrades the efforts and remains a challenge in taming

the vice in Kenya. This paper argues that the existing anti-corruption campaigns may continue to preserve the status quo since they are not backed up by a more robust assessment of the lifestyles of public and state officers. It concludes that the lackluster approach to LSAA offers a graft holiday for corrupt public officials, hence the need to actively engage the

legislation in identifying, exposing and rooting out corrupt public officers before they crumble the economy. The strengthening of lifestyle audit multi-agency framework to effectively coordinate lifestyle audits for better outcomes in the fight against graft remains vital.



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## Introduction

Globally, Kenya is ranked 137 out of 180 countries in the corruption perception index. The country's Auditor General's Report reveals that approximately 1 trillion shillings is lost to corruption every year. The perception index 2019 indicates that Kenya scored 28% globally, much below the average score of 43% and the sub-Saharan score of 32%. This depicts slow progress in efforts to curb corruption activities in Kenya. Similarly, it underscores the need to actively engage the lifestyle audit law for better outcomes in corruption prevention and eradication.

The LSAA was enacted by the National Assembly in September 2019 to provide a legal framework for combatting corruption in Kenya through lifestyle checks on public and state officers. Section 4(1) of the LSAA underscores

circumstances under which a lifestyle audit may be carried out against a public/state officer. These include situations where a public officer is living beyond the lawfully obtained and reported income; is unable to account for their source of income; and has misappropriated funds under the officer's care or trust.

Efforts to curb corruption in the public sector have been doubtful over the years despite lifestyle audit being solidly anchored in various articles of the 2010 Constitution of Kenya (CoK, 2010). Chapter six of the constitution forms the foundation for undertaking lifestyle audit for both public and state officers as it provides for values of integrity, transparency, accountability and principles of public service (CoK, 2010).



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## Lifestyle audit

Lifestyle audit refers to reviewing and verifying information contained in income, assets and liabilities declarations, as well as consideration of facts obtained from open sources that testify to discrepancies in the lifestyle observable and items declared by an individual (LSAA, 2019).

The process involves background investigations as a method to profile an individual suspected of being involved in corrupt or illicit activities. Background investigations form a key component of lifestyle audits and is a useful way to discreetly obtain information without the suspected individuals noticing that they are on the radar.

Lifestyle audit has been lauded by many as one of the most feasible anti-corruption mechanisms. It has been championed by many sectors, both private and public as a necessary mechanism to expose fraud and corruption (Gillespie, 2014). It helps to identify and isolate corrupt officials for investigations immediately their lifestyles start showing that they are living beyond their legitimate income or means. The audits are championed for being speedy in unravelling corruption incidences and have low cost implications to carry out since they do not require lengthy investigations (Hiddleston, 2016).

## Pillars of life style audits and implications in taming corruption

There are no international standards mandating how income, assets and liabilities should be declared and monitored but there are core principles that form the foundation of any legal framework. They include scope of the contents to be declared; exact values of the contents to be declared; specific coverage of officers; frequency of declaration and; the possibility of a monitoring and evaluation agency collecting, verifying, investigating, prosecuting and sanctioning those who fail to comply (Richard, 2009). Ukraine and Rwanda are classic examples of how capitalising on the core principles to fight graft generates impressive outcomes.

A lifestyle audit relies on a wealth declaration and verification regime to establish a baseline for benchmarking the standard of living. In this effect, asset verification procedure may foresee use of publicly available digital mapping service to determine location of declared property, while lifestyle audit could crosscheck with data bases to find if any wealth found in the field is registered in the specific individual's name or those of his/her family members.



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## The lifestyle audit act, 2019

The Lifestyle Audit Act No. 2 of 2019 seeks to entrench integrity in the public service and offer guidelines on vetting state officers suspected to be living beyond their known income. The Act also seeks to remove restrictions on Kenyans seeking to access information on income, assets and liabilities of persons holding public offices as part of efforts to fight endemic corruption in Kenya (LSAA, 2019). It puts the wealth of state officers/public officers such as the President, the deputy president, cabinet secretaries, senators, members of parliament, top county officials, executives in government parastatals and senior civil servants to public scrutiny. Kenyans will be able to scrutinise what a public officer had before being appointed into a public office and what they have accumulated after the appoint-

ment and raise a red flag on illicit enrichment (LSAA, 2019). The lifestyle audit law also acts as a one-stop-centre in the war against graft as the Ethics and Anti-Corruption Commission (EACC) will host unrestricted database or a website of the wealth declaration forms and other information on wealth of public officers, their spouses and dependent children. Previously, public officers submitted wealth declaration information to various commissions in charge of their welfare but the information was not available to the public.

Further, the law provides for multiagency coordination in investigation bringing together KRA, EACC and DCI while conducting a lifestyle audit on any profiled public officer (LSAA, 2019).



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## Application in anti-corruption campaign

Various anti-corruption agencies have made efforts to fight graft in Kenya especially in investigating and prosecuting high profile graft cases such as the Arror and Kimwarer dams scandals and the KEMSA scandal on procurement of personal protective equipment (PPEs). However, there is a general public feeling that there has been a lackluster implementation of graft laws in Kenya. This is demonstrated in the manner in which previous graft cases have been pursued. For instance, if the accused has established a personal relationship with the executive, political class, media and is charismatic enough to appeal to ethnic loyalties and gain public sympathy, they can scuttle efforts by the agencies to hold them accountable.

Although EACC and DPP have made progress in investigating, charging and prosecuting former governors such as Mike Sonko (Nairobi), and Ferdinand Waititu (Kiambu), and current governors such as Moses Lenolkulal (Samburu), and Anne Waiguru (Kirinyaga), among others, with economic crimes and abuse of office charges, none has been convicted of the alleged economic crimes. This may be attributed to comprehensive lifestyle audits which have been incapable of producing adequate evidence for the economic crimes. There is also the fear of damages induced by section 14(5) of the law on malicious

acts of the investigators such as unlawful freezing of accounts in the process of carrying out investigations. Consequently, most of the accused public officers continue to execute their functions due to the gaps in implementation of the LSAA and this casts doubt on the competence of the various institutions that fight graft in Kenya. While it is arguable that the principle of due process demands that corruption suspects enjoy the right to remain innocent until proven guilty, the anti-corruption crime prevention perspective should demand that handling of economic crimes be given priority in the execution of justice to get culprits behind bars as quickly as possible.

Lifestyle audits as a mechanism to vet accumulation of wealth by public officers holding key offices should be guided by the following key questions in profiling corrupt individuals in public offices for prosecution and charging in a court of law:-

- i. What were the assets, income and liabilities of the suspected individual before being appointed into public office?
- ii. What are the current assets, incomes and liabilities of the suspected public officers now that they are in government? and
- iii. How much taxes have the suspected individual paid based on their income?

## Challenges facing implementation

Institutional inefficiencies such as inadequate personnel, skills and resources to expedite corruption cases within reasonable time are key challenges. For instance, advancement in technology may be an obstacle in undertaking lifestyle audit on bank transactions since collusion between bank staff and corruption perpetrators may distort data on existing bank transactions.

Lack of transparency and accountability mechanisms on how proceeds of crime are utilised or injected back into the economy also negates the essence of undertaking assets recovery of the proceeds of corruption. This casts doubt on

whether the recovered proceeds are channeled to other corrupt individuals or are used to benefit the public through provision of basic services.

Other key challenges may be attributed to overlap of functions by the various anti-corruption agencies tasked with responsibilities of implementing the law; vested political interests and lack of goodwill from the political class; system design failure due to lack of cooperation between different state agents; and multiplicity of anti-corruption statutes that support lifestyle audits which are subject to different interpretation by legal scholars and practitioners.



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## Implications on national values

Selective implementation of the lifestyle audit law implies subjecting individuals suspected of graft activities to different lenses of the graft law. This is likely to pose danger to the country as it may be a recipe for chaos in the anti-corruption campaigns platform due to selective application of justice (Laila, 2016). John Locke in his Theory of Social Contract, argues that the purpose of the government and law is to “uphold and protect the natural rights of men and the law ceases to be binding when a government fails to fulfil this purpose”.

In Locke’s view, unlimited sovereignty is contrary to natural law (Laila, 2016). Consequently, inability of any regime to control corruption may lead to instability. This can be through increased

protests by citizens leading to state failure. Failing to speedily prosecute and punish corrupt individuals using the proposed law is also likely to make corruption a norm in Kenya. Yet the LSAA clearly eliminates all the hurdles or restrictions to access information on income, assets and liabilities of persons holding public offices and hold them accountable of their corrupt activities.

The proposed law empowers the DPP to enter into deferred prosecution agreements with suspects who cooperate during the lifestyle audit process. It is anticipated that if the suspect agrees to pay a given amount or return certain assets to the DPP, then their prosecution can be deferred (LSAA, 2019).



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## Conclusion

This paper concludes that even though the lifestyle audit law grants a window for Kenya to root out corruption at the initial stages with minimal resources, its dreary implementation offers a graft holiday to corrupt public officers and this undermines the governments' anti-corruption clarion call. This is detrimental to the prospects of turning around the already struggling Kenyan economy.

## Recommendations

This policy paper recommends the following;

- a) The Ethics and Anti-Corruption Commission to strengthen the lifestyle audit multi-agency framework to effectively coordinate lifestyle audits for better outcomes in the fight against graft.
- b) The National Assembly to amend the existing law on lifestyle audits to seal loopholes in time lags in declaring wealth, scope of wealth declared, weak coordination of various agencies, and address conflicting legislations on lifestyle audits by bundling them together for coherence, verification and monitoring of lifestyle audits in Kenya.
- c) The Central Bank of Kenya to establish a collaboration framework between the NIS, FRC, and banks in vetting employees that are vested with providing supervisory, oversight and compliance roles in the financial sector to enhance integrity and honesty.
- d) The Kenyan Executive to embrace political goodwill in supporting the implementation of the lifestyle audit law to ensure elected and appointed leaders declare their wealth as required by law to achieve better outcomes on the war on graft.

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