



Court Case Management for the Administration of Justice

**REPORT ON REGISTRY BASED SURVEY ON CASE MANAGEMENT
ON SOCIAL AND ECONOMIC RIGHTS FOR THE
ADMINISTRATION OF JUSTICE**

by

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Acronyms

ADR	Alternative Dispute Resolution
AIDS	Acquired Immune Deficiency Syndrome
CSO	Civil Society Organizations
FIDA-K	Federation of Women Lawyers (Kenya Chapter)
HIV	Human Immuno-deficiency Virus
ICESCR	International Covenant on Economic, Social and Cultural Rights
MDGs	Millennium Development Goals
PPI	Pro Poor Integrity Programme
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World Health Organization

Acknowledgements

Executive Summary

The Federation of Women Lawyers (Kenya Chapter) has partnered with TIRI to implement the Pro Poor Integrity Programme (PPI). TIRI is an independent non-governmental organization that works with governments, businesses and civil society to find practical solutions to making integrity work. TIRI works to raise standards of integrity in specific institutions by promoting and facilitating a growing network of reform leaders, specialists, and policy practitioners informed by sound and objective evidence.

The PPI Programme attempts to demonstrate the contribution of improvements in local and national governance to the attainment of the Millennium Development Goals (MDGs). PPI seeks to improve the performance of the MDGs at the local level by focusing on 4 sectors:

- i. Water and sanitation;
- ii. Education;
- iii. Health; and
- iv. Social protection.

PPI is one of the first multi-stakeholder, CSO-driven initiatives to address improvements in governance and integrity to directly impact MDG outcomes on the ground. The programme links the needs, priorities, and voices of local communities with decision-makers in the executive, parliament, and the judiciary at the national level. This bridging improves the prospects for genuine development gains, sustainability, and replication.

FIDA (K) aims to strengthen capabilities, responsiveness and accountability to improve the prospects of meeting the Millennium Development Goals (MDGs) locally and, by extension, nationally. It is for this reason that it is working towards the

contribution of improvements in local and national governance, to the attainment of the MDGs.

It is evident that at the local level, citizens and CSOs find it difficult to play their part to achieve the MDGs. Governance also fails to be responsive to the needs of the poor and the most vulnerable. In that event, communities often lack the capabilities to secure their rights, even when these are enshrined in law and budgetary allocation.

In this regard, FIDA (K) undertook a registry-based survey on case management and local court's integrity performance as redress route for the enforcement of rights to water /sanitation, education, health and social protection (as part of MDGs).

The survey targeted Nairobi and Thika. The ultimate objective of the survey was to strengthen the capacities of local civil society to gain sufficient and legitimate leverage on local state institutions such as the local courts to positively impact on the achievement of MDGs within their communities. Special attention was given to gender issues in the thematic areas.

Social Economic Rights in Kenya

Social, economic and cultural rights are not expressly protected under the current Kenyan Constitution. Fundamental Freedoms and Rights protected by the current Constitution of Kenya are:

- The right to life
- The right to personal freedom
- Protection against slavery and forced labour
- Protection from inhuman treatment
- Protection from property being taken away illegally
- Protection against illegal search or entry
- The right to the protection of the law
- Freedom of conscience
- Freedom of expression
- Freedom of association and assembly
- Freedom of movement, and
- Freedom from discrimination

The Proposed Constitution Kenya restates these rights and adds further categories of rights including economic, social and cultural fundamental rights. Article 43 of the Proposed Constitution provides for socio-economic rights and reads as follows;

Economic and Social Rights

- A. (1) Every person has the right—
- (a) to the highest attainable standard of health, which includes the right to healthcare services, including reproductive health care;
 - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education.
- (2) A person shall not be denied emergency medical treatment.
- (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants."

The enactment of this Constitution will herald a new beginning in the enforcement of socio-economic rights in Kenya. This will lead to improved access to health, education, social security, etc.

Human Rights and the Millennium Development Goals

In September 2000, 189 world leaders agreed to the Millennium Declaration, a new global commitment to reduce extreme poverty and achieve human development and human rights. Recognizing the need to translate the commitment into action, the international community arrived at the Millennium Development Goals (MDGs) – a set of eight time-bound, quantifiable goals focused on human development. They are:

1. Eradicate extreme poverty and hunger.
2. Achieve universal primary education.
3. Promote gender equality and empower women.
4. Reduce child mortality.
5. Improve maternal health.
6. Combat HIV/AIDS, malaria and other diseases.
7. Ensure environmental sustainability.
8. Develop a global partnership for development.

Goals 1 to 7 are committed to raising the poor out of poverty and hunger, getting every child into school, empowering women, reducing child mortality, improving maternal health, combating HIV/AIDS, malaria, and other diseases, and ensuring environmental sustainability.

Goal 8 explicitly recognizes that eradicating poverty worldwide can only be achieved through international cooperation. Since their adoption in 2001, the MDGs have risen to the top of the development agenda. At the same time, human rights have risen in prominence within development policy and programming.

Human rights and the MDGs have much in common. They share guiding principles such as participation, empowerment, national ownership; they serve as tools for reporting processes that can hold governments accountable; and, most fundamentally, they share the ultimate objective of promoting human well-being and honouring the inherent dignity of all people.

MDG's and Social Economic Rights

Human Rights

Human rights are the rights possessed by all persons, by virtue of their common humanity, to live a life of freedom and dignity (UNDP, 2000). Human rights are universal – they are the same for everyone, everywhere.

They are inalienable – they can neither be taken away, nor given up.

Black's Law Dictionary, Eighth Edition, defines 'human rights' to mean the freedoms, immunities, and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they live.

Human rights have been divided into three categories:

- (i) First generation rights which include civil and political rights.
- (ii) Second generation rights such as economic, social and cultural rights.
- (iii) Third generation rights such as the right of self-determination and the right to participate in the benefits from mankind's common heritage (Mehta & Jaswal, 2004).

The "generational" classification of human rights implies an order of importance (or priority) in human rights and this has had the effect of marginalising socio-economic rights to second-class rights.

International human rights law is based on the 1948 Universal Declaration on Human Rights, which contains thirty articles delineating all human rights that ought to be protected by governments and the international system. Since the Declaration is not legally binding, the international community has established a series of

international treaties that have expanded both the scope and depth of the rights to be protected by states. In 1966, two key international covenants were adopted simultaneously: the Covenant on Civil and Political rights and the International Covenant on Economic Social and Cultural rights.

Economic, Social and Cultural Rights

Economic, social and cultural rights are a broad category of human rights guaranteed in the International Covenant on Economic, Social and Cultural Rights.

They include:

- the right to education (Article 13);
- cultural rights including the right to participate in cultural life (Article 15);
- the right to the highest attainable standard of physical and mental health (Article 12);
- the right to adequate housing, including security of tenure, protection from forced eviction and access to affordable, habitable, well located and adequate housing (Article 11);
- The right to social security (Article 9)

At the regional level, the African Charter on Human and Peoples' Rights protects the right to health (Article 16), and the right to education (Article 17).

In many countries, economic, social and cultural rights are not recognized or enforceable by law. In December 2008, the UN General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol). The Optional Protocol establishes an international mechanism for individuals whose economic, social and cultural rights are violated and who are denied a domestic remedy to seek justice at the international level. The protocol was opened for signature on 24 September 2009. As of February, 2010, the

Protocol had 32 signatories and no parties. It will enter into force when ratified by 10 parties (Optional Protocol ICESR, Article 18).

This report investigates the enforcement of social and economic rights under our judiciary and the application of case management systems in the judicial process. It is clear from the findings that the Judiciary does enforce social and economic rights but without any express wording of the same. The report also takes a look at procedural and other reforms that can be adopted in order to enhance the quality of justice in the courts.

These are the major findings of the research:

1. That courts do enforce social and economic rights in Kenya by implication;
2. That the courts do not have capacity to enforce the rights in good time;
3. That although there is an initiative to start a comprehensive case management system in some courts, most of the processes are manual. This has caused delays, loss of files and huge backlog of cases.

Key Recommendations

1. That there is urgent need for education and training of judicial officers to embrace information technology in order to enhance service delivery.
2. That judicial officers need to be sensitized to enforce in an express manner the international instruments ratified by Kenya providing for social and economic rights.
3. Where there is case management, the process is enhanced and transparent as is clear in the High Court Family Division.
4. The enforcement of sanitation and access to health are almost non-existent in our courts. These rights may be revived if the new Constitution comes into force.

Study Site

The study was conducted in two areas – Nairobi and Thika. The two areas were selected because Thika has a Chief Magistrates Court, is a town that has both urban and rural inhabitants and would be ideal to provide insight into whether the rural communities were using the Courts as a redress route for the enforcement of the thematic rights. Nairobi is the capital city and the head quarters as it were of judicial administration and as such has the highest rate for the institution of suits generally.

Data Sources

The consultant obtained the information by perusing court records in Thika Magistrates Courts and the High Court Division in Nairobi. The Consultant also reviewed secondary sources of research previously undertaken on the subject. The literature review provided background information upon which the study was based. The following data collection instruments were used:

I. Interviews

A cross-section of Court Clerks were interviewed in the registries that were visited (Thika Magistrates Court and High Court Division, Nairobi). A total of three Clerks were interviewed. Relevant legislation, key international treaties, protocols and covenants as well as related project documents provided the bulk of the secondary data used in this study.

II. Data Management and Analysis

The data from the data sources and interviews as well as the secondary data collected from the relevant legislation, key international treaties, protocols and related project documents was analysed by the consultant and assisted in generating this report.

Enforcement of the Target Rights in Kenya

The Right to Health

The right to health is solidly embedded internationally and regionally. At the international level, the starting point is article 25 of the Universal Declaration of Human Rights (UDHR). It recognizes the right of “everyone ... to a standard of living adequate for the health of himself and his family, including food, clothing, housing and medical care and necessary social services.” The concept of health under the UDHR is further defined and given legal standing in international law under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 12 (1) of the Covenant recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” while article 12 (2) provides a non-exhaustive illustrative list of the steps a country must take to achieve the progressive realisation of the right.

The preamble to the constitution of the World Health Organization (WHO) conceptualises health as “a state of complete physical, mental and social well being and not merely the absence of disease or infirmity” and the African Charter on Human and Peoples’ Rights recognize the right to health in article 16. The basic elements of the right to health are availability, accessibility, acceptability and quality.

Elements of the Right to Health

Availability: According to the CESCR, availability connotes functioning public health care facilities, goods and services including relevant programmes.

Accessibility: The concept of accessibility connotes a situation where there is equitable access to and rational use of quality essential medicines. The concept of accessibility underpins the fundamental right to health care for all people by making medicines essential products for basic human survival. The notion of accessibility has four dimensions, namely; non-discrimination, physical accessibility, economic accessibility and information accessibility. The precise nature of the facilities, goods and services to be provided in fulfilling the obligations will, however, vary from state to state and depend on a variety of factors, including the level of development.

Acceptability: All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, that is, respectful of the culture of the individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

Quality: As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

Maina Kiai, former Chairman of the Kenya National Commission for Human Rights, in his Key note address at the Health Rights Advocacy Forum first Annual Conference from the 14th to 15th November, 2007 at the Savelberg Retreat Centre in Nairobi, addressed the issue of funding as the main impediment to health in Kenya. He discussed several financial scandals involving resources that could be used to

achieve the right to health. These include the Kroll, Goldenberg and Anglo leasing scandals that Kenya has witnessed.

According to Kiai, the Kroll report shows that more than 130 billion Kenya shillings were invested out of the country under the Moi regime. In comparison to Kenya's budgetary allocation to health in the 2007/2008 year, which stands at 34 billion, this money could be used to finance the equivalent of four health sector budgets. He remarked that for the right to health to be realized in Kenya, civil society organizations and Kenyan citizens have a responsibility to fight practices that lead to wastage of resources that are vital to supporting the right to health.

The Right to Education

Cause 1 of Article I of the World Declaration on Education for All provides a definition of education. It states as follows:

1. Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy and problem solving) and the basic content (such as knowledge, skills, values and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.

The right to education is one of the basic human rights stipulated in the Universal

Declaration of Human Rights, 1948 and has since been enshrined in various international conventions and development plans. Achieving the right to education for all is one of the biggest challenges of our times and the second Millennium Development Goal seeks to address this challenge.

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make.

The Kenyan education system, 8-4-4, offers eight years of compulsory primary education, four years of secondary school and four years of university education. Both primary and secondary education in Kenya is free in public schools. Universal Primary Education (UPE) was introduced in January 2003, while Universal Secondary Education (USE) was introduced in January 2008. Free primary education was first introduced in 1979, but was abandoned with the implementation of the Structural Adjustment Programmes in the 1980s.

The provision of free basic education saw a sharp increase in public primary school enrolment. There was a gross enrolment rate of 99 per cent and a total of 1.2 million children were absorbed into schools (Republic of Kenya, Sessional Paper No.5, 2006). The high number of students enrolled at these lower levels will cause more students to seek tertiary/ university education. There are major challenges to access and

quality. University education was heavily subsidised by the government until the early 1990s when, as a result of International Monetary Fund (IMF) conditions and the government's policy changes, students were required to meet their own costs, including tuition, accommodation and the purchase of books and other learning materials.

To ensure that university education was not completely out of reach of those with no means, the Higher Education Loans Board (HELB) was established in 1995. The Board is mandated to, inter alia, give loans, bursaries and scholarships to needy Kenyan students pursuing their education within and outside Kenya. Initially the loans were only available to students attending public universities' regular or day programmes. In 2007, HELB extended the loan facilities to students attending private universities in the country.

The government fully subsidises primary school books and other teaching materials that are sourced/ procured using the set government procurement procedures. The government has had to enact policies that facilitate access to materials, including the National Text Book Policy on Publication, Procurement and Supply of June 1998 (Rotich, 2000). The government's expenditure on education is equivalent to 7 per cent of the country's GDP.

The Right to Water and Sanitation

The right to water was recognised in 2002 with the adoption of General Comment No. 15 by the United Nations (UN) Committee on Economic, Social and Cultural Rights. It interprets Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Moreover, the right to water has been linked with the right to sanitation ever since. The latter

was not, however, explicitly addressed until 2006, in the guidelines on the realisation of the right to drinking water and sanitation adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights.

In 2008, the United Nations appointed the first Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation. The Independent Expert is asked to clarify the content of the human rights obligations in relation to access to water and sanitation, look into best practices, and make recommendations to the realisation of these human rights.

The human right to water implies that water supply must be accessible within, or in the immediate vicinity of, each household, educational institution, workplace and public place. Where this is impossible, a source must be provided close enough to allow people to collect sufficient water – at least the essential minimum of 20 litres of water. The time required to collect these 20 litres should normally not exceed 30 minutes (walking both ways, including waiting times), and the overall distance should be less than one kilometre. The water source should be located in a secure place, taking into account the needs of the most vulnerable groups using it. Threats to the security of women collecting water must be prevented.

Like water supply, the human right to sanitation implies that a sanitation facility is also accessible within, or in the immediate vicinity of, each household, educational institution, workplace and public place. Toilet locations must guarantee physical security, which is why the path to the latrine should be even and safe to walk along, especially at night time. It should be protected to reduce the danger of attack from animals or sexual assault, particularly against women and children. Public toilets and toilets shared between several households can be a valuable first solution, if they are well-managed and kept hygienic.

On the 20th of February 2008, at the AfricaSan Conference on Sanitation and Hygiene, held in Durban (eThekweni), South Africa, Ministers and Heads of Delegations responsible for sanitation and hygiene from 32 African countries, including Kenya, adopted the eThekweni Declaration. The eThekweni Declaration recognizes that nearly 589 million people, or more than 60% of Africa's population, currently do not have access to basic sanitation. Without basic sanitation, water supplies become contaminated with human excreta and become unfit for human consumption.

Kenya has been a very strong supporter of the right to water and sanitation in the past. At the international level, Kenya acknowledged the right to water in two declarations unanimously adopted by all 118 Member States of the Non-Aligned Movement. Kenya also endorsed the right to water and sanitation through the 1994 Programme of Action adopted at the Cairo International Conference on Population and Development and the 1996 Habitat Agenda, both of which explicitly recognise that the right to an adequate standard of living includes the right to have access to water and sanitation.

At the domestic level, the government has committed itself to adopting a human rights based approach in the water and sanitation sector. Key policies such as the National Water Services Strategy (2007-2015) recognises that access to safe water and basic sanitation is a human right and the Pro-Poor Implementation Plan for Water Supply and Sanitation (PPIP - WSS) 2007 aims at up-scaling and fast-tracking actions for water and sanitation coverage by concentrating on low cost technology and settlements of the urban poor.

The Kenyan National Water Services Strategy has set ambitious targets for increasing sustainable access to drinking water supply and sanitation that comply with the

human rights principles. In urban areas, access to drinking water is to be increased from 60 to 80 percent by 2015. It must meet defined standards for water quality as well as for the distance to source. The time needed to reach the nearest public outlet and return home is planned to be reduced to an average of 30 minutes. The target for rural areas is to increase access from 40 to 75 percent, and to decrease the maximum fetching distance to 2,000 metres. This figure takes into account that, unlike in urban situations, water collection in rural areas usually does not require queuing.

The World Health Organization (WHO) states that access to drinking water means receiving at least 20 litres per person per day, although not all requirements can be met with this amount. It considers 50-100 litres per person per day as the amount necessary to meet most hygiene and consumption needs. 7.5 litres per person per day is regarded as the minimum for survival needs under most conditions. 20 litres per person per day is the minimum requirement set by the Kenya's National Water Services Strategy, which follows the WHO's recommendation.

Access to basic sanitation is primarily addressed by the National Environmental Sanitation and Hygiene Policy and the Sanitation Concept for the Water Sector. Both strategies ambitiously aim to ensure that, by 2015, every school, institution, household, market, and other public place will be provided with hygienic, affordable, functional and sustainable toilets and hand-washing facilities.

The Right to Social Protection

Social protection is defined as a range of protective public actions carried out by the State and others in response to vulnerability and poverty. It seeks to guarantee relief from destitution for those sections of the population who, for reasons beyond their control, are not able to provide for themselves. The right

to social security cuts across a number of provisions of the International Covenant on Economic, Social and Cultural Rights – e.g. provisions on the right to work, to just and favourable conditions of work, to adequate standard of physical and mental health, adequate standard of living etc. – but is explicitly mentioned in Articles 9 and 10.

The right to social security awaits a formal definition from the Committee but the draft General Comment on the Right to Social Security indicates that it covers the right to access benefits through a system of social security in order to secure adequate income security, access to health care and family support (Draft General Comment on the Right to Social Security, 2006).

Kenya has no formal welfare or social assistance program that is set up by statute. Social Protection in Kenya is being addressed through different sectoral interventions which are fragmented. Examples of these efforts are the Free Primary School Education program, Subsidized Secondary School Education, the Hospital Fee Waiver for children under 5 years and patients suffering from malaria and Tuberculosis, the Women Enterprise Fund, Youth Empowerment Scheme and the Constituency Development Fund.

The Constitution of Kenya, which is the country's supreme law that provides for other fundamental rights and freedoms, does not recognize the right to social security. The Government has not domesticated the provisions of international treaties and conventions on the right to social security, much is a pre-requisite before such provisions can be invoked in domestic courts.

Social security in Kenya is regulated and provided for under a plethora of laws- the Children Act, the Disability Act, the Retirement Benefits Act, 1997, the Retirement

Benefits (Amendment) Act, 1998, the National Social Security Fund Act, the National Health Insurance Fund Act, the Pensions Act, and the Pensions (Increase) Act.

Enforcement and Accountability of Rights

Forcing states to abide by their human rights commitments is a challenge. At an international level, the Treaty Bodies responsible for overseeing the international human rights treaties that states have ratified can only recommend actions by state parties but not force states to act. At a national level, going to court to hold the state accountable for a violation of human rights can be complicated, expensive and in some cases out of reach for poor and marginalized groups. Moreover, even if successful in taking a state to court, the state may resist the enforcement of the verdict.

The Role of Courts in the Implementation of Social and Economic Rights

According to Danie Brand, courts can protect socio-economic rights in two ways. Firstly, through their law-making powers of interpreting legislation and developing the rules of the common law, and secondly, by adjudicating constitutional and other challenges to state measures that are intended to advance those rights (Brand, 2005).

With regard to human rights the role of the Court is to:

- (i) Protect and implement the constitution and laws (including human rights provisions).
- (ii) Interpret the law in a way that is compatible with human rights.
- (iii) Make or develop laws with the guidance of the human rights framework (UNDP, End Poverty 2015).

In performing these roles, the Courts face a number of challenges. Courts, especially in the common law dependent systems, are dependent on the arguments raised by lawyers for the parties. If no one chooses to bring a particular violation to court, there is nothing the courts can do. In addition, going to court for the enforcement of rights is expensive, and often the most disadvantaged groups are the least likely to know about their rights or to have the means to pursue them through the courts.

Kenyan courts are faced with the ever-increasing problem of case backlog, delayed justice and escalating costs of litigation. The problem is compounded by the fact that Kenya inherited the British adversarial system of litigation and resolution of disputes. This system is characterized by strict adherence to rigid rules of procedure that leave little or no room for judicial activism, or settlement of the dispute; and where the pace of the litigation process is determined or controlled by the litigants themselves and their lawyers. In such a context, one cannot talk of a “case management system” as there strictly isn’t one, and litigation sort of takes its course.

Case Management

There is no monolithic definition or generic form for what is meant by the term “judicial case management”. However, successful regimes generally exhibit four main features:

- 👤 early and continuous judicial control over the case;
- 👤 time limits for each step in the process;
- 👤 constant monitoring to ensure compliance; and
- 👤 firm dates for judicial proceedings with strict controls on adjournments.

In short, case management refers to the schedule of proceedings involved in a matter be it civil or criminal. There are various stages in litigation, such as the filing

of a suit, defence, the discovery process and other motions that occur before a trial is held or a decision is rendered. Each stage of the process has a scheduled timeframe in which it must be filed with the court or completed. When a complaint is filed and a case is assigned to a judge, the judge will often set forth a schedule for the submission or completion of the relevant pleadings, court appearances, and other matters.

The objective of case management is to speed up the litigation process by way of innovation and adaptation. The measures undertaken in case management include emphasis on pre-trial procedures, time-bound hearings, alternative dispute resolution (ADR) and use of information technology.

Advantages of Case Management

Although the more conservative writers on the subject have criticised the modern trends of court case management as being undesirably intrusive, the more progressive writers have highlighted the advantages of court case management as including the following:

I. Empowerment of all stakeholders in the litigation process to contribute to the expeditious resolution of disputes:

Through strict compliance with set dates; filing of comprehensive pleadings and participation in the pre-trial or scheduling conference, the judge, litigants and their lawyers work as a team to minimise delay; reduce the cost of litigation by narrowing down issues; promote substantive and conciliatory justice by exploring avenues for settlement, and ultimately expedite the resolution of disputes. Matters are no longer left to the litigants or their lawyers to determine the pace of litigation.

II. Enhancement of the court's ability to manage the litigation and adjudication process:

The presiding judge is in a better position to identify disputed issues early; to fix firm dates; to simultaneously deal with as many aspects of the case as possible; to control the cost of litigation by helping the parties to narrow down points of disagreement, to dispose of cases summarily where pleadings disclose no case or defence; to dispose of the non-contentious aspects of the case without requiring the attendance of the parties; and to give directions ensuring that the trial of the case proceeds expeditiously and efficiently.

III. Minimum delay:

Unlike the adversarial system where litigants and their lawyers can use delaying tactics as a combat strategy, the court expects the parties to cooperate with each other by making prompt, full and mutual disclosure of all relevant facts or evidence; and by strictly observing the time limits set by court. The court also saves time by insisting on the early disposal of any pre-trial motions/ applications and by granting adjournments sparingly.

IV. Reduced cost of litigation:

Some of the aspects that determine the cost of litigation include such mundane things as the number of times the lawyer goes to court; phone calls to the client; transport and accommodation costs of witnesses, etc. By insisting that the parties make early and full disclosure of the relevant facts/evidence and by narrowing down the points of contention, the court assists the parties to cut down on the number of witnesses required, and ensures further that each witness attends court according to the time-table thus saving costs.

Characteristics of a Good Case Management System

I. Specialised Court divisions:

A good Case Management System demands that the Court be administratively separated into specialized divisions (e.g. civil, tax, commercial, family, criminal etc). Judges should be allowed to choose their area of preference and specialisation. Litigants should be required to file their actions in the appropriate division where each case will be handled from start to finish. The advantages of a specialised court is that the personnel (Judges and Registrars) are more confident and efficient in handling the cases that are within their area of specialisation.

II. Organised automated Registries:

In Kenya, the registries are disorganized and overwhelmed. In addition, the records are manually kept and managed. This has contributed greatly to the delay in disposal of cases through loss of records or lack of entries because of human error or sheer incompetence. Conversely, an organised, automated registry with computerized filing and allocation of cases; automated data management and caseflow tracking, is essential to effective case management.

III. Automated recording of court proceedings:

In Kenya, the Judges manually and tediously record court proceedings. This is an archaic system that contributes significantly to delays, and hampers the judge in his or her endeavour to devote full attention to the real issues in the case. On the other hand, automated recording of the court proceedings contributes significantly to expeditious adjudication and frees the judge to devote maximum attention to the case, thereby improving the quality of justice.

IV. Filing of comprehensive pleadings:

In a good case management system, parties to a suit are obliged to make a full and early disclosure of the vital facts/evidence in the interests of transparency and expeditious resolution of disputes. The adversarial system as is practiced in Kenya, is famous for its “trial-by-ambush” style where the parties become experts at with-holding vital information from each other and from the court, as a trial strategy.

V. Enforcement of firm dates by the Court:

Another characteristic of a good case management system is the ability of the judge to set and enforce observance of strict deadlines for doing certain things. Usually the judge will fix dates for pre-trial motions, appearance of witnesses, submissions etc, and will ensure that the parties comply with these dates or else face the penalty of costs. The result is an expedited trial.

VI. Progressive Procedural Rules:

It has been said that “Procedural Rules are handmaidens of justice, meant to expedite rather than impede the delivery of justice” (Iron and Steel Wares Ltd vs. C.W. Martyer & Co, 1956). Accordingly, a good Case Management System should be accompanied by procedural rules that facilitate the expeditious resolution of disputes.

Role of Effective Procedural Rules

If used properly, rules of procedure can be an effective tool in the management of cases. Rules of Procedure can be modified or introduced to achieve the following important measures:-

- (i) Prescribe time frames within which parties are expected to perform certain tasks;

- (ii) Prescribe punitive measures for undue delay (e.g. costs);
- (iii) Empower Registrars to dispose of any non-contentious matters such as pre-trial motions;
- (iv) Compel lawyers and litigants to exhaust opportunities for settlement before opting for a full trial of the case;
- (v) Empowering the court to dispose of cases summarily where pleadings disclose no case or defence.

Case Flow in Kenya

Civil Court Proceedings

The first step is the registration of the suit where the person or his/her advocate presents his/her plaint for filing within a specific time. The time frame within which the case is to be filed is determined by the Limitation of Actions Act (Cap. 22). Upon receipt of the plaint, the Registry clerk calculates the fees payable and then opens a court file and allocates the suit a Case Number. The plaint is then stamped and one copy filed in the court file while the plaintiff retains a copy for himself and another for service upon the defendant(s).

The next step is the issuing of summons where summons are prepared by the Court Clerk who then delivers it to a court process server in duplicate for service on the defendant. The defendant, upon service, must sign the summons or affix his thumbprint thereto, retaining a copy of the plaint and the summons. The process server then endorses the original copy of the summons, indicating the place, date and time that service was effected. The process server then returns it to the court clerk, who places it in the court file.



After this, the next stage is the hearing of the suit. Both parties are required to attend the hearing of the matter. Once judgment has been entered, the party in whose favour it was entered applies to the court to draw up a decree. Such a decree contains the principal amount claimed in the suit together with interest. The courts presently award interest at 12% of the principal amount. Once this is done, the decree holder is free to apply for the execution of his decree. It is by the process of execution that the decree holder is able to receive his dues. An appeal can be filed 30 days after delivery of judgement.

Appeals from lower courts and tribunals are filed in the High Court Appeals registry. An appeal against civil judgment must normally be filed within 30 days after such judgment is delivered and pronounced.


Role of Stakeholders in Case Management

The stakeholders in the management of cases are the court clerk, the registrar, the presiding judge/magistrate, the lawyers and litigants. Each stakeholder has a vital role to play in the effective management of cases, and where one falters, the whole process is hindered.

The Court Clerk is the administrative link between the judge/magistrate and the registry. His contribution to efficient case management entails:

-  Ensuring that files are put before the judge well in advance to facilitate adequate preparation;
-  Receiving and recording of any exhibits admitted in evidence.

The Registrar is the administrative link between court and the lawyers. His role is to:-

-  Receive, register and allocate filed cases in an orderly, organised manner;

- 👉 Publish the cause list; and
- 👉 Track the progress of cases.

The Presiding Judge as case manager is expected to:

- 👉 Study each file in advance; get acquainted with case for each side;
- 👉 Handle contentious pre-trial motions;
- 👉 Encourage parties to settle;
- 👉 Conduct trial (administers substantive justice without undue regard to technicalities.)

The Lawyers represent their client's interests and are the link between the litigants and the court. As such, they are expected to:-

- 👉 File clear, comprehensive pleadings and exchange information through discovery or other forms of disclosure;
- 👉 Adequately prepare in advance (must be well-versed with all relevant facts of the case);
- 👉 Comply with judge's/court's time-table;
- 👉 Avoid proliferation of wasteful pre-trial motions and other delaying tactics.

The Litigants are the key beneficiaries and consumers of court services. However, they too can positively contribute to the effective management of cases by:

- 👉 Stating their case clearly and fully to the lawyer and to court (being transparent);
- 👉 Being amenable to settlement or other forms of alternate dispute resolution (ADR);
- 👉 Being willing to cooperate with other stakeholders in order to expedite the resolution of disputes.

Casetrack System for the Judiciary of Kenya

In a measure aimed at improving efficiency in the Judiciary and reducing the backlog of cases, the Judiciary of Kenya in conjunction with GTZ have started a pilot project of designing a computerized case management system known as Casetrack in the Family Division of the High Court of Kenya. The development of the system involves computerized data capture of pending cases and storing it in a central, secure and robust database system which is capable of processing the data and giving reports relevant to various classes of users, i.e. Judicial Officers, Judiciary administrators, para-legal staff, advocates and litigants.

The proposed system will keep track of the progress of the hundreds of cases heard every day in the Court of Appeal and the High Court. The system will indicate when a case has been filed, all the relevant interlocutory proceedings and the date judgment is finally delivered. This information will be entered by an appointed person (preferably the court clerk) via a computer connected to the system.

Judicial officers will have access to the information stored in the system depending on their access privileges. Members of the public may access some information online e.g. how far the hearing of their cases has gone. The system is still under development. Currently, the system has input over 11,000 case files and continue to input metadata that will help litigants check status updates of their cases.

Findings

This chapter presents the findings from the data collected under the Registry Based Survey. The survey was carried out in two Court Stations: High Court Nairobi, and Thika Law Courts.

Nairobi Law Courts

The Nairobi Law Courts are made up of the Court of Appeal, the High Court and Magistrates Courts. The High Court in Nairobi has the following specialized divisions:

- (i) Family Division
- (ii) Criminal Division
- (iii) Civil Division
- (iv) Commercial Division
- (v) Constitutional and Judicial Review Division

In the Nairobi Law Courts, a total of one hundred and ten cases were surveyed and analyzed. Out of the 110, here are the statistics for the various rights that we were considering:

Right to Education

Fifteen cases related to the right to education i.e. 13.64% of the cases. The plaintiffs in six of these cases were children proceeding to university and needed their parents

to support them in the payment of school fees. Seven cases were from separated parents suing for support of their partners to educate their children. Two cases were of schools that expelled children arbitrarily and were required to re-accept the children back to school.

In enforcing this right, the court relied on the Children's Act as well as international treaties to enforce the right.

Right to Water and Sanitation

Eight of the cases surveyed (7.2%) were on the right to water and sanitation. In one particular case, the residents of a village sued business men who were starting a slaughter house for discharging waste into the river and bordering a children's home. In its judgment, the court noted that the defendants had breached the relevant provisions of the Environmental Management and Coordination Act especially S. 3 which entitles all persons to a clean and healthy environment. Further, the Court noted that the Act empowers aggrieved parties to sue in court for redress.

Right to Social Protection

Out of the one hundred and ten cases surveyed, ten cases related to social protection. Under the umbrella of these rights, the researcher looked at rights enforced by the courts with regard to administration of estate and especially payment of pensions, division of property to widows, orphaned children etc. In certain particular cases, the court invoked its inherent power under section 3A of the Civil Procedure Act to enforce certain rights and disregard technical and procedural hurdles that would hinder the enforcement of such rights. This was especially in three cases involving minors as dependants of an estate. In regard to pension, two cases seem to stand out and the courts seem to rely on trust deed arrangements

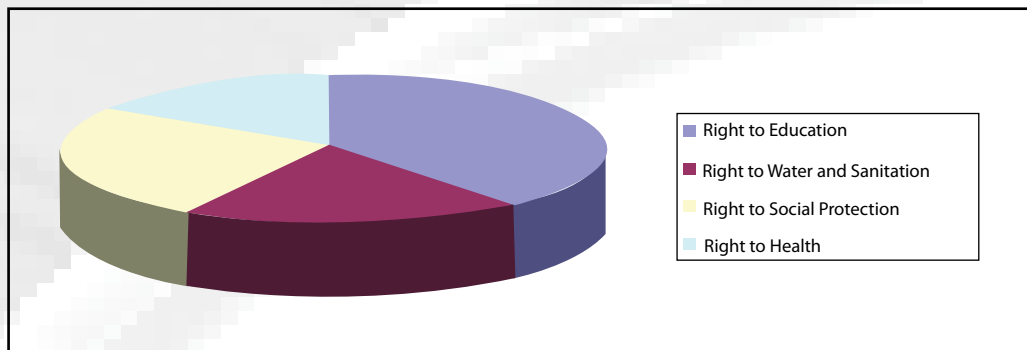
between pensioners and their employers. In the instant 2 cases, it would appear that retirees were denied their prayers for full benefits since their claims did not conform to the provisions of the trust deed. In one of the cases for custody and maintenance of a child, the court awarded money for accommodation even though none was prayed for. On appeal against that award, the Appellate Court cited S. 98 of the Children's Act which gives the court power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provisions for the child.

In one particular case, the court acquitted a father who had been accused of defiling the daughter. The acquittal stemmed from poor prosecution of the case. However, in the judgment, the Judge in my view used insensitive language for a five year old victim of sexual abuse; "further, it suggests the complainant was a spoilt child who could go sleep in peoples' toilets, on verandahs, on top of a tree instead of going to seek assistance if she needed it from houses of relatives and friends.

Right to Health

Six cases surveyed related to the right to health. In three of the cases, one of the parties was resisting an attempt by his family to declare him mentally unfit to run the family affairs and manage the family businesses and be adjudged to be a person suffering from mental disorder under the Mental Health Act. In declining the request to declare the plaintiff mentally ill, the Court observed that it shall be very wary of making an order which can go to the extent of deprivation of a person's liberty and property.

Table 1: Breakdown of Rights



Adjournments

Twenty three of the above cases were adjourned at least six times due to non-attendance by witnesses and at least three times by the prosecution asking for more time to investigate. Three cases were adjourned at least four times for loss of the court file which were later found. Six of the cases were adjourned three times as part heard due to transfer of judicial officers from one station to another. Fourteen cases had adjournments from a combination of reasons; lack of witnesses, and lawyers applying for adjournments.

Thika Law Courts

Thika Law Courts is one of the one hundred and five (105) Magistrates Courts in the country. Magistrates Courts are created under the Magistrates Courts Act (Chapter 10 of the Laws of Kenya). They handle civil and criminal matters depending on the pecuniary jurisdiction of the magistrate. The higher the rank of the magistrate, the bigger the pecuniary jurisdiction he can handle. The head of Thika station is a Chief Magistrate.

The hierarchy of Magistrates in descending order is as follows:

- (i) Chief Magistrate
- (ii) Senior Principal Magistrate
- (iii) Principal Magistrate
- (iv) Senior Resident Magistrate
- (v) Resident Magistrate
- (vi) District Magistrate

Section 3 of the Magistrates Court Act is very clear with regard to the jurisdiction of the Magistrates courts and provides as follows;

1. *Subject to any other written law the resident magistrate's Court shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed one hundred thousand shillings, or three hundred thousand shillings where the court is held by a principal or a senior resident magistrate and five hundred thousand shillings where the court is held by a chief magistrate or a senior principal magistrate:*

Provided that the Chief Justice may, by notice in the Gazette, increase the limit of jurisdiction of-

- (a) *a chief magistrate to a sum not exceeding three million shillings;*
 - (b) *a senior principal magistrate to a sum not exceeding two million shillings;*
 - (c) *a principal magistrate to a sum not exceeding one million shillings;*
 - (d) *a senior resident magistrate to a sum not exceeding eight hundred thousand shillings; or*
 - (e) *a resident magistrate to a sum not exceeding five hundred thousand shillings.*
2. *The Resident Magistrate's Court shall have and exercise the same jurisdiction and powers in proceedings concerning claims under customary law as is conferred on district magistrates under section .*

The Magistrates courts are also empowered under the Magistrates Act to settle claims under customary law relating to

- (a) land held under customary tenure;
- (b) marriage, divorce, maintenance or dowry;
- (c) seduction or pregnancy of an unmarried woman or girl;
- (d) enticement of or adultery with a married woman;
- (e) matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;
- (f) intestate succession and administration of intestate estates, so far as not governed by any written law;

In Thika Law Courts, a total of one hundred and eighty five cases were surveyed and analyzed covering the period from the year 2004 - 2010. Out of the one hundred and eighty five, 24% of the cases surveyed related to compensation with regard to

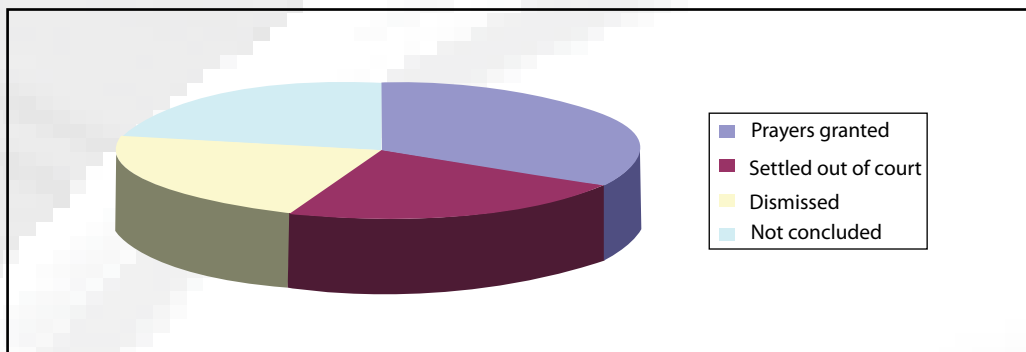
pregnancies, 4.8% of the cases related to the issue of water and sanitation and the rest related to disputes concerning the division and ownership of land as well as administration of estates which were not thematic areas in this study.

Right to Water and Sanitation

Nine of the cases surveyed, i.e. 4.8% were on the right to water and sanitation. In one of the cases, owners of a plot instituted a suit against the Ruiru, Juja Water and Sewage Co. Ltd for a permanent injunction restraining the sewage company from in any way interfering, intermeddling and or in any way attempting to take over the running, control and management of the Plaintiffs' Water project instituted at Weteithie Gwaka. In addition, the plaintiffs' claimed a refund of the capital value expended on the said water project. The sewerage company wanted to take over the management and running of the water company and therefore restrict access of water project by the owners. This case's outcome simply was marked as 'granted'. This would mean that the Court may have granted a permanent injunction to the plaintiffs. The researcher was unable to determine the very final outcome of the suit as the file had already been moved to the National Archives. The details of the case were entered in the registry survey.

In the second case, the plaintiffs instituted a suit against the Municipal Council of Thika and the National Housing Corporation for a declaration that the defendants are supposed to provide and meet the costs for such necessary facilities as supply of water and electricity and a permanent injunction restraining the Municipal Council of Thika from disconnecting the water supply of the plaintiffs. The suit was heard on 30/6/04 and on 5/08/04, one month later, the suit was struck out with costs to the Municipal Council of Thika. The plaintiffs were therefore not granted their prayers as requested.

Out of the nine cases, 33% were granted their prayers as requested, 22% were settled out of court and 22% were dismissed and 22% had not been concluded.



Right to Social Protection

Out of the one hundred and eighty five cases surveyed, forty six cases related to social protection. Under the umbrella of these rights, the researcher observed that within the station, the cases instituted that touched on this right were of a customary nature. In particular, pregnancy compensation under Kikuyu Customary Law of 20 goats and six lambs, the present value of which was to be determined by the court. No other claim for social protection was evidenced.

Under Kikuyu Customary Law, if a girl was impregnated and the father of the child was not going to marry her, her father would then claim compensation from the family of the father of the child in a bid to 'right' the wrong. This practice has been carried on by the modern Kikuyu community and now the practice is for the aggrieved parties to go to court to claim compensation.

The researcher was unable to determine the outcome of most of the suits as the files had been moved to the National Archives. However in one case judgment was entered in favour of the plaintiff at the cost of Ksh. 29, 000.

Another case was marked withdrawn with costs to the defendant. While in another, the suit was withdrawn for want of prosecution.

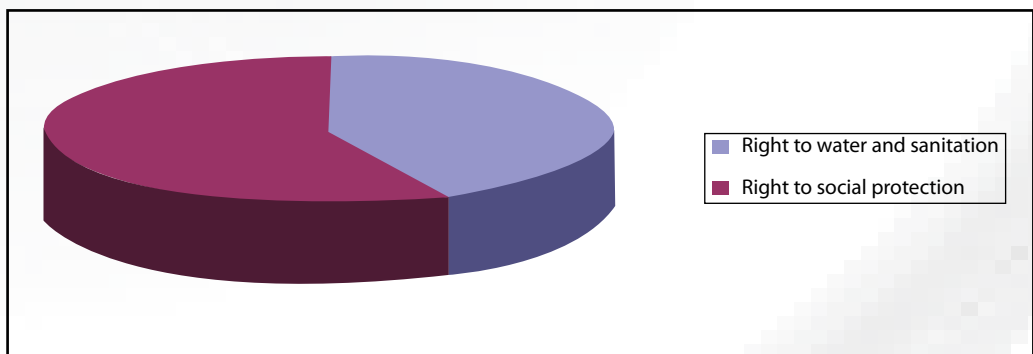
Right to Education

From the cases surveyed, there were no cases instituted in Thika Law Court relating to this right. The researcher observed that the majority of cases instituted on the right to education were by way of judicial review which fell within the jurisdiction of the High Court.

Right to Health

From the cases surveyed, there were no cases instituted in Thika Law Court relating to this right.

Table 2: Breakdown of Rights



Conclusion

Kenya is a developing society with great disparities in wealth, in which millions are living in deplorable conditions and in great poverty with high levels of unemployment, inadequate social security and lack of access to adequate health services. It is a society in which the people on their own and through their governments are striving to alleviate these unacceptable conditions.

This study reveals that the number of cases filed that regard the implementation of social economic rights are very few and far between. The study establishes that Kenya is a common law dependent system, dependent on the arguments raised by lawyers for the parties thus if no one chooses to bring a particular violation to court, there is nothing the courts can do.

In addition, this adversarial system of litigation and resolution of disputes is characterized by strict adherence to rigid rules of procedure that leave little or no room for judicial activism, and the pace of the litigation process is determined or controlled by the litigants themselves and their lawyers. Adjournments are commonplace with the bulk of the reasons for adjournments stemming from the litigants and their counsel.

Moreover, the study highlights the difficulty in tracking case files in order to determine the outcome of suits filed. Most case files on completion are moved to the National Archives where they are stored in a haphazard manner. Though the documents become public documents, they are almost impossible to locate.

The study has also revealed that there is no structured form of case management in the Kenyan litigation framework and litigation takes its course as determined by litigants and their lawyers.

However, there have been steps in a positive direction by the Judiciary with the introduction of the pilot case tracking system. The success of this program will determine the direction of case management in the Judiciary.

Recommendations

Based on the identified challenges, the study recommends the implementation of the following recommendations:

- ✎ Parliament should domesticate the international treaties and instruments / conventions relating to social and economic rights.
- ✎ Parliament should amend the law to incorporate alternative dispute resolution mechanisms such as mediation, arbitration, etc as a pre-trial mechanism for resolving disputes and ensure that parties do use these mechanisms to reduce backlog and solve disputes within short spans of time.
- ✎ From the survey, it is not possible to determine if judgments given have been enforced even where a Judge has issued a time frame for the enforcement. The Judiciary should incorporate a post trial mechanism after judgment to investigate if there was enforcement.

- ✎ The law should be amended to simplify court procedures of filing claims to avoid the dismissal of cases on technical and procedural grounds and empower litigants to approach the courts in person.
- ✎ Parliament should pass the Small Claims Courts Bill which has been pending and is intended to settle certain claims with a cash limit of Ksh. 100,000 and thus reduce such claims from the mainstream courts hence reduce backlog.
- ✎ The judiciary should speed up the computerization of registries and the adoption of case management systems to facilitate the expeditious disposal of cases.
- ✎ The Judiciary should enforce the limits of the number of days in which a judgment may be made to avoid delays in finalizing cases.
- ✎ The State Law office should increase the capacity of prosecutors and investigative agencies to ensure that there are no adjournments in cases where government agencies are concerned due to unfinished investigations, etc.



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