KITUO CHA SHERIA
LEGAL ADVICE CENTRE
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LEGAL EMPOWERMENT *Journal*

VOLUME 1 ISSUE 2
2025

LEGAL EMPOWERMENT JOURNAL

Volume 1 Issue 2
2025

Produced by

Kituo Cha Sheria

(Legal Advice Centre)

With support from Internation Development Research Centre (IDRC)

ACKNOWLEDGEMENTS

As we celebrate the second volume of the Legal Empowerment Journal, it is with immense gratitude and humility that we extend our heartfelt appreciation to all those who have contributed to its publication. This endeavour would not have been possible without the dedication, expertise, and unwavering support of numerous individuals and organizations who have generously shared their time, insights, and wisdom.

First and foremost, we extend our deepest gratitude to the authors whose invaluable contributions have enriched the pages of this journal. Your commitment to advancing legal empowerment and access to justice is evident in the thought-provoking articles and perspectives that you have shared.

Your willingness to share your knowledge and experiences from across the world enriches the discourse on legal empowerment and will inspire readers around the globe.

We would also like to extend our sincere appreciation to the peer reviewers who have served as the members of the Technical Board. Your rigorous evaluation and insightful feedback have ensured the quality and integrity of the articles published in this journal. Your dedication to upholding scholarly standards and promoting excellence in legal empowerment research is truly commendable.

Additionally, we express our gratitude to the members of the Advisory Board who have provided guidance, expertise, and strategic direction throughout the editorial process. Your invaluable insights and support have been instrumental in shaping the vision and scope of this journal. Your commitment to promoting access to justice and empowering marginalized communities is an inspiration to us all.

Last but not least, we extend special gratitude to the Kituo cha Sheria team involved in coordination of the development and review of this publication: John Mwariri, Tobias Mwadime, Felix Kipkoech, James Adala and Glory Kairi. A special mention goes to Dr. Annette Mbogoh for the editorial support she provided the team.

In closing, we would like to express our sincere gratitude to everyone who has contributed to the success of this issue. Let us continue to work tirelessly towards a world where justice is accessible to all.

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Voices from the field: Reflections on Legal Empowerment Practice

By: John Mwariri*

Legal empowerment is more than just a concept—it is a practical, transformative tool that enables individuals and communities to understand, use, and shape the law to protect their rights and improve their lives. It bridges the gap between legal theories and real-world challenges, ensuring that justice is not reserved for the privileged few but is accessible to all. The Legal Empowerment Journal continues this critical conversation by presenting research and case studies that illustrate how legal empowerment functions in practice.

This issue brings together contributions that explore the role of legal empowerment in diverse contexts, including community-led legal support, alternative justice mechanisms, statutory interpretation, digital justice, and human rights protection. The articles critically assess how legal frameworks operate in everyday life, providing insights into the successes, challenges, and ongoing evolution of justice systems, particularly in the Africa. By examining specific cases and comparative analyses, the papers seek to demonstrate how legal empowerment serves as a bridge between legal principles and real-world justice outcomes.

Furthermore, the issue amplifies the voices of those directly involved in justice work—legal aid providers, community paralegals, and alternative dispute resolution practitioners—ensuring that discussions on legal empowerment are informed by both lived experiences and scholarly analysis.

A central theme of this volume is the accessibility of justice, particularly for marginalized and vulnerable populations. Legal empowerment plays a crucial role in ensuring that people can navigate legal systems, claim their rights, and challenge injustice. Margaret Kimani's case study on Mary—a woman who was denied access to her children and matrimonial home—illustrates how legal aid and alternative dispute resolution mechanisms can restore justice in personal and family law matters. Similarly, Elsa Melissa Topsoba's research on community legal assistants in Burkina Faso highlights how trained local actors provide essential legal support to rural populations, ensuring that justice is not limited to those with formal legal representation.

Another key focus of this volume is the integration of Alternative Justice Systems (AJS) in resolving disputes. Many communities, particularly in Africa, continue to rely on traditional or informal justice mechanisms. Muguongo G. Kungu's article on land inheritance disputes in Kenya demonstrates how AJS, facilitated by Kituo Cha Sheria, provided an effective resolution where formal courts failed. Margaret Kimani's study further reinforces the role of village elders in dispute resolution, underscoring how indigenous justice mechanisms can complement formal legal structures to deliver fair and culturally relevant outcomes.

The issue of the journal also examines how technological advancements are transforming access to justice. David Orega's comparative analysis of digitization in the Kenyan and Rwandan justice sectors explores how digital tools—such as virtual courts and electronic

* John Mwariri is the Acting Executive Director, Kituo cha Sheria – Legal Advice Centre and Co-Editor, Legal Empowerment Journal. The author acknowledges the contribution of Glory Kairi in the writing of this piece.

case management—enhance legal accessibility. While these innovations offer promising solutions, they also raise concerns about digital literacy and infrastructural barriers, particularly for rural and underserved populations. The discussion on legal technology in this issue highlights both its potential and the need for inclusive implementation strategies.

Beyond practical applications, this issue engages with statutory and constitutional interpretations that shape legal empowerment. Michael O. Okello's discussion of habeas corpus underscores the importance of procedural safeguards in protecting individuals from unlawful detention. Meanwhile, Peter Onsongo Ogeto's analysis of the Land Control Act interrogates how statutory interpretation impacts property rights and social justice, emphasizing the need for legal reform to align with constitutional principles. These contributions illustrate how laws, once enacted, must be continuously reviewed and critiqued to serve their intended purpose of delivering justice.

Legal empowerment is also about transforming the way legal knowledge is produced, shared, and applied. Many of the articles in this issue contribute to the broader vision of the Legal Empowerment Journal on decolonizing knowledge by centering local experiences, indigenous legal systems, and Pan African knowledge exchange. Muthama Mutangili's study on the formalization of paralegalism in Kenya and Zambia recognizes the vital role played by non-lawyer legal practitioners in expanding access to justice, challenging traditional notions of legal expertise. Meanwhile, David Orega's comparative study of Kenyan and Rwandan justice systems encourages learning across African jurisdictions, rather than defaulting to Western models.

Recognizing that legal empowerment must be inclusive of diverse linguistic and legal traditions, the issue also amplifies voices from both Anglophone and Francophone Africa. This approach helps bridge historical divides and ensures that legal empowerment strategies benefit from a wide range of perspectives, reflecting the shared struggles and solutions that transcend linguistic and national boundaries. The contribution by Francophone writer, Elsa Melissa Topsoba, touches on the unique experience of community legal assistants in Burkina Faso.

The Legal Empowerment Journal, Volume 1 (Issue 2) (2025) demonstrates that legal empowerment is not just an academic subject but a lived reality that shapes justice outcomes for billions of people. By linking theory to practice, this issue provides valuable insights into how legal empowerment is operationalized in different contexts, from local community initiatives to national legal frameworks.

As legal practitioners, scholars, and justice advocates, we must continue to push for systems that are inclusive, people-centered, and responsive to community needs. Whether through legal aid, alternative dispute resolution, technological innovations, or statutory reforms, legal empowerment remains a dynamic and evolving field that holds the key to a more just and equitable society. By engaging with the themes presented in this volume, we take another step towards ensuring that the law serves as a tool for justice, rather than an instrument of exclusion.

We sincerely appreciate the members of the Advisory and Technical Boards for their dedication in reviewing and providing invaluable feedback on the contributions to this

volume. We are equally grateful to all the authors and contributors whose work has enriched this edition with critical insights and practical experiences. Ultimately, we believe that these contributions not only advance legal empowerment in theory but also offer practical tools and strategies that will continue to shape the pursuit of justice across Africa and beyond.

PART A

Les Assistants Juridiques Communautaires : un levier pour l'accès à la justice des populations rurales au Burkina Faso

Par Elsa Melissa Topsoba*

Abstrait

L'accès à la justice, bien que reconnu par la Constitution burkinabè, n'est pas effectif pour tous. Il demeure un défi majeur pour les populations rurales du Burkina Faso, confrontées à des obstacles tels que l'éloignement géographique, l'analphabétisme, la complexité des procédures judiciaires et le coût prohibitif des services. Dans ce contexte, les assistants juridiques communautaires, bien que peu nombreux, jouent un rôle crucial pour combler les lacunes des structures étatiques telles que la Commission nationale des droits de l'homme et le Fonds d'assistance juridique. Cet article explore leur contribution à la justice communautaire par la médiation des conflits, la sensibilisation des populations à leurs droits et l'accompagnement des victimes de violations des droits humains. Il analyse également les défis auxquels sont confrontés les assistants juridiques, tels que le manque de financement, la reconnaissance juridique insuffisante et les risques liés à l'insécurité, tout en soulignant des initiatives telles que le projet DINADANË, qui illustrent leur efficacité dans la résolution des conflits communautaires. En conclusion, l'article propose des recommandations pour maximiser l'impact des assistants juridiques, soulignant leur rôle indispensable dans la promotion d'une justice équitable et inclusive pour les populations marginalisées au Burkina Faso.

Introduction

Au Burkina Faso, l'accès à la justice en milieu rural demeure un défi majeur en raison des nombreuses barrières structurelles, géographiques et socio-économiques. Pourtant marginalisés et démunis, les populations rurales sont les premières victimes de violations de leurs droits. Incapables de s'offrir une représentation juridique et souvent ignorés par les autorités, ils sont les proies faciles d'employeurs sans scrupules, de fonctionnaires véreux et de violences diverses. Leurs tentatives pour obtenir réparation sont souvent vaines, les laissant dans une situation de grande vulnérabilité. Les assistants juridiques communautaires (AJC), souvent appelés parajuristes, acteurs de terrain apparaissent comme une lueur d'espoir pour combler ces lacunes en offrant une assistance juridique de proximité. Cet article examine leur impact, en mettant en lumière les contributions d'organisations locales telles que le Mouvement burkinabé des droits de l'homme et des peuples (MBDHP) et l'Association des femmes juristes, qui œuvrent pour renforcer l'état de droit dans les zones rurales du pays.

Contexte de l'accès à la justice en milieu rural

Le Burkina Faso a ratifié des conventions internationales consacrant le droit d'accès à la justice. C'est le cas de la déclaration universelle des droits de l'homme qui en son article 8,[1] et le pacte international relatif aux droits civils et politiques qui dispose au paragraphe 3 de son article 2 que les Etats parties au pacte doivent garantir le droit d'accès à la justice

* L'auteur est un avocat burkinabé titulaire d'un LLM du Centre des droits de l'homme de l'Université de Pretoria.

1 La déclaration universelle des droits de l'homme 1948.

à leurs citoyens.[2]

Conformément à ses engagements internationaux, la constitution du 11 juin 1991 du Burkina Faso consacre en son article 4 le droit à l'accès à la justice pour tous les burkinabè sans exception ni discrimination.[3]

Malheureusement dans les zones rurales du Burkina Faso, l'accès à la justice par demeure un défi. Les défis liés à l'accès à la justice dans les zones rurales inclut la distance physique entre les villages et les tribunaux ou bureaux administratifs, souvent situés dans des centres urbains éloignés.[4] Malgré le fait que la justice se soit beaucoup décentralisée ces dernières années à travers le pays, son accès par les populations rurales demeure un défi. En effet, sur les 45 provinces que compte le Burkina Faso, le pays ne dispose que de 27 Tribunaux sur tout son territoire.[5] Les longues distances à parcourir pour accéder à la justice, associées à l'incertitude du résultat, constituent de réels obstacles qui dissuadent les justiciables d'engager des procédures pour faire valoir leurs droits.

De plus, dans un pays fortement analphabétisé qu'est le Burkina Faso, l'ignorance de la langue de travail par la population rurale constitue une barrière importante, même avec l'intervention d'interprètes, car un dialogue direct entre le juge et le justiciable est souvent irremplaçable. De plus, même si le justiciable maîtrise la langue officielle, la complexité du langage juridique crée un risque de malentendus, aggravant le "dialogue de sourds" entre juge et justiciable.

A cela s'ajoute le coût des procédures judiciaires, qui demeure prohibitif pour une grande partie de la population rurale. Le manque de sensibilisation aux droits fondamentaux et l'analphabétisme, particulièrement chez les femmes et les groupes marginalisés. En outre, la méfiance envers le système judiciaire formel, qui peut être perçu comme distant, bureaucratique ou corrompu. Comme l'explique *Yonaba*, l'indépendance et l'impartialité du juge burkinabé sont très souvent remis en question du fait de la dépendance de ceci aux hautes autorités politiques qui sont chargées de la gestion de leur carrière professionnelle.[6]

Ces barrières mettent en évidence l'intérêt de l'adoption de solutions alternatives et locales pour garantir l'accès à la justice aux populations rurales et vulnérables. Les AJC se présentent alors comme une réponse adaptée, en fournissant une assistance juridique de proximité et en protégeant les droits des groupes les plus défavorisés au Burkina Faso.

Le rôle des assistants juridiques communautaires

Les organisations de la société civile (OSC) à travers les AJC utilisent une combinaison d'outils juridiques et non juridiques pour répondre aux besoins des communautés, tels que

2 Le pacte international relatif aux droits civiles et politiques 1966 (adopté par le Burkina Faso en 1999).

3 La Constitution du 11 juin 1991 du Burkina Faso, article 4.

4 S Yonaba 'Indépendance de la justice et droits de l'homme : Le cas du Burkina Faso' 1997, Centre for the Independence of Judges and Lawyers https://www.icj.org/wp-content/uploads/1997/01/Burkina-Faso-independence-of-justice-thematic-report-1997-fra.pdf

6 Op. Cit. n 5.

la médiation, la défense des droits, ainsi que l'éducation et l'organisation communautaire.[7] Leur approche holistique leur permet de sensibiliser les justiciables à leurs droits tout en les orientant vers des solutions adaptées.

Dans la plupart des cas, les AJC jouent un rôle clé en informant les plaignants et les victimes des différentes options disponibles pour obtenir justice. Pour renforcer leur impact, les organisations des AJC établissent des accords institutionnels avec des cabinets d'avocats ou avec le Fonds d'assistance judiciaire (FAJ). Ces partenariats permettent aux justiciables des zones rurales et démunies de bénéficier d'une assistance professionnelle pour résoudre des problèmes juridiques complexes.

Cependant, une étude réalisée par l'Initiative sur l'état de droit de l'American Bar Association a révélé que les AJC au Burkina Faso sont fréquemment confrontés à des cas dépassant leur mandat et leur champ d'expertise. Cette situation souligne la nécessité d'un soutien accru, notamment par des formations continues et un meilleur encadrement, pour leur permettre de répondre efficacement aux besoins croissants des populations vulnérables.[8]

Les AJC, souvent issus des communautés qu'ils servent, fournissent des services juridiques de base en milieu rural, tels que:

- **La sensibilisation et éducation juridique**: Informer les populations sur leurs droits fondamentaux et les procédures pour les faire valoir.
- **La médiation des conflits**: Intervenir dans les litiges fonciers, familiaux ou communautaires avant qu'ils n'atteignent les tribunaux.
- **L'accompagnement juridique:** Aider à la rédaction de documents administratifs et guider les individus dans les démarches auprès des institutions.
- **Le plaidoyer local**: Identifier les cas de violations des droits humains et alerter les autorités compétentes ou les organisations de défense des droits.

Impact des Assistants Juridiques communautaires sur l'accès à la justice en milieu rural

a) Proximité avec les populations rurales

La commission nationale des droits de l'homme (CNDH) bien qu'importante dans le cadre institutionnel national, est limitée par sa **faible couverture territoriale**, avec seulement **deux antennes régionales** pour les treize régions que compte le pays.[9] Cette présence restreinte limite considérablement sa capacité à répondre efficacement aux besoins des populations vulnérables, particulièrement celles vivant dans des zones reculées. De son

7 Open Society Justice Initiative 'Les assistants juridiques communautaires : Guide à l'intention des praticiens' 2010, https://www.justiceinitiative.org/uploads/1f83814c-5269-458f-b04b-e6c51aa3d9d4/OSJI-Paralegal-Manual-FR-11-05-2014.pdf

8 'Les institutions nationales des droits de l'homme (INDH) et leurs interactions avec les organisations de la société civile (OSC)' ConnexUs, 2023 https://cnxus.org/wp-content/uploads/2023/09/nhri-burkina-faso-study-fr.pdf .

9 'Droits humains : la CNDH et sa première antenne régionale à Bobo' Commission Nationale des droits humains, 2021 https://cndhburkina.bf/droits-humains-la-cndh-a-sa-premiere-antenne-regionale-a-bobo/

côté, le **FAJ**, destiné à fournir une assistance judiciaire aux citoyens démunis, fait face à des **contraintes financières** et administratives qui réduisent son efficacité sur le terrain.

En revanche, les OSC à travers les AJC sont **présents dans presque toutes les localités rurales**, offrant des services essentiels aux populations qui, autrement, seraient exclues du système judiciaire. De même dans l'étude menée par l'Initiative sur l'état de droit de l'American Bar Association il est aussi mentionné que 80% des personnes vivants en zone rurale ont confiance aux AJC quand la gestion de leur dossier.[10]

b) Réduction des inégalités géographiques

Les AJC jouent un rôle essentiel dans l'accès à la justice en fournissant un soutien juridique direct au sein des communautés, ce qui permet d'éliminer les barrières géographiques liées à la distance et aux déplacements. Leur présence sur le terrain leur confère une position stratégique pour identifier et signaler les violations des droits humains.

Grâce à une collaboration active entre les OSC et la CNDH, certains cas nécessitant une prise en charge plus approfondie, comme la lenteur des procédures judiciaires ou les traitements arbitraires par les tribunaux, sont transférés à la CNDH pour un suivi approprié. Toutefois, en raison de la faible présence territoriale de la CNDH, les AJC des OSC, sont souvent désignés comme points focaux et observateurs locaux. Ils jouent un rôle clé en documentant et en signalant les violations des droits humains commises dans les zones rurales.

Un exemple marquant de cette synergie est le partenariat entre le Haut-Commissariat des Nations Unies pour les Réfugiés (HCR) et le MBDHP. Ce partenariat permet aux réfugiés, exilés, et déplacés internes victimes de violations de leurs droits dans leurs localités de saisir la CNDH via le réseau des AJC.[11] Ce mécanisme est rendu possible grâce à la large implantation du MBDHP sur le territoire national, qui garantit une couverture étendue même dans les zones les plus reculées.

c) Renforcement des capacités et de l'autonomie locales en matière de droits

Les initiatives de formation des AJC jouent un rôle crucial dans le renforcement de l'autonomie des communautés en matière de défense des droits. En formant et sensibilisant les populations rurales, les AJC permettent à ces dernières de mieux comprendre leurs droits et devoirs et de se mobiliser pour les faire valoir. Cette approche contribue à une autonomisation juridique durable, où les membres des communautés deviennent eux-mêmes des acteurs de la justice.

En outre, les formations dispensées par les AJC incluent des informations sur des lois spécifiques, pertinentes pour les besoins locaux, comme les droits fonciers, les droits des enfants, et les violences basées sur le genre. Les sensibilisations permettent également d'éduquer les populations sur les mécanismes juridiques disponibles pour résoudre des conflits ou signaler des violations. Les organisations comme le MBDHP et l'Association des Femmes Juristes jouent un rôle complémentaire en fournissant une assistance juridique

10 Op. cit. n 8.

11 'Aide Juridique' UNHCR https://help.unhcr.org/burkinafaso/ou-trouver-de-laide/aide-juridique/ .

gratuite aux personnes dans le besoin, notamment celles qui ne peuvent pas se permettre de payer des honoraires d'avocats.

d) Résolution des conflits

Les AJC occupent une place centrale dans la résolution des conflits locaux, particulièrement dans les zones rurales où l'accès aux institutions judiciaires formelles est limité. Leur ancrage dans les communautés et leur connaissance des réalités locales leur permettent d'intervenir efficacement dans divers types de litiges, notamment les conflits fonciers, qui sont parmi les plus fréquents et les plus sensibles en milieu rural.[12]

Grâce à leurs compétences en médiation et à leur approche de proximité, les AJC aident les parties en conflit à parvenir à des solutions amiables, réduisant ainsi la charge pesant sur les tribunaux et favorisant une paix sociale durable. Par exemple, dans le village de Goumpia, situé dans la commune de Tiébélé, une communauté d'agriculteurs et d'éleveurs cohabite en partageant un bouli (retenue d'eau) utilisé à la fois pour l'abreuvement des animaux et pour la pratique du maraîchage. Cependant, cette cohabitation harmonieuse a été perturbée par un conflit opposant les deux communautés, menaçant la paix sociale.

Grâce à l'intervention des AJC volontaires du *Projet DINADANË*, un accord a pu être trouvé, évitant ainsi une escalade des tensions. En jouant un rôle de médiateurs, les AJC ont réussi à réconcilier les deux parties, restaurant ainsi un climat de confiance et de collaboration entre les agriculteurs et les éleveurs. Leur intervention illustre l'impact positif des AJC dans la résolution des conflits locaux et la promotion de la cohésion sociale dans les zones rurales.[13]

Ces interventions des AJC s'appuient souvent sur des mécanismes de dialogue, impliquant les autorités locales traditionnelles et les parties prenantes concernées. En favorisant une compréhension mutuelle et des compromis équitables, les AJC contribuent à prévenir l'escalade des tensions et à instaurer un climat de confiance entre les différentes communautés

Défis à surmonter

Malgré leur impact positif, les AJC au Burkina Faso doivent faire face à plusieurs défis majeurs qui entravent leur efficacité et leur pérennité.

i) Manque de financement

Les OSC souffrent d'un manque de ressources financières pour mener à bien leurs initiatives. Ce sous-financement limite les capacités des AJC à fournir des services juridiques de qualité, à couvrir les coûts logistiques nécessaires pour atteindre les zones reculées, et à organiser des formations continues. Sans un appui financier durable, il devient difficile de maintenir leurs activités à long terme.

12 'Assistance juridique Communautaire : Pour faciliter l'accès au droit à la population' Help https://helpbf.org/assistance-juridique-communautaire-pour-faciliter-lacces-aux-droits-a-la-population/

13 Idem

ii) Insuffisance de reconnaissance légale

L'absence d'un cadre juridique clair pour reconnaître officiellement le rôle des AJC dans le système judiciaire burkinabé restreint leur portée. En effet, les métiers para juridiques au Burkina Faso ne dispose pas d'un cadre législatif bien définit. Les métiers para légaux règlementés sont ceux exercés par les fonctionnaires de l'Etat burkinabé. Il s'agit notamment des métiers de promotion et de protection des droits humains règlementé par le décret 2021-0285 du 22 Avril 2021 portant statut particulier du métier de promotion et de protection des droits humains au Burkina Faso.[14] Le manque de reconnaissance légal des AJC réduit leur légitimité auprès des institutions formelles et les empêche de participer pleinement à des processus judiciaires officiels ou de représenter efficacement les justiciables dans certains cas.

iii) Insécurité

La situation sécuritaire au Burkina Faso, marquée par des attaques terroristes dans certaines régions, expose les AJC à des risques importants lorsqu'ils se déplacent pour fournir leurs services. Dans les zones occupées ou instables, leur travail devient particulièrement dangereux, ce qui restreint leur accès aux communautés les plus vulnérables. Cette insécurité affecte également la continuité de leurs activités dans les zones touchées.

Conclusion et Recommandations

Les assistants juridiques communautaires AJC au Burkina Faso représentent une solution prometteuse pour améliorer l'accès à la justice en milieu rural. En incarnant une véritable justice de proximité, ils jouent un rôle clé dans la réduction des inégalités structurelles et la promotion des droits humains.

Pour maximiser leur impact, plusieurs mesures doivent être mises en œuvre à savoir:

- **Renforcer leur formation et leur accompagnement technique**, afin de les doter des compétences nécessaires pour répondre aux défis juridiques locaux.
- **Plaider pour leur institutionnalisation légale**, garantissant ainsi leur reconnaissance officielle et leur intégration dans le système judiciaire.
- **Développer des partenariats durables** entre les ONG, l'État et les bailleurs de fonds, afin d'assurer un appui financier et logistique stable.
- **Mettre en place des stratégies de protection** pour les AJC dans les zones à risque, notamment en recourant à des partenaires locaux et à des solutions technologiques adaptées.

Enfin, il est crucial que l'État envisage de recruter davantage d'AJC pour couvrir efficacement les zones rurales où les besoins en justice sont les plus pressants. Cette

14 Décret n° 2021-0285/PRES/PM/MINEFID/MFPTPS portant statut particulier du métier de promotion et de protection des droits humains au Burkina Faso.

expansion permettrait d'assurer une justice équitable, accessible et inclusive pour les populations marginalisées du Burkina Faso.

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Community Legal Assistants: A means of Access to Justice for Rural Populations in Burkina Faso

By: Elsa Melissa Topsoba*

Abstract

Access to justice, although recognised by the Constitution of Burkina Faso, is not effective for all. It remains a major challenge for rural populations in Burkina Faso, who face barriers such as geographical remoteness, illiteracy, the complexity of legal procedures and the prohibitive cost of services. In this context, community legal assistants, although few in number, play a crucial role in filling the gaps left by state structures such as the National Human Rights Commission and the Legal Assistance Fund. This article explores their contribution to community justice through conflict mediation, raising people's awareness of their rights, and supporting victims of human rights violations. It also analyses the challenges faced by legal assistants, such as lack of funding, insufficient legal recognition and the risks associated with insecurity, while highlighting initiatives such as the DINADANË project, which illustrate their effectiveness in resolving community disputes. In conclusion, the article puts forward recommendations for maximising the impact of the legal assistants, highlighting their indispensable role in promoting fair and inclusive justice for marginalised populations in Burkina Faso.

Introduction

In Burkina Faso, access to justice in rural areas remains a major challenge due to numerous structural, geographical and socio-economic barriers. Although marginalised and deprived, rural populations are the leading victims of rights violations. Unable to afford legal representation and often ignored by the authorities, they are easy prey for unscrupulous employers, crooked officials and various forms of violations. Their attempts to obtain redress are often in vain, leaving them in a situation of great vulnerability. Community legal assistants (CLAs), often referred to as paralegals, appear to offer a glimmer of hope in terms of filling these gaps by providing local legal assistance. This article examines their impact, highlighting the contributions of local organisations such as the *Mouvement burkinabé des droits de l'homme et des peuples* (MBDHP, Burkinabe Movement for Human and Peoples' Rights) and the *Association des Femmes Juristes* (Association of Women Lawyers), which are working to strengthen the rule of law in rural areas of the country.

Context of access to justice in rural areas

Burkina Faso has ratified international conventions enshrining the right of access to justice. Examples include article 8 of the Universal Declaration of Human Rights[15] and article 2 (3) of the International Covenant on Civil and Political Rights, which stipulate that states which are parties to the Covenant must guarantee their citizens the right of access to justice.[16]

In accordance with its international commitments, Article 4 of Burkina Faso's Constitution of 11 June 1991 enshrines the right of access to justice for all Burkina Faso citizens

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15 The 1948 Universal Declaration of Human Rights.

16 The 1966 International Covenant on Civil and Political Rights (adopted by Burkina Faso in 1999).

without exception or discrimination.[17]

Unfortunately, in rural areas of Burkina Faso, access to justice remains difficult. The challenges involved include the physical distance between villages and courts or administrative offices, which are often located in distant urban centres.[18] Despite the fact that the justice system has become more decentralised across the country in recent years, the challenge remains. Although Burkina Faso consists of 45 provinces, there are only 27 courts in the country.[19] The long distances involved in accessing justice, combined with the uncertainty of the outcome, are real obstacles that dissuade litigants from initiating proceedings to assert their rights.

What's more, in a country with a high illiteracy rate such as Burkina Faso, the rural population's lack of knowledge of the working language constitutes a major barrier, even with the involvement of interpreters. This is because direct dialogue between the judge and the litigant is often essential. Moreover, even if the litigant has a good command of the official language, the complexity of legal language creates a risk of misunderstanding or of the judge and litigant talking at cross purposes.

Added to this is the cost of legal proceedings, which remains prohibitive for a large proportion of the rural population and a lack of awareness of fundamental rights and illiteracy, particularly among women and marginalised groups. In addition, there is mistrust of the formal justice system, which can be perceived as distant, bureaucratic or corrupt. As Salif Yonaba explains, the independence and impartiality of Burkina Faso's judges are very often called into question because of their relationship with the senior political authorities who are responsible for their professional careers.[20]

These barriers highlight the importance of adopting alternative and local solutions to guarantee access to justice for rural and vulnerable populations. The CLAs are an appropriate response, providing local legal assistance and protecting the rights of the most disadvantaged groups in Burkina Faso.

The role of community legal assistants

Through CLAs, civil society organisations (CSOs) use a combination of legal and non-legal tools to respond to community needs, such as mediation, advocacy, education and community organisation.[21] Their holistic approach enables them to make people aware of their rights while guiding them towards appropriate solutions.

17 The Constitution of Burkina Faso of 11 June 1991, Article 4.

18 S. Yonaba. *Indépendance de la justice et droits de l'homme : Le cas du Burkina Faso* (Independence of the judiciary and human rights: The case of Burkina Faso), 1997, Centre for the Independence of Judges and Lawyers: https://www.icj.org/wp-content/uploads/1997/01/Burkina-Faso-independence-of-justice-thematic-report-1997-fra.pdf

19 *Annuaire Statistique 2022 de la Justice* (Justice Statistics Directory 2022), Ministry of Justice and Human Rights, p. 33: http://cns.bf/IMG/pdf/annuaire_statistique_2022_de_la_justice_vf_ns.pdf

20 Op. cit. n 5.

21 Open Society Justice Initiative, Community-based Paralegals: A Practitioner's Guide, 2010: https://www.justiceinitiative.org/uploads/1f83814c-5269-458f-b04b-e6c51aa3d9d4/OSJI-Paralegal-Manual-FR-11-05-2014.pdf

In most cases, CLAs play a key role in informing complainants and victims of the various options available for obtaining justice. To strengthen their impact, CLA organisations establish institutional agreements with law firms or with the Legal Assistance Fund (FAJ in the French acronym). These partnerships enable citizens in rural and deprived areas to benefit from professional assistance in resolving complex legal problems.

However, a study carried out by the American Bar Association's Rule of Law Initiative revealed that CLAs in Burkina Faso are frequently faced with cases that go beyond their mandate and scope of expertise. This situation highlights the need for increased support, particularly through ongoing training and better supervision, to enable them to respond effectively to the growing needs of vulnerable populations.[22]

CLAs, who often come from the communities they serve, provide basic legal services in rural areas, such as:

- **Awareness-raising and legal education**: Informing people about their fundamental rights and the procedures for asserting them.
- **Conflict mediation**: Intervening in land, family or community disputes before they reach the courts.
- **Legal support**: Assisting people to draw up administrative documents and guiding them in their dealings with institutions.
- **Local advocacy**: Identifying cases of human rights violations and alerting the relevant authorities or rights defence organisations.

Impact of community legal assistants on access to justice in rural areas

a) Proximity to rural populations

The National Human Rights Commission (CNDH in the French acronym), although an important part of the national institutional framework, is limited by its low **territorial coverage**, with only **two regional branches** for the country's thirteen regions.[23] This considerably restricts its ability to respond effectively to the needs of vulnerable populations, particularly those living in remote areas. For its part, the **FAJ**, which is intended to provide legal assistance to the poor, faces **financial** and administrative **constraints** that reduce its effectiveness on the ground.

On the other hand, through the CLAs, CSOs are **present in almost all rural areas**, offering essential services to people who would otherwise be excluded from the legal system. Similarly, the study conducted by the American Bar Association's Rule of Law Initiative also mentions that 80% of people living in rural areas have confidence in the CLAs when it comes to managing their case.[24]

22 National Human Rights Institutions (NHRI) and their interactions with Civil Society Organisations (CSOs), ConnexUs, 2023: https://cnxus.org/wp-content/uploads/2023/09/nhri-burkina-faso-study-fr.pdf.

23 *Droits humains : la CNDH et sa première antenne régionale à Bobo* (Human rights: the CNDH has its first regional branch in Bobo), National Human Rights Commission, 2021: https://cndhburkina.bf/droits-humains-la-cndh-a-sa-premiere-antenne-regionale-a-bobo/

24 Op. cit. n 8.

b) Reducing geographical inequalities

CLAs play an essential role in providing access to justice by offering direct legal support within communities, thereby eliminating geographical barriers related to distance and travel. Their presence on the ground puts them in a strategic position when it comes to identifying and reporting human rights violations.

Thanks to active collaboration between CSOs and the CNDH, certain cases requiring more in-depth attention, perhaps due to the slowness of legal proceedings or arbitrary treatment by the courts, are transferred to the CNDH for appropriate follow-up. However, due to the CNDH's limited territorial presence, the CLAs of the CSOs are often appointed as key contacts and local observers. They play a vital role in documenting and reporting human rights violations committed in rural areas.

A striking example of this synergy is the partnership between the United Nations High Commissioner for Refugees (UNHCR) and the MBDHP. This partnership enables refugees, exiles and internally displaced persons who are victims of rights violations in their localities to refer their cases to the CNDH via the CLA network.[25] This mechanism is made possible by the MBDHP's extensive presence throughout the country, which guarantees wide coverage even in the most remote areas.

c) Strengthening local capacities and autonomy with regard to rights

CLA training initiatives play a crucial role in empowering communities to defend their rights. Through training and awareness-raising among rural populations, the CLAs enable them to better understand their rights and responsibilities and to mobilise to assert them. This approach contributes to sustainable legal empowerment, where community members themselves become actors in the justice system.

In addition, the training provided by the CLAs includes information on specific laws relevant to local needs, such as land rights, children's rights and gender-based violence. The awareness-raising sessions also educate people about the legal mechanisms available for resolving conflicts or reporting violations. Organisations such as the MBDHP and the *Association des Femmes Juristes* play a complementary role by providing free legal assistance to people in need, particularly those who cannot afford to pay lawyers' fees.

d) Conflict resolution

CLAs play a central role in resolving local disputes, particularly in rural areas where access to formal legal institutions is limited. Their roots in the communities and knowledge of local issues enable them to intervene effectively in various types of disputes, particularly land disputes, which are among the most frequent and sensitive in rural areas.[26]

Thanks to their mediation skills and grassroots approach, CLAs help the parties in a conflict to reach amicable solutions, thereby reducing the burden on the courts and promoting

25 *Aide Juridique* (Legal Aid), UNHCR: https://help.unhcr.org/burkinafaso/ou-trouver-de-laide/aide-juridique/

26 *Assistance juridique Communautaire : Pour faciliter l'accès au droit à la population* (Community Legal Assistance: Facilitating people's access to the law), Help: https://helpbf.org/assistance-juridique-communautaire-pour-faciliter-lacces-aux-droits-a-la-population/

lasting social peace. For example, in the village of Goumpia, in the commune of Tiébélé, a community of farmers and herders live together, sharing a *bouli* (water reservoir) used both for watering animals and for market gardening. However, this harmonious coexistence was disrupted by a conflict between the two communities, threatening social peace.

Thanks to the intervention of the volunteer CLAs from the DINADANË Project, an agreement was reached that prevented tensions from escalating. By acting as mediators, the CLAs succeeded in reconciling the two parties, thereby restoring a climate of trust and collaboration between the farmers and the herders. Their involvement illustrates the positive impact of the CLAs in resolving local conflicts and promoting social cohesion in rural areas.[27]

These CLA interventions are often based on dialogue mechanisms, involving traditional local authorities and the stakeholders concerned. By promoting mutual understanding and fair compromises, the CLAs help to prevent tensions from escalating and to establish a climate of trust between the various communities.

Challenges facing CLAs in Burkina Faso

Despite their positive impact, CLAs in Burkina Faso face a number of major challenges that hamper their effectiveness and sustainability.

i) Lack of funding

CSOs do not have access to sufficient financial resources to carry out their initiatives. This underfunding limits the CLAs' ability to provide quality legal services, cover the logistical costs of reaching remote areas and organise ongoing training and education. Without sustainable financial support, it becomes difficult to maintain their activities in the long term.

ii) Lack of legal recognition

The absence of a clear legal framework to officially recognise the role of CLAs in Burkina Faso's legal system restricts their scope. In fact, the paralegal professions in Burkina Faso do not have a clearly defined legislative framework. The ones that are regulated are those practised by civil servants of the Burkina Faso state. These include, in particular, the profession of the promotion and protection of human rights regulated by Decree 2021-0285 of 22 April 2021 on the special status of that profession in the country.[28] The lack of legal recognition of CLAs reduces their legitimacy in the eyes of formal institutions and prevents them from participating fully in official legal proceedings or from representing litigants effectively in certain cases.

27 Idem

28 Decree no. 2021-0285/PRES/PM/MINEFID/MFPTPS on the special status of the profession of human rights promotion and protection in Burkina Faso.

iii) Security concerns

The security situation in Burkina Faso, marked by terrorist attacks in certain regions, exposes CLAs to significant risks when they travel to provide their services. In occupied or unstable areas, their work can be particularly dangerous, restricting their access to the most vulnerable communities. This lack of security also affects their ability to continue their work in the affected areas.

Conclusion and Recommendations

Community legal assistants (CLAs) in Burkina Faso represent a promising solution for improving access to justice in rural areas. By providing genuine local justice, they play a key role in reducing structural inequalities and promoting human rights.

To maximise their impact, a number of measures need to be implemented:

- **Strengthen their training and technical support**, in order to equip them with the skills needed to meet local legal challenges.
- **Advocate for their legal institutionalisation**, thereby guaranteeing their official recognition and integration into the judicial system.
- **Develop sustainable partnerships** between NGOs, the state and donors, in order to ensure stable financial and logistical support.
- **Implement protection strategies** for CLAs in at-risk areas, in particular by using local partners and appropriate technological solutions.

Finally, it is crucial that the state consider recruiting more CLAs to effectively cover rural areas where the need for justice is most pressing. This expansion would ensure fair, accessible and inclusive justice for Burkina Faso's marginalised populations.

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A Comparison of the Digitization of the Kenyan and Rwandese Justice Sectors

By: David Orega*

Abstract

The Covid-19 pandemic served as a catalyst for embracing digitization in both Rwanda and the Kenyan justice system. Kenya's Electronic Case Management System (ECMS) which is yet to be fully adopted by all the courts in all cases. Judicial services in Kenya and Rwanda were digitized before the pandemic. The restrictions only emphasized the need for change in how justice and legal services were administered and accessed especially for the poor and marginalized.

Kenya and Rwanda's positive uptake of digitization in the justice space can be seen in their adoption of e-services, toll-free helplines, case management systems and video conferencing tools. Both countries have virtual courts which has bridged geographical gaps allowing citizens from remote areas to access justice.

Challenges faced by Kenyan and Rwandese justice sectors include: low digital literacy, expensive ICT infrastructure and internet among others The study findings had implications for policymakers, legal practitioners, civil society organizations, and the general public in both Kenya and Rwanda.

This article highlights the strides made by the bench marked country, enumerates the hits and the misses made in the justice digital space. It also presents the experiences of selected key justice actors who use technology to administer justice. The article also discusses the experiences of the indigent in using ICT to access justice.

Introduction: Leveraging of Digital spaces and Platforms

The e-filing system has enabled legal practitioners to easily file cases remotely from the onset to their conclusion. Rwanda's ICT system provides a shared space for the Judiciary and clients to carry out electronic filing and also follow up on cases enabling an individual to access features such as electronic filing, issuing of summons, receiving notifications, and reminders of any deadlines regarding case processes via email, SMS, and system notifications on their computers, tablets or mobile phones. Pleadings and other documents are easily filed online and new evidence is added online after the initial filing by interested parties.

Kenya's system tracks all activities in the life cycle of a suit from the beginning to the end. Rwanda's way of following up on the developments in cases is done virtually. In court, defendants and their lawyers have online access to the opponent's case. In criminal cases, once court proceedings are completed, they are documented and forwarded automatically to the prisons for execution with all supporting documents in the criminal process chain. The system also keeps track of the whole criminal record of the convicted person from detention through all appeals with the corresponding decisions from all the institutions. Cases of missing files have been substantially reduced. The system helps track unnecessary adjournments and other delays and assists in compiling reports.

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Civil society organizations in both Kenya and Rwanda have designed and implemented digital innovations aimed at enhancing access to justice for indigent clients. Kituo cha Sheria's M-Haki platform is a game changer in terms of legal aid provision. It is an SMS based technology that enables the public to text legal questions to be answered by lawyers without the need of physically travelling to their offices. It reduces costs of accessing justice and time. The legal questions handled on the M-Haki platform include land rights and succession issues, labour rights, refugee rights and forced migration, housing and evictions. On the other hand, Legal Aid Forum in Rwanda has rolled out ICT based solutions to expand access to justice with platforms like 845, 1022 toll-free lines and a call centre. These interventions are being used in providing legal services to the community.

The article comprehensively analyses the digitized platforms of justice in Kenya and Rwanda. It outlines that lessons that can be adopted in the respective jurisdictions so as to enhance access to justice for marginalized communities. The article further discusses the recommendations that are informed by empirical research conducted in the countries of Kenya and Rwanda. Finally, conclusions are made on the way forward.

Comparative Analysis of Kenya and Rwanda's Electronic Justice Platforms

Rwanda's Judiciary seems to have the best clearly outlined web-based Integrated Electronic Case Management System (IECMS). The Online Cases Division clearly outlines the purpose of the Integrated Electronic Case Management System, benefits, account creation, case filing and follow up, a self-service user manual and video recording on how to access the system. Access to these online services is outlined on Rwanda's Judiciary website.

Both countries have incorporated e-filing system in their court processes. The e-filing systems used in Kenya and Rwanda have helped to reduce paperwork. Court users can file and access necessary documents remotely and at their ease.

Both countries' have fully operational e-services systems in their government or affiliated web portals give the public online access to services offered by various government departments. The Kenyan and Rwandese justice systems through web portals have made it easier for the public to access judicial services and legal information. The legal services being offered through the Kenyan and Rwandese web portals have also enabled seamless transitions from physical to virtual consumption of legal information for those that cannot travel long distances for court appearances.

Both countries have adopted case management systems which have helped litigants, advocates, judges and administrators to track cases, and enabled individual citizens and citizen advocacy groups to monitor the progress of specific cases. Kenya's Electronic Case Management System has transformed litigation by providing digital services for filing, serving documents and requesting court orders. Rwanda's Integrated Electronic Case Management System has enabled the electronic access to documents and the integrated processes for tracking the progress of, and taking actions related to, cases throughout their lifecycle.

Both Kenya and Rwanda justice systems have made it easier for citizens to report incidents and make legal enquiries through toll-free helplines. Cases on physical violence, theft and corruption can be shared in confidence on calls and SMSs at no cost to the individual

reporting the case. This has increased confidence in the Judiciary. Both justice systems have supported access to justice by availing toll-free telephone and SMS services that enable citizens to also be assisted in emergency situations and receive virtual legal consultation. In Kenya, the need for digitization of court records encouraged the Judiciary to consider the testing of an online Case Tracking System that enables online filing, digital file searches, status of the case and cause listing.

In Rwanda, the web service enables citizens to file their complaints regarding legal services. This tool compliments the already existing IECMS. Through these platforms one can report cases of corruption and poor service. A unique code is allocated to the person providing such information or filing for review and follow up. Citizens are also able to file an application for review where the appeal process has been exhausted but the litigant is still unsatisfied.

The Judiciary of Rwanda, the Office of the Ombudsman and other responsible institutions use this tool to handle complaints submitted to them by citizens and hence easing the provision of legal services to the general population and more so the indigent who may not have the means to travel long distances to submit their claims.

Recommendations and Lessons for Inclusive Digitized Justice

There is a need for further sensitization and training of the population on the existing ICT solutions in the justice system. The government and other stakeholders should develop capacity building initiatives with the aim of bringing awareness to the public on existing technology that enhance access to justice.

The government and other key stakeholders should integrate all the justice actors in the electronic platform as in the case of Rwanda. Information sharing should be made easy and efficient right from investigations, adjudication to correctional services.

Skills development and advancement through relevant training programs for both service providers and justice seekers on the use of technology to access justice is important. Increased training and capacity building for local administration and other community-based justice actors at the grassroots including paralegals should be considered.

Empowering the justice and human rights defenders and paralegals at the community levels with knowledge and skills of using the platforms could also be impactful in ensuring that first responders have the capacities. Research from the Rwandese side pointed out on the need for improving knowledge and skills of using IECMS to ensure digital inclusion.

There is an urgent need to improve the quality and coverage of the internet in these areas. Reducing the cost of the internet and installing more publicly accessible Wi-Fi will go a long way too. In

Incorporating e-justice in the services provided by grassroots establishments could bring justice services to those who would otherwise not be reached by the justice sector. In Kenya especially, the justice system has the potential to establish fruitful partnerships with various entities to bring e-justice closer to rural communities. Collaborations with Chiefs' Camps, Huduma Centres, and local cyber cafes hold promise, given their extensive

networks, experience, and expertise in engaging with local communities. The Rwandese strategies can be adopted in countries such as Kenya. For instance, the Ministry of Justice in Rwanda partners with the Cyber Café Agents to bring IECMS services closer to the people. Justice seekers therefore can visit the Ministry of Justice Certified Agents and file their cases or access the IECMS with the support of trained agents. Considering that Cyber Cafés are also very popular in the rural areas of Kenya, and other countries, judiciaries can train the agents on electronic filing and other judiciary e-services. These agents can help citizens sign-up for the e-filing, file cases and access the other online services.

The following are proposals that could be domesticated in Kenya and other jurisdictions:

a) Working with local administration like chiefs could support further access to e-justice by making available and accessible a judiciary desk at the Chiefs' Camps. These desks could be facilitated with the requisite ICT infrastructure. Through these desks, community members can attend courts virtually and also access the online justice services including e-filing and cause lists.

b) The chiefs' camps can be used as Alternative Dispute Resolution mini-centres and work with the administrators to bring the justice ICT services to the grassroots. This would ensure that many vulnerable people can enjoy the benefits of ICT in the justice sector.

c) Huduma Centre's are popular in Kenya and many government services are accessed in these hubs. With over 52 centers across the country, these centers could also work with the Judiciary and other justice actors to bring the justice services closer to people by establishing Judiciary Desks or Justice Desks. Establishing service desks at the centers would promote access to the justice services including the justice, virtual courts, support e-filings and other justice e-services. While this was a plan conceived by the Judiciary in partnership with Huduma Kenya during COVID-19 period, it is yet to be operationalized.

d) Justice institutions like the police stations and prisons should be provided with the resources needed to support e-justice services delivery. There is currently insufficient support being provided to these departments of the justice system, with offices ill-equipped without the digital resources needed to support ICT based justice access. Resources for virtual courts attendance include ICT officers, fast and stable internet connections, large display screens, speakers, voice distortion devices and HD cameras. Additionally, dedicated rooms from which the court sessions could be conducted should be provided in these institutions.

Conclusion and Way Forward

The complete digitization of justice services in Rwanda through the IECMS serves as a roadmap for the journey that Kenya should consider taking in the digitization of its judicial processes for the purposes of enhancing access to justice. While it is acknowledged that the Kenyan justice sector is making notable progress in the digitization of its processes, most of the systems are stand-alone systems that do not speak to each other. There are

different institutions in the Kenyan justice ecosystem that do not have a central system to share data concerning cases for a more integrated flow of information from one agency to the other.

The digitization of the entire case life cycle with Rwanda's IECMS from filing to hearing, judgment, appeal, closure, and execution in civil and criminal matters has made case processing to be quicker and less prone to errors. IECMS has also helped data to move more seamlessly from one institution in the justice system to another. The Kenyan justice sector needs to develop an integrated system similar to IECMS that speaks with all institutions and agencies involved in the justice system. This comprises registration of cases, investigation, evidence gathering, prosecution, judgment and correctional services. Studies show that digitalization in the justice system provides significant opportunities to enhance access to justice for the poor and marginalized.

Future research should continue to monitor the evolution of digital justice systems in these countries and evaluate the effectiveness of the recommendations. Additionally, a comparative analysis of similar initiatives in other jurisdictions could provide valuable insights for further improvements. Future studies could also do comparative assessments of the perception, transparency and trust of digitized justice systems. country comparisons on the extent and impact of bridging the gender digital divide in access to digitized justice services are also worth exploring.

As technology increasingly penetrates our daily life, the integration of ICT into justice services is not merely a matter of convenience but a fundamental aspect of ensuring equitable access to justice. For Kenya and Rwanda to catalyze early gains toward a more digitized justice system, the lessons learned from this study ought to inform policy decisions and ultimately contribute to a fairer and more accessible justice system for all.

Formalization of Paralegalism in Kenya and Zambia

By: Joseph Muthama Mutangili*

Abstract

This article critically assesses and evaluates formalization of paralegalism on issues surrounding the implementation of the Legal Aid Act in Kenya and Zambia. Despite, five decades of paralegal practice that has positively impacted communities in many regions, there is the existence of deficient formal legal systems. Empirical research carried out in Kenya and Zambia observes that paralegals who work in correctional facilities and in the communities are crucial to improving the indigent's access to justice. However, the legislation that governs paralegal practice is like a double-edged sword; on the one hand, it recognizes paralegals whilst still limiting their space and scope of work. The research project was qualitative in nature and undertaken in both Kenya and Zambia. The article demonstrates the way formalization of paralegalism has impacted on the practice on the ground.

Introduction

Over the years, the delivery of legal aid has notably transformed as the paralegals continue to evolve by providing the vulnerable, poor and marginalized in the society with legal support thus enhancing the right to access to justice for all citizens. In Kenya, access to lawyers has been largely difficult not only because of the prohibitive costs of such services but also due to the insufficient number of lawyers to address the needs of the people.

Existing research shows that a section of paralegals who work in prison facilities and in the communities are crucial to improving the indigent's access to legal information and courts. However, the legislative frameworks in both Zambia and Kenya are seen as both a blessing and a hindrance to paralegal practice. In Kenya, the Legal Aid Act 2016 provides for accreditation of paralegals as legal aid providers. However, the formalization of paralegals can come with a heavy price for the legal empowerment movement. State regulation of paralegal practice poses a danger in limiting the scope of paralegals as opposed to reinventing it. It is further thought that state recognition and formalization may result in the loss of gains made in building the community paralegal movement in Kenya, Zambia and region as a whole. In addition, practitioners are anxious that regulation may over-legislate on the requirements and qualifications of being a paralegal rendering it elitist and inaccessible for indigent communities. It is against this backdrop that the paper herein is anchored. The article reviews literature, law and policy in Kenya and Zambia on formalization of paralegalism. It further critically assesses and evaluates formalization and its impact on paralegal practice. Finally, recommendations are made on addressing the emerging challenges of formalization.

Law and Policy Review

Currently there is no universally accepted definition of a paralegal. In most African jurisdictions, "paralegals", also called "community-based paralegals" or "community paralegals", are usually understood to be individuals who do not have a law degree but

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have skills and knowledge of the law that allow them to provide some form of legal aid and assistance to those in need, in particular members of a community they are part of or know well, and typically under the supervision of a legal practitioner[29]

The lack of national policy on paralegalism relegates paralegalism to the world of informality hence complicating efforts geared to address Kenya's critical justice issues considering the pending UN Agenda 2030 on Sustainable Development No.16 that feature access to justice as well as Article 48 of Kenya's Constitution and Vision 2030, which also prioritized access to justice.

Likewise, through the Kenya's Draft National Legal Aid and Awareness Policy [DNLAAP] of 2015, the Government of Kenya commits to establish an institutional framework for legal aid and awareness. The policy framework is aimed at enhancing access to justice; facilitating the provision of legal awareness, assistance, advice and representation for the poor, marginalized and vulnerable. Further, the policy promotes the use and establishment of a framework of Alternative and Traditional Dispute Resolution mechanisms. Integrating the paralegal approach to the administration of justice is considered critical.[30] One of the drawbacks is that the said draft policy document is yet to be adopted 8 years since it was formulated. However, the National Legal Aid Service (NLAS) is operational and anchored in the Office of the Attorney-General. Section 7(1) of the Kenyan Legal Aid Act (2016) enumerates the functions of NLAS that include standardization of legal aid providers and formalization of paralegal practice.

On the other hand, the Zambian Government has established a quality assurance framework and regulations for paralegals and legal assistants. Section 4 of the Zambian Legal Aid Act (2021) establishes the Legal Aid Board that constitutes a multi stakeholder Standing Committee which has several functions. The Zambian Legal Aid Policy (2018) confers on the LAB the overall responsibility and mandate for the provision, administration, coordination, regulation of legal aid providers including issuance of certificates, establishment and sustenance. The Zambian government has an obligation to develop a long-term resources mobilization strategy to support the work of legal aid providers including community paralegals. The Legal Aid Board monitors the entire legal aid system in Zambia such as initiating disciplinary process for legal aid assistants and paralegals.[31]

Research Methodology

Kituo cha Sheria in collaboration with the Paralegal Alliance Network Zambia, the African Centre of Excellence for Access to Justice and the Grassroots Justice Network commissioned an empirical study on the impact of formalization on paralegal practice. In undertaking this evidence-based research, the study employed a qualitative research methodology. Both primary and secondary data were collected and informed the findings of the study.

The research team developed tools for data collection. These tools were administered to respondents and key informants in Kenya and Zambia through individual in-depth

29 Gwenaelle D (2016) *Formalizing the role of paralegals in Africa* ((2016) Dulla Omar Institute p. 4
30 Attorney General (DNLAAP 2015) 8
31 Ibid 11

interviews and focus group discussions. In Kenya, the tools were administered in 8 counties namely Kwale, Mombasa, Kilifi, Kitui, Nairobi, Nakuru, Kisumu, and Uasin Gishu. On the other hand, 10 provinces were reached in Zambia namely Lusaka, Eastern, Southern, Luapula, Central, Muchinga, Northern, Copperbelt, Western, and Northwestern. The respondents included paralegals, legal practitioners, communities, legal empowerment organizations, state actors among others. Through desk review, best practices were documented to capture different experiences.

In terms of numbers interviewed, a total of 48 key informants were conducted in Kenya. A further 24 focus group discussions each involving 12 paralegals and 12 beneficiaries were held in the different counties. In Zambia, a total of 49 paralegals were interviewed in the 10 provinces reached. In addition, thirty (30) community members who benefited from the paralegal services were interviewed.

Findings and Analysis

Majority of the paralegals interviewed were males consisting of 63.9% while 36.1% were females. This may have been dictated by mobilization of respondents which was by way of purposive sampling. That notwithstanding, the cultural biases, prejudices and negative attitudes towards the female paralegals discourage a number from volunteering in offering legal aid services hence the lower percentage. Therefore, it is not unexpected that in such cultural environment negative masculinity and insubordination of women creates barriers for women to engage in paralegal work.

Most of the paralegals (36.1%) had been in paralegal practice for 5-6 years. Another 25% been paralegals for more than 6 years. Critically looking at age groups, 61.1% of the paralegals were above 40 years of age, 16.7% were between 25-29 years and 5.6% between 18-24 years and 30-35 years. The number of youth getting into paralegal practice was low hence may pose a challenge in sustaining the movement in the future. It can further be deduced that older members of the society have lesser financial obligations hence their commitment. It therefore affirms that occupations and livelihoods quests influence opportunity and time to serve as a paralegal.

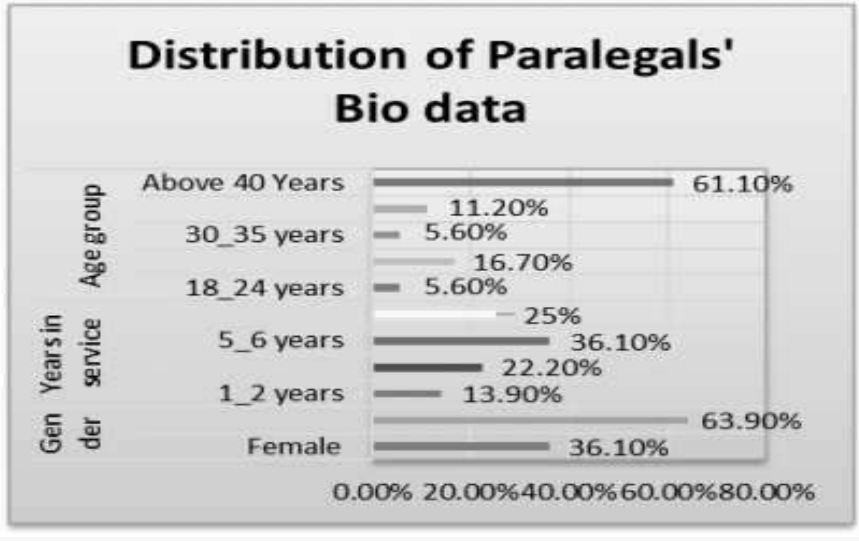

Figure 1: Distribution of the paralegals Demographics

Impact of Formalization on Paralegalism

Formalization refers to regulation of paralegal practice by state agencies. It is informed by the need to standardize and harmonize training and capacity building programmes for paralegals, entry requirements into paralegalism including the standards of practice. There were varied views collected from practitioners on the place of formalization in paralegalism. Some of the voices from the field stated as follows:

KII Kisumu

The state regulation means the government to identify and accredit the paralegals who are qualified to handle legal matters based on education and set boundaries on what paralegals can offer.

KII Nakuru

The state regulation means that all paralegals are expected be accredited by the government. The government wants to identify and accredit only paralegals who are qualified and who can handle legal matters professionally based on education.

KII Kitui

The state regulation means the government puts up limitations and boundaries for paralegals and accredits the paralegals who are qualified to handle legal matters based on education. And on recognition the Government to empower the work of paralegals.

Formalization has been critiqued as limiting paralegals without minimum academic qualifications but with extensive work experience. Therefore, state regulation may therefore have the unwanted consequence of demeaning the role of community-based paralegals in favour of professional paralegals. The latter work mainly as government employees, clerks or assistants in courts or law firms. However, the formal regulation may support the development of standardized training programmes and a code of conduct on the scope of paralegal work. Further, formalization should be coupled with financing of paralegal work by the state.[32]

Conclusion and Recommendations

It is important to identify what the formalization of paralegals should entail and the provisions that legal aid legislation or policies must incorporate. These standards could be codified in a regional or international instrument that identifies what provisions the required legislation or policies could contain. Countries have usually been slow at incorporating these soft law instruments into their domestic legislation.[33]

However, a small but growing number of African countries are adopting policies and passing legislation to promote paralegals within their criminal justice systems. Majority of African states lack a legal framework which grants formal recognition to paralegals and the services they provide.[34]

32 Ibid 4

33 Gwenaelle Dereymaeker "Formalising the role of paralegals in Africa: A review of legislative and policy developments" (2016) 4

34 Ibid

Formalization should serve specific purposes. It should harmonize training programmes, develop and adopt codes of conduct for paralegals, scope of work for paralegals, recognize all categories of paralegals, ensure sustainability of the paralegal profession through financial support and should guarantee independence of paralegals in order for them to still be able to hold the State accountable. Formalization has the potential of ensuring higher quality services whilst sustaining paralegal practice. However, leeway ought to be granted to paralegals to self-regulate through their own networks.

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Nature of the Right to a Writ of Habeas Corpus in Kenya: An International Human Rights Perspective

By: Michael O. Okello*

Abstract

The Constitution of Kenya, 2010 lays a foundation and obligation upon the courts to enforce the rights and fundamental freedom including access to justice. The penal law, practice directions and rules of the courts aligned to international laws and principles, give effect to such obligations. The Constitution of Kenya under article 25 (b) lists the right to an order of habeas corpus, amongst the rights and fundamental freedoms that shall not be limited. Further, article 51 (2) provides that persons who are detained, held in custody or imprisoned are entitled to petition for an order of habeas corpus. Besides, the Constitution protects such persons from torture, and cruel inhuman or degrading treatment or punishment; freedom from slavery or servitude; and in that regard considers, the international human rights instruments. In the nutshell, the right to the writ of habeas corpus enables a detained subject or persons acting on their behalf of an unlawfully detained person, to plead that the subjects be produced or be brought before a court, or otherwise challenge the authority that has detained them to prove that the person's imprisonment or detention is not illegal.

The writ is directed to person(s) who are alleged to be responsible for the unlawful detention of the subject. There is an emerging discussion on the form the application should take, and the courts have allowed applications for the writ of habeas corpus by way of chamber summons as well as by way of petition. Both forms of applications are based on stipulation of rules. The courts have by their inherent powers overlooked the procedural technicalities, and exercised discretion in cases were some applications in the nature of habeas corpus would fail for want of procedure and best approach.

The paper has objectively discussed both approaches, while recognizing the reforms under the Constitution of Kenya, 2010 under article 51 (2) read purposely with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. It also recommends the most relevant statutory dictates and case law; and a set of actions that can progress the positive obligations upon the courts and key stakeholders, to ensure that the rights of detained persons and those held in custody are protected. It highlights the bench, the bar, executive authorities and advocates in aiding the court to achieve its overriding objective and to ultimately enforce the rights and fundamental freedoms of detained persons.

1.0 Introduction

According to the Black's Law Dictionary[35], *habeas corpus* pronounced as *hay-bee-as kor-p;}s* is a Latin word that means "*that you have the body*". It is a writ employed to bring a person before a court, to ensure that the person's imprisonment or detention is not illegal (*habeas corpus ad subjiciendum*). In addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain judicial review of the regularity of the extradition process, or the right to or amount of bail, or the jurisdiction of a court that has imposed a criminal sentence.[36] *Habeas corpus* is therefore, a legal order (or writ) that serves to enable that a person in prison (hereinafter referred to as the 'subject') must appear before and be judged

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35 Black HC, 'Black's Law Dictionary'.

36 Ibid.

by a court of law, before he or she can be forced by law to stay in prison.

The writ is directed to one or more persons, alleged to be responsible for the unlawful detention of the subject. It is a means by which the humblest citizen may challenge the unjustified action of the executive official of the government who ordered the detention of another. The nature of the writ serves key roles. It protects the constitutional rights of the subjects, particularly from violation by law enforcement authorities while in custody or detention, while enabling the courts to enforce fair trial in the adjudication process. Second, it protects the subjects from unlawful detention. Third, the writ of *habeas corpus* is protected as one amongst the fundamental rights and freedom that cannot not be limited. This facet is buttressed on the express construction of article 25 of the Constitution of Kenya, as non-derogable right.[37]

The statutes and case laws have given further insights into the nature and adjudication processes involving applications based on the right to habeas corpus. Section 328 (1) of the Criminal Procedure Code, CAP 75 Laws of Kenya, provides that the High Court may give directions in suits involving orders in the nature of the right to *habeas corpus*. This aligns to Article 165(3) (a)(b) which depicts the High Court as the best forum, and further qualifying its unlimited jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened[38].

2.0 Elements to be (dis)proved in an Application of the Nature of Habeas Corpus

The matter has been adjudicated across the globe where courts have spoken to the nature, effect and right of subjects subjected to unlawful detention of confinement. In *Fozia Ahmed Bayusuf v Director of Public & 2 others [2020] eKLR*[39], at paragraph 15, Hon. Lesiit, J. cited the Supreme Court of the Philippines in the case of *MA Estrdita D. Mortinex v Director General and Others GR No.153795,* thus:

> Habeas corpus applies to all cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody of any person is withheld from the person entitled thereto ... the ultimate purpose of the writ of habeas corpus is to relieve a person from unlawful restraint. It is devised as a speedy relief from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority.

The right to *habeas corpus* is issued '*grante ex debito justitiae' upon satisfying key parameter. Namely*; it is granted from the debt of justice for example, upon prove that the detention was unlawful. This is pursuant to Article 51(2) of the Constitution[40] which guarantees '*the right to a writ of habeas corpus'* to persons *detained or held in custody*.

Accordingly, section 389 of the Criminal Procedure Code highlights the elements that must be satisfied if the claims and justifications for cause of action in the nature of *habeas*

37 Constitution of Kenya 2010 art 25 (d).

38 Ibid Article 165 (3) (a)(b).

39 *Fozia Ahmed Bayusuf v Director of Public & 2 others* [2020] eKLR (High Court at Nairobi (Milimani Law Courts)) [15].

40 Ibid 51(2).

corpus must be sustained with a resultant reprieve to the subject and the victims who suffer from the impact of their unlawful detention. The subject must have been detained within the local limits of Kenya, or detained in public or private custody, or prison.[41] The limits of the territory may be construed under article 5 of the Constitution of Kenya, 2010[42], to include territorial waters and the territory of Kenya divided into the forty-seven counties specified in the First Schedule of the Constitution.[43]

Further, it must be proved that the person is detained or being held unlawfully. In this regard, it would be in vain, if the Court were to issue the writ of *habeas corpus* wherein the subject is neither in any illegal detention or within the local limits of the territory of the Republic of Kenya.

The element of "custody" is very critical so that when an order for *habeas corpus* is made, it should not be in vain.[44] The Petitioner or Applicant should seek immediate and speedy release of the subject from unlawful custody. The general burden of proof in a *habeas corpus* cause remains with the Petitioner or the Applicant, who must establish by probative evidence that the missing person has been detained or confined or is under the custody of the Respondents.

The above elements must be met, without which the Application (or Petition) for writ of *habeas corpus* may be an exercise in futility and of no use. For instance, a plea by an applicant may also fail for want of probative evidence or on grounds of uncertainty as to where, by whom, when and why unlawful detention occurred. The subjects may also be held by unknown persons or in circumstances where they cannot be found, presumed or dead. This makes unlawful detention by authorities an abject violation and wonton infringement of rights and fundamental freedoms of the victims. These possible scenarios are bound to aggravate the predicament of the subject and his or her family members; both categories of which are victims of this unlawfully enforced detention.

Based on the above, it is therefore noteworthy, to appreciate how effects of unlawful detention is directly and indirectly linked with human rights and fundamental freedoms of the victims, which are enshrined and protected under the Constitution and international human rights instruments. It has an effect to the victims and fair trial process; and the onus it places on the courts and law enforcement authorities as well as litigants for probative prove at evidence law.

3.0 Approaching the Court: Petition or Chamber Summons?

Article 51 (2) of the Constitution of Kenya provides that "*A person who is detained or held in custody is entitled to petition for an order of habeas corpus*'. This seems to contradict if not supplement the prescription under Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules (revised 1963) which under Rule 2 provided that, 'an application for directions in the nature of habeas corpus shall be made in the first instance to a judge in *chambers ex parte, supported by affidavit in triplicate'*.

According to the aforementioned Criminal procedure rules, 'an order by summons shall issue to the person in whose custody the subject is alleged to be improperly detained'. The summons shall require the appearance of the subject in person or by advocate, at a place

41 Criminal Procedure Code Cap. 75 Laws of Kenya s 389.

42 Constitution of Kenya art 5.

43 Ibid 6.

44 Hon. Justice E. Muriithi, in LSK Versis Brian Nzenze and others (2018) eKLR

and time named on the summons, and requiring the detaining authority to show cause why the person so detained should not be forthwith released. Under rule 4, where the person is detained in public custody, the summons is to be served on Attorney-General and accompanied by a copy of all supporting affidavits lodged in support of the application, and a duplicate of the application, summons and all affidavits lodged in support thereof. Pursuant to rule 7, pending the return to the summons, the person detained, if in public custody, may be admitted to bail, and if in private custody may be released on such terms and conditions as the court may deem fit. This rule depicts the rigors and compliance requirements that had to be met, particularly reduced in writing within some strictures and stringent form of application.

Accordingly, in adjudicating over the proceedings, section 328 (1) of the Criminal Procedure Code, provides that the High Court may whenever it thinks fit direct that:[45]

> Any person within the limits of Kenya be brought up before the Court to be dealt with in accordance with the Law.

Any person illegally or improperly detained in a public or private custody within those limits be set at liberty.

Further, the Criminal Procedure Code[46] provides that the High Court may issue orders regarding pleas for *habeas corpus* whenever it thinks fit (giving a wider discretion), such as orders that a person be dealt with according to law, be set at liberty, be examined as a witness in any matter pending, be inquired into in that court, be removed from one custody to another for the purpose of trial or be brought in on a return of *cepi corpus* to a writ, that is a signifying compliance to an order of *habeas corpus*, to produce the body to the party.

The above process is tedious, and ultimately takes litigants back to the pre-2010 dispensation, which is not in tandem with the present constitutional reforms. The sociological approach to law would dictate as at today, that the enforcement of such rights should *ipso facto* be sought through a petition, given the rights and fundamental freedoms that are violated by unlawful detention in its entirety.

4.0 Paradigm shift to Petition for a Writ of Habeas Corpus

The overriding objective[47] of the courts and its inherent power has served to cure the procedural technicalities and strictures that attained through applications by way of chamber summons.[48] Nonetheless, the courts have openly reiterated the need for progressive response to reforms enshrined under Article 51 (2) of the Constitution of Kenya, 2010. The provision I opine, should be constructed purposely when read alongside relevant provisions of Criminal Procedure Code (supra).

The Chief Justice in exercise of his powers under article 22 (3) as read with articles 23 and 165 (3) (b) of the Constitution of Kenya, made the Practice and Procedure rules.[49] Accordingly, the rules be interpreted in accordance with article 259 (1) of the Constitution

45 Criminal Procedure Code Cap. 75 Laws of Kenya s 328 (1)
46 Ibid 389
47 Civil Procedures Act, Cap 21 2012 ss 1A and 1B
48 Constitution of Kenya art 159 (2) d
49 Ibid Article 22 (3); 23 and 165 (3) (b)

and shall be applied with a view to advancing and realizing rights and fundamental freedoms enshrined in the Bill of Rights; and values and principles in the Constitution.[50] The rules in particular, provide a clear process that should now guide applicants, to file a petition to enforce the right in the nature of *habeas corpus*. The rules obligate the courts to facilitate the just, expeditious, proportionate, and affordable resolution of all cases. Part II of the rules prescribe that where such rights and fundamental freedoms have been denied, infringed, violated or threatened, application by petition shall be made to the High Court by prescribed Form A in the schedules of the rules pursuant to rule 4.[51]

The Practice and Procedure Rules, further enhances the application processes and cures undue strictures of procedure, hence furthers the 'overriding objective'. For instance, under rules 9 and 10, the Court may accept and reduce to writing; an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.[52] The proceedings may therefore be instituted, by the persons themselves or on their behalf. The petition must be signed by the Petitioner or the advocate acting on behalf of the Petitioner disclosing the following:

- The Petitioner's name and address; the facts relied upon.
- The constitutional provision that has been violated.
- The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community.
- The key details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue, in the petition.
- Statement of the relief sought by the Petitioner.

Voice of Reason, 'Stare Decisis'

The two modes of application for order in the nature of *habeas corpus* have been discussed above; and how laws and rules dictate the procedures and the forms of how the application should be structured. The attendant post-2010 Constitution of Kenya rules tend to reinforce the overriding objective concepts and offer a flexible way of approaching the courts, without undue technicalities as to the form of petition (which can be in writing or orally made provided the Court will reduce oral petition in writing for purposes of the rules). Lesiit J opined under paragraph 13, in *Fozia* (supra), thus:

> '...while an order for habeas corpus was previously sought by procedure for Directions in the Nature of Habeas Corpus under the Criminal Procedure Code Cap. 75, the procedure under the [new] Constitution is for a petition under Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, for the enforcement of the Right to habeas corpus under Article 51 (2) of the Constitution..."

50 Ibid 259 (1)

51 Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 see rule 10

52 Ibid 9 read with rule 10 (3) and article 51 (2) of the Constitution of Kenya, 2010

Lesiit, J, referred to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[53], at paragraph 17[54] and reiterated that the hearing of a petition shall, unless the Court otherwise directs, be by way of affidavits; written submissions; or oral evidence, where under the Rules, the Court may limit the time for oral submissions by the parties. [55]

The Constitution of Kenya under Article 25 (b) provides that the right to an order of *habeas corpus* shall not be limited. Indeed, article 51 (2) provides that a person who is detained or held in custody is entitled to petition for an order of *habeas corpus*. This provision sounds exhaustive, as it enumerates, freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the *right to an order of habeas corpus only.*[56] *Habeas corpus*, therefore, serves as a procedural remedy in that regard in the course of the trial process.

5.0 Conclusions & Recommendations

The paper has discussed two kinds of pleadings that have been filed before court for causes in the nature of writ of *habeas corpus*. However, it is anticipated that this article will trigger more conversations and debates, regarding the legal position. Nevertheless, as much as courts may exercise discretion, justified by their inherent powers, the best direction can be gleaned from provisions of the pragmatic Constitution, laws, rules and case laws, along which adjudicating *habeas corpus* should be in flux, as a sociological perspective in our legal reform.

The criminal justice system integrates the international obligations on human rights in our laws and implementation of policies. The relevant stakeholders including the Office of the Attorney General, the office of the Director of Public Prosecution and the Inspector General of Police, have an opportunity to further these obligations generally, and the rights of detained persons in particular. Litigating rights in the nature of *habeas corpus* is within the purview of human rights and fundamental freedoms which courts have a positive obligation to interpret and enforce.

It is recommended that the investigative and law enforcement authorities should assist the court to enforce the rights and fundamental freedoms of the confined subjects. Further, detention should be legally and procedurally executed, without violating the rights of arrested or detained persons. There is need for more research and capacity building and inquiries, into the nature of investigation, involving detained persons whose whereabouts and presumption of death raises uncertainties to the victims as conceived in this paper. There is still room for innovative strategies, for filing useful, detailed, reliable and probative reports that can be presented in evidence, where petitions involving allegations of unlawful detentions have to be determined. It is submitted that the bar, the bench, state law office, legal practitioners and scholars should foster paradigm shift, to constitutional underpinnings that are aligned to international human rights laws. Finally, processes

53 Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013

54 *Fozia Ahmed Bayusuf v Director of Public & 2 others* (n 13)

55 *Fozia Ahmed Bayusuf v Director of Public & 2 others* (n 13)

56 Constitution of Kenya art 25

involved in litigation, legislation, policy reform and capacity building on detention and habeas corpus should embrace the wholistic approach to human rights and fundamental freedoms, including their right to dignity, liberty and protection from inhuman and degrading treatment while in custody.

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Omar Gordana Dida v Inspector General & 3 others [2021] eKLR,

Civil Procedures Act, Cap 21 2012

Constitution of Kenya 2010

Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013

Criminal Procedure Code Cap. 75 Laws of Kenya

Rules of Statutory Interpretation and Application of the Land Control Act Cap 302 Laws of Kenya: Towards Promoting Property Rights and Social Justice

By: Peter Onsongo Ogeto*

Abstract

The Land Control Act Cap 302 Laws of Kenya and the Land Control Regulations provide substantive and procedural laws on controlling transactions in agricultural land by the Land Control Boards. Land transactions must also adhere to the fundamental values of equity, human rights, and social justice as enshrined in Kenya's Constitution. Superior courts have been called upon to protect the rights of vendors and purchasers involved in controlled transactions, mainly where the Land Control Board's consent still needs to be obtained. Various rulings from the superior courts have addressed issues related to the Act and Regulations, revealing conflicting interpretations that judges have acknowledged in multiple cases. Against this backdrop, it becomes imperative to examine the rules of statutory interpretation and application of the Land Control Act vis a' vis fulfilling the tenets of social justice by promoting equitable property rights. The first three parts of this paper introduce the topic, delving into the Land Control Act objectives and the applicable statutory interpretation rules. The paper then critically analyses the key areas litigated under the Act, including the transactions affecting agricultural land, application for consent, recovery of consideration, potential applications of the doctrines of equity such as proprietary estoppel and constructive trust, and the feasibility of granting specific performance in favour of the purchaser. The paper concludes with final reflections and targeted policy recommendations on the way forward regarding applying the Old Age Act and Regulations to agricultural land in modern Kenya.

Introduction

The Land Control Act (herein referred to as "LCA") remains one of Kenya's highly litigated land statutes, reflecting its profound impact on land ownership, agricultural sustainability, and economic development.[57] Many case laws have emerged from the High Court, Environment and Land Court, and the Court of Appeal on the interpretation and application of various provisions of the LCA. These authorities, spanning over fifty years since the Act's inception, underscore the legal complexities surrounding agricultural land transactions. At the heart of the LCA's legal framework are key elements, particularly sections 2, 3, 6, 7, 8, and 22, which hold substantial importance.[58] These sections regulate land transactions aiming to preserve agricultural land practices, prevent exploitative sales, and protect vulnerable landowners.[59]

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57 Land Control Act (Cap 302, Laws of Kenya).

58 Land Control Act (n 1). These provisions provide as follows: s 2 (Interpretation), s 3 (Application of control), s 6 (Transactions affecting agricultural land), s 7 (Recovery of consideration), s 8 (Application for consent), and s 22 (Acts in furtherance of void transaction).

59 Ibid.

Some of the core objectives of the Act include preventing the sub-division of land into non-viable economic units that can undermine agricultural production, mitigating the danger of landlessness through unrestricted sales, and controlling land ownership by non-Kenyans.[60] To enforce these objectives, the LCA mandates that any transaction involving agricultural land must seek the consent of the Land Control Board (LCB). The LCB must assess whether a transaction in agricultural land aligns with public policy, including factors such as economic development and agricultural sustainability.[61] Concerned parties must seek LCB's consent; if the consent is denied, any related agreements are rendered void, reinforcing the Act's regulatory power.[62]

The importance of the LCA's safeguards was reaffirmed in the case of *Kiplagat Kotut v Rose Jebor Kipngok [2019] eKLR*, where the Court of Appeal emphasized the role and objectives of LCA. The Court opined that:

> The Land Control Act was not designed for unjust enrichment or to absolve vendors acting in bad faith from their contractual duties. It supports those who deal in good faith without exploiting the other party. It is not meant to facilitate unethical behaviour between parties. In this context, the constructive trust doctrine ensures property is returned to its rightful owner, preventing unjust enrichment and unethical conduct, ensuring one party does not profit at another's expense.[63]

This ruling reinforced the LCA's role in ensuring land sellers always act in good faith and fulfil their contractual duties. In case of a dispute, through the doctrine of constructive trust, the Act ensures that property is returned to the rightful owner, preventing unjust enrichment. Similar sentiments were echoed in *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri*,[64] and *David Sironga Ole Tukai v Francis Arap Muge & 2 others.*[65] Here, the Courts recognized the LCA's historical significance as an old legislation enacted in 1967. These cases also reiterated the importance of the constructive trust doctrine and public policy, as well as the significance of the LCA in advancing the tenets of access to justice as enshrined under Article 159(2)(a).

Methodology

This study adopts a case law analysis and comparative legal methodology to examine the interpretation and application of the Land Control Act (LCA) in Kenya. Key cases were selected based on their legal significance, precedential value, and contribution to resolving ambiguities in the LCA, particularly regarding LCB consent and the doctrine of constructive trust. The research also integrates a doctrinal review of statutory provisions and evaluates judicial trends from the High Court, Environment and Land Court, and

60 Ibid s 6(1)

61 Ibid Part V (Granting of Consent)
62 Ibid, s 8(1)
63 Kiplagat Kotut v Rose Jebor Kipngok [2019] eKLR [24].
64 Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri (2014) eKLR.
65 David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR.

Court of Appeal.

Further, a comparative legal analysis is conducted by contrasting Kenya's LCB-regulated land transactions with the UK's market-driven system, where agricultural land dealings are governed by statutes such as the Agricultural Holdings Act 1986 and the Land Registration Act 2002.[66] This comparison highlights the strengths and challenges of Kenya's strict consent framework, offering insights into potential legal reforms.

Literal versus Golden Rules of Interpretation

The study in analyzing these case laws and statute provisions relies on the literal versus the golden rules of interpretation. The literal approach applies when the legislation is unambiguous, requiring the Court to interpret it strictly as written.[67] Conversely, the golden rule is preferred when a literal interpretation of a statute can lead to irrational results.[68] Understanding these two rules is critical, particularly in unearthing the philosophical interpretation of the key cases utilized in the study. In modern court cases, the purposive approach, or golden rule, is preferred when a literal interpretation leads to absurd results.[69] This method focuses on Parliament's intent, choosing the least absurd interpretation when a statute allows multiple meanings. The golden rule is advocated for ambiguous situations where words have various meanings.[70]

Critical questions in the study are: Which rule should be applied in interpreting conflicting provisions the Land Control Act particularly section 6? Is it literal or golden rule? Are the words capable of only one meaning or more than one meaning? Which rule have our courts been applying? When an interpretation is straightforward, using the Act poses no issue. However, if ambiguity arises during interpretation, the Court must then interpret and apply the statute's intention as Parliament for sore it.

An examination of case law reveals that Kenyan Courts have typically played safe by deferring to Parliament any statutes that result in absurdity. They have consistently held that only Parliament can amend such statutes even if its interpretation results in societal injustices. Contrary to this, Courts in the UK have taken a proactive role in interpreting, constructing, applying, and interpreting laws to ensure and safeguard justice for the community. Statutes that result in injustices cannot be enforced in the UK, and courts will be willing to find their proper interpretation and application as they deem fit. This contrast underscores the different judicial philosophies in both jurisdictions and raises important considerations for potential reforms in Kenya's LCA framework.

66 The Agricultural Holdings Act 1986 (UK) and the Land Registration Act 2002 (UK).

67 'LITERAL Definition & Meaning - Black's Law Dictionary' (*The Law Dictionary*, 4 November 2011) <https://thelawdictionary.org/literal/> accessed 22 May 2024

68 Ankit Kaushik, 'Golden Rule of Interpretation' [2024] SSRN Electronic Journal <https://www.ssrn.com/abstract=4676773>.

69 Ibid, 1-5

70 Ibid.

Transactions Affecting Agricultural Land

The Land Control Act (LCA) applies to transactions involving agricultural land, a category of land that holds immense significance legally and culturally in Kenya. Generally, agricultural land refers to land that is arable and capable of sustaining farming practices, including cultivating permanent crops and maintaining pastures.[71] This definition is crucial, as it determines which transactions fall under the LCA's regulatory framework. Beyond its legal definition, agricultural land is the backbone of Kenya's economy and social fabric. The agriculture sector contributes approximately 20% to the country's Gross Domestic Product (GDP) and serves as the primary source of livelihood for over 70% of the rural population.[72] For many Kenyan communities, land, particularly agricultural land, is more than just an economic asset; it is a sacred inheritance, deeply rooted in traditions, identity, and generational continuity.[73] As a result, transactions involving such land are not just commercial dealings but matters of profound social and cultural importance.[74]

The LCA explicitly defines agricultural land as any land outside designated urban areas, including municipalities, townships, trading centres, and markets.[75] However, the Act grants the Minister responsible for land matters the authority to declare specific areas as agricultural land, even within urban settings.[76] Despite this broad classification, exceptions apply if the title conditions, covenants, or other legal restrictions explicitly prohibit agricultural use; the land may fall outside the LCA's purview.

Under the Act, "land" is broadly defined as an estate, interest, or right in the land.[77] This expansive definition ensures that a wide range of land transactions, whether outright ownership or lesser interests are subject to legal oversight. When it comes to agricultural land, the LCA is particularly stringent.[78] Any transaction that affects such land, whether a sale, transfer, lease, mortgage, exchange, division, partition or any other form of disposal or dealing, must comply with strict regulatory requirements.[79] This includes even declarations of trust within designated land control areas, reinforcing the government's intent to monitor and regulate land ownership and use carefully.[80]

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71 'Glossary | DataBank' <https://databank.worldbank.org/metadataglossary/world-development-indicators/series/AG.LND.AGRI.K2> accessed 11 March 2025

72 'Agriculture Sector Survey of January 2024 | CBK' <https://www.centralbank.go.ke/2024/02/09/agriculture-sector-survey-of-january-2024/> accessed 11 March 2025.

73 Wellington Mulinge and others, 'Economics of Land Degradation and Improvement in Kenya' in Ephraim Nkonya, Alisher Mirzabaev and Joachim Von Braun (eds), *Economics of Land Degradation and Improvement – A Global Assessment for Sustainable Development* (Springer International Publishing 2016) 471–473 <http://link.springer.com/10.1007/978-3-319-19168-3_16>.

74 Ibid.

75 Land Control Act, s 2.

76 Ibid.

77 Ibid, s 2.

78 Ibid, Preamble (An Act of Parliament to provide for controlling transactions in agricultural land) and Part IV (Control of Dealings in Agricultural Land).

79 Ibid, s 6(1) & (2).

80 Ibid, s 6(1).

Importantly, these rules extend beyond individual landowners. If a private company or cooperative society owns agricultural land within a land control area, they, too, must adhere to these legal provisions.[81] Any transaction is deemed void without obtaining formal approval from the Land Control Board (LCB), rendering it legally ineffective for all purposes.[82] This underscores the LCB's role in safeguarding land use, preventing unauthorized dealings, and ensuring that agricultural land remains protected and properly managed.

However, conflicting judicial interpretations have emerged regarding whether Land Control Board (LCB) consent is mandatory for land transactions. This uncertainty is further compounded by inconsistencies within the Land Control Act (LCA) itself and the application of different legal interpretation principles, such as the golden and literal rules, as previously discussed. Addressing this legal ambiguity is crucial in establishing a clear and consistent legal framework for key stakeholders in the justice system.

A well-defined approach will help reconcile the spirit of the Constitution of Kenya, existing land laws and regulations, sustainable agricultural practices, and the often-competing interests of communities and individual landowners. Ultimately, resolving these conflicts will reinforce the role and objectives of the LCA, ensuring that land transactions are regulated in a manner that is both legally sound and aligned with Kenya's broader socio-economic and environmental goals.

Conflicting Interpretations of the various provisions of the Land Control Act (LCA): The Conundrum in Section 6

Since the inception of the LCA, superior courts have been at loggerheads on how the provisions of section 6(1) (a), (b), and (c) are to be interpreted and applied. The section provides that:

> "6. Transactions affecting agricultural land
>
> (1) Each of the following transactions, that is to say —
>
> (a) the sale, transfer, lease, mortgage, exchange, partition, or other disposal of or dealing with any agricultural land which is situated within a land control area;
>
> (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less

81 Ibid, s 9(1)b)(ii) & (c)(ii).
82 Ibid, s 6.

> than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
>
> (c) is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act"'

This section clearly states that any transaction in agricultural land is a controlled transaction that requires the LCB's consent, and failure to obtain it shall render the sale agreement void for all purposes.[83] Under the literal sense of section 6, Courts must apply legislative mandates without deviating from equity or natural justice. Any agreements for agricultural land sales lacking the LCB's consent within the stipulated six months are rendered void, including for specific performance purposes.[84]

The phrase "is void for all purposes" has often been interpreted to mean that any land agreement lacking consent is unlawful.[85] No legal body will uphold such a contract. In *Mapis Investment (K) Ltd v Kenya Railways Corporation*,[86] the Court applied Lindley LJ's sentiments from *Scott v Brown, Doering, Mcnab & Co*,[87] stating that no court should enforce an illegal contract or use it to enforce obligations from an unlawful transaction. The misinterpretation and misapplication of the term 'void' under section 6 of the LCA was further demonstrated in the case of *Patel v Singh*.[88] The Court relied on the words of Devlin LJ (as he then was) in the case of *Archbolds (Freightage) Ltd v S Spanglett Ltd,*[89] where it stated that:

> The effect of illegality upon a contract may be threefold. If, at the time of making the contract, there is an intent to perform it unlawfully, the contract, although it remains alive, is unenforceable at the instance of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if, to prove his rights under it, he has to rely upon his own illegal Act; he may not do that even though he can show that at the time of performance, he did not know that what he was doing was illegal. The third effect is if the contract was illegal *ab initio*, and that arises if the making of the contract is expressly or implied prohibited by a statute or is otherwise contrary to public policy.

83 Ibid
84 Ibid, s 8(1)
85 David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR, para 17
86 Mapis Investment (K) Ltd v Kenya Railways Corporation [2005] 2KLR, para 410
87 Scott v Brown, Doering, Mcnab & Co (3) (1892) 2 QB 274 [728].
88 Patel v Singh No. 2 (1987) KLR 585 at 588.
89 Archbolds (Freightage) Ltd v S Spanglett Ltd (1961) 1QB374 [388].

Conversely, other Court rulings attempt to circumvent the strictness of Section 6, citing injustices and inequality, while others enforce its harshness and stringency. Equity and natural justice are applied to mitigate harshness, such as in trusts benefiting occupying purchasers, where the vendor must transfer the land. This aligns with Article 10 of the Constitution, which supports equity principles like constructive trusts and proprietary estoppel, overriding the Act's severe provisions.[90] This can be seen in the case of *Kiplagat Kotut* Case.

Here, the Court of Appeal was called upon to determine the validity of LCB consent in an agricultural land transaction. The matter arose after the High Court ruled that the sale agreement was invalid due to the failure to obtain LCB consent within the six months stipulated under Section 8(1) of the Land Control Act (LCA). The Court, relying on the case of *Willy Kimutai Kitilit v Michael Kibet, Civil Appeal No. 51 of 2015 [2018] eKLR*, held as follows:

> …. We hold that it is the Constitution through article 10 (2) (b) that provides the legal framework that underpins the application of equity in dispute resolution. The contestation that equity cannot override the express provisions of the statute is an anachronism inconsistent with article 10 (2) (b) of the 2010 Constitution.[91]

A similar stance was adopted by the Court of Appeal in the case of *Aliaza v Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR)*. Mumbi J allowed an appeal by an aggrieved initial purchaser. The Court directed the specific performance of the land sale agreement and the land transfer to the purchaser and also awarded legal costs to the purchaser across both the Court of Appeal and the trial court.[92] The Court further stressed that the LCA does not prevent claimants from using the constructive trust doctrine when vendors imply purchasers will own property. Thus, sellers cannot act unconscionably against the common intention in land sale contracts.[93] The Court prioritized substantial justice over procedural formalities to ensure fairness for all parties. Kiage JA, concurring with Mumbi JA, rejected the vendor's attempt to exploit the LCA, supporting the purchaser's success based on constructive trust principles and preventing unjust enrichment.[94] Mumbi J had the following to say:

> Failure on the part of the Respondent [vendor] to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the Appellant [purchaser] to transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of *the Constitution*, require that the

90 Constitution of Kenya 2010, Article 10.
91 Willy Kimutai Kitilit v Michael Kibet, Civil Appeal No. 51 of 2015 [2018] eKLR.
92 Aliaza v Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment) [44].
93 Ibid
94 Ibid, para 48

> *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer but renders justice to a party in the position of the Appellant.[95]

The question that arises from the two conflicting jurisprudential underpinnings is what then amounts to the accurate interpretation of the phrase "void for all purposes" in agreements. Is there potential for misapplying and misinterpreting the Land Control Act? Shouldn't statutory interpretation methods, like the literal and purposive, be used to understand Parliament's intent? Can "void" in contract law and statutory interpretation mean immediate illegality or unenforceability due to non-compliance or public policy? How do statutory interpretation rules and contract law experts guide the understanding of voidness in various contexts?

The conflicting judicial interpretations of section 6(1) of the Land Control Act underscore the tension between strict statutory compliance and equitable principles in contractual disputes over agricultural land. While the Court of Appeal has upheld the mandatory nature of LCB consent, recent jurisprudence suggests an evolving approach that considers fairness and constructive trust. This raises critical questions on the correct interpretation of "void for all purposes" and the role of statutory interpretation methods in reconciling legal certainty with equitable justice.

Recovery of Consideration

In any agreement including the sale of land, consideration is a key element whose absence can make such a contract unlawful. Section 7 of the LCA provides verbatim as follows:

> If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.'

Section 22 of the Act addresses actions to advance void transactions. Under the LCA, the buyer is entitled to reclaim the purchase amount from the seller as a civil debt. This allowance exists because the agreement is void not due to initial illegality but to non-compliance with statutory requirements. Does the LCA outlaw such contracts? The simple answer is that it does not. The Act oversees agricultural land sales, requiring parties to obtain consent from the Land Control Board. The seller must reimburse the purchase price if permission is denied, indicating its absence.

95 Ibid, para 40

Application for the Land Control Board's (LCB) Consent

The LCB consent is a mandatory requirement for the sale of agricultural land.[96] Parties involved in such transactions must apply for consent within six months of entering into the agreement.[97] However, the Act provides for a six-month extension in exceptional circumstances, allowing additional time to obtain the required approval under justifiable grounds.[98] Affected parties must petition the High Court, providing valid reasons for the extension.[99] Extension of time is not automatic, and parties in seeking doing so, they must make a formal request to the High Court.[100]

However, the Act is not clear on who must obtain the consent in subsequent transactions specifically where consent was not obtained in the first instance. In *Gabriel Makokha Wamukota v Sylvester Nyongesa Donati* [1987] eKLR,[101] Gachuhi JA explored the role of equity in agricultural land transactions requiring LCB consent. He stated that equity cannot assist parties who fail to secure consent, raising the question of who is responsible for obtaining it. Despite lawful actions by the vendor and the subsequent buyer, with consent obtained from the second buyer after neglecting the first, the Court found no fraud.

Gachuhi JA further emphasized the need for legislative amendments to address hardships in controlled transactions, stressing adherence to legal procedures and the inadequacy of ignorance as a defense. He also noted that the purchaser faces hardship when the vendor is imprisoned, recommending prompt caution registration and efforts to secure consent. The Court further captured the injustice meted on purchasers in interpretative situations, voiding the land sale contract because LCB consent had not been obtained. Apaloo JA observed as follows:

> In a contest of title between Machio [original owner of the land/vendor] and the respondent [initial purchaser], if the latter sought to rely on the *Land Control Act* to defeat the sale he himself made, it would seem to me perfectly legitimate to reply that it would be contrary to good conscience for him to be permitted to do that. He ought not to be allowed to use an Act of Parliament as a vehicle for fraud. If that argument could properly be made against Machio, it can, in like manner be made against the appellant [subsequent purchaser], who as the Judge found colluded with Machio to purchase the land.

In the *Aliaza Case*, Mumbi JA stated that the views expressed by Apaloo JA thirty-five years ago encapsulate the proper interpretation of the provisions of the

96 Land Control Act, s 6.
97 Ibid.
98 Ibid, s 8 (Application for Consent)
99 Ibid.
100 Ibid
101 Gabriel Makokha Wamukota v Sylvester Nyongesa Donati [1987] eKLR 287

LCA and its harshness ameliorated by considerations of equity and fairness. She observed as follows:

> Happily for us today, we have been empowered to render justice and fairness and to rule in accordance with good conscience by nothing less than the Supreme Law of the land, which renders any legislation inconsistent with *the Constitution* null and void. Under the new constitutional dispensation and in light of the provisions of section 7 of the Sixth Schedule to *the Constitution*, the *Land Control Act* must be read in a manner that does not give succour to a party, such as the Respondent, who wishes to renege on his contractual obligations to steal a match on the purchaser.'[102]

Kiage JA also emphasized that the Court would not do an injustice based on an old statute of 'dubious utility' in current times. He opined as follows:

> It is time… this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the *Land Control Act*, an old statute of dubious utility in current times.[103]

However, various questions arise: Are the courts providing the Land Control Act with the requisite interpretation and application? If the courts can mandate vendor cooperation in securing consent, including appearing before the Board, and if the Board's refusal is accompanied by clear reasons aligning with the Act's legislative purpose, could it be inferred that the courts are fulfilling Parliament's intent? This approach could potentially lead to a distinct outcome from the current scenario. Should we consider amending the Act or opting for a purposive interpretation to address these issues effectively?

In *Kariuki v Kariuki [1982] eKLR*,[104] the Court of Appeal ruled that parties to a transaction voided by Parliament for lack of consent cannot be accused of fraud for acknowledging its nullity. This raises questions about interpreting "void for all purposes," as stated by Parliament. The *ejusdem generis* rule might limit this to purposes in section 6, aligning with Parliament's intent. The scope of these purposes, including refunds if the seller does not reimburse, is debated. The Court noted that while damages are not recoverable for void transactions, payments can be reclaimed under section 7, implying agreements can be used for refunds if sellers do not comply.

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102 *Aliaza v Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment)*, para 38

103 Ibid para 46

104 Kariuki v Kariuki [1982] eKLR

Courts must determine the interpretation of 'void' in contracts. If a contract is illegal or against public morality from the start, any payments are not recoverable. However, payments can be recovered if a contract becomes void later due to unmet legal conditions. The implications of void contracts from inception versus those voided later vary. Failure to meet a condition precedent, such as a vendor not obtaining Board consent on time, makes the vendor liable for damages and refunding the purchase price.

In contract law, frustration may apply if a vendor claims the contract is frustrated by lack of Board approval. However, this is typically seen as self-induced and not legally recognized. True legal frustration involves parties, particularly the vendor, engaging with the LCB regarding subdivision or transfer. The Board assesses the situation based on the Act's objectives. If consent is denied due to conflict with these objectives, the contract becomes void, and the buyer is reimbursed. This is legal frustration. Deliberate avoidance of Board approval by the vendor is a breach of contract, allowing the buyer to seek remedies.

The genesis of the *Kariuki* case was that the purchaser took legal action against the vendor in the Magistrate's Court in Kiambu in 1975, seeking specific enforcement of their land sale contract. The learned Resident Magistrate ruled in favour of the purchaser, emphasizing that while the consent mandated by section 6 of the Act had not been secured, the Act should not be a tool for fraud. The Magistrate's decision drew from a precedent set by Sachdeva AG J (as he then was) in the case of *Munana Kimani v Wahethis Kimani and Another HCCC No. 19/197,*[105] where the learned Judge had stated as follows:

> For the Appellant now to come before the Court and attempt to seek refuge under the Land Registration Act or the Land Control Act is tantamount to fraudulently backing out of the commitments he had knowingly entered into.

Here, the Judge referred to the recognition of equity as a source of law. In the *Munana Kimani* case, the High Court rejected the vendor's attempt to use the Act as cover for fraudulent actions, emphasizing that the law does not protect or aid illegality. The Court upheld the contract's integrity, stating the seller could not evade commitments made knowingly. Consequently, the vendor was held accountable under contract law. The purchaser retained the right to seek various remedies like specific performance, special damages, and general damages to restore him to the position they would have been in if the contract breach hadn't occurred.

Application of the Doctrine of Equity

Section 6(1) of the LCA defines a controlled transaction, highlighting the necessity of LCB consent for such transactions, specifically in cases involving the sale of agricultural land. According to section 9(2) of the Act, if consent from the Board is denied, the controlled

105 Munana Kimani v Wahethis Kimani and Another HCCC No. 19/197.

transaction agreement becomes void. This avoidance occurs under various circumstances: (a) upon the lapse of the appeal deadline in section 11, (b) after an appeal in section 11 is dismissed, and (c) the subsequent appeal deadline in section 13 lapses, or if a further appeal in section 13 is dismissed.

In several cases, the Court of Appeal has considered the effect of a failure to obtain LCB consent on a transaction. Mumbi JA correctly observed that 'there has been no consensus on the issue, and the question is still unsettled.'[106] In *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR*, the Court of Appeal held that the possession of land by purchasers was an overriding interest in favour of the purchasers.[107] In the case of *Mwangi & another v Mwangi (1986) KLR*,[108] it was established that the rights of an individual in possession of land represent equitable rights that bind the land itself, regardless of any trust mentioned in the title documents. Even without a specific trust reference, the trust's validity remains intact, as a trustee in section 126(1) of the now-repealed Registered Land Act is permissive rather than obligatory.

Precedents like *Mutsonga v Nyati (1984) KLR*[109] and *Kanyi v Muthiora (1984) KLR,*[110] demonstrate that implied, constructive, and resulting trusts apply to registered land through section 163 of the repealed Registered Land Act, incorporating common law with equity modifications. When a vendor places buyers in possession of land with the intention to transfer plots and receive payment, doctrines like proprietary estoppel and constructive trust apply, preventing the vendor from retracting.[111] Establishing a constructive trust for those who paid the price is enforceable for land under the LCA, aligning with the Court of Appeal's focus on substantive justice over technicalities.[112]

Unlike the *Macharia Maina* case, the Court of Appeal rulings varied, with the *Sironga* case applying equitable principles to the Land Control Act. The Court argued that the LCA's specific provisions exclude equity doctrines, citing section 3 of the Judicature Act (Cap 8, Laws of Kenya),[113] and overturned a High Court decision that proposed using equity and natural justice to soften the law's strictness. Therefore, it's crucial to differentiate between the LCB denying consent for public policy reasons and vendors not applying for consent.

106 *Aliaza v Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment)*, para 23. See also para 31, where the learned Judge correctly recognizes that 'there is some conflict in the jurisprudence regarding the validity of a transaction for the sale of land where no consent from the Land Control Board has been obtained.'

107 Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR, para 19.

108 Mwangi & another v Mwangi (1986) KLR 328.

109 Mutsonga v Nyati [1984] KLR 425.

110 Kanyi v Muthiora [1984] KLR 712.

111 Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR, para 20. See alsoYaxley v Gotts & Another (2000) Ch 162. These principles were also applied with approval by the Court of Appeal, where it was stated that the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable regarding land subject to the Land Control Act in the following cases: William Kipsoi Sigei case; Kiplagat Kotut case 24.

112 The Macharia Maina case, para 25. See also Chase International Investment Corporation and Another v Laxman Keshra and Others [1978] KLR 143; [1976-80] 1 KLR 891 (Madan, JA (as he then was)) where it was stated that 'If the circumstances are such as to raise equity in favor of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed….'

113 Judicature Act (Cap 8, Laws of Kenya).

The LCA interpretation should allow for changes. Refusal of consent under section 6 can occur for Act-specified reasons or when a vendor sells without applying. Both parties must sign consent applications per the 1967 Regulations. If the vendor doesn't apply, it's not a 'refusal' under section 9(2) since the LCB hasn't evaluated the application.

The *Githu vs Katiji [1990] KLR*, case provides further insight into the issue,[114] Nyarangi J ruled that the transaction was controlled, making the agreement void without the Land Control Board's consent. The absence of a consent application nullified the agreement, barring any interest registration under the Registration of Titles Act. Masime JA and Cocker AG JA concurred. This case raises the question of who, between the vendor and purchaser, is responsible for obtaining Board consent.

Section 9(2) of the Land Control Act explicitly states, "...where the application for consent has been refused..." This implies that an application for consent must be submitted and rejected by an entity or authority. Pertinent questions arise: (a) was this process followed in the current case? (b) Is the scenario where a vendor intentionally avoids seeking consent to deceive the purchaser and thwart justice the same as a formal refusal of consent as outlined in section 9(2) of the Land Control Act? (c) Can courts achieve justice by interpreting all terms in the Act with a purposive approach? Without clear answers to the above questions, it becomes difficult for courts to rule and judge on similar cases.

Conclusion and Recommendations

The Land Control Act and the Land Regulations of 1967, initially enacted to regulate agricultural land transactions for societal benefit, are now seen by many, including judges, as outdated and needing reform to serve modern Kenyan society better. Its rigid application has often led to injustices, particularly on purchasers who have acted in good faith, paid for, and developed land but denied ownership due the lack of the Land Control Board (LCB) consent. The continued strict interpretation particularly section 6(1) gives rise to tensions on whether to apply the literal rule or golden rule, underscoring the need for a more balanced approach that aligns the LCA with the constitutional principles of equity and fairness.

Cases such as *Mapis Investment Case*, and *Patel v Singh Case* have strictly applied the LCA, rendering transaction invalid for all purposes if LCB consent is not obtained. This approach often prioritizes statutory compliance but leads to harsh outcomes for purchasers who have acted in good faith. Other cases such as *Kiplagat Kotut Case*, and *Aliaza Casa*, have adopted a more equitable approach applying the doctrine of constructive trust and proprietary estoppel to protect purchases. These cases suggest a move towards interpretations that align with the constitutional spirit of the Land Control Act, referencing the transitional provisions in section 7 of the Sixth Schedule of the Constitution of Kenya.

To address the ambiguities and inconsistencies in the LCA, it is important to amend the Act particularly section 6(1) and provide more clarity on its provisions. For instance, the phrase "void for all purposes" should be amended to specify that transactions lacking

114 Githu vs Katiji [1990] KLR.

LCB consent are void only for specific purposes such as transfer of title, but not for recovery of consideration or equitable remedies. There is also need to clearly outline the roles and responsibilities of vendors and purchasers in obtaining LCB consent. This will include timelines and consequences for non-compliance. The amendments should allow for exceptions where purchasers have acted in good faith, paid the purchase price and made significant improvements to the land.

Further to this, the role of the LCB should be strengthened and streamlined to enhance transparency in land transactions. This will include simplifying and expediting the LCB consent process to reduce unnecessary delays and bureaucratic hurdles. The LCB in enhancing transparency, must at all times provide clear reasons for denying consent, ensuring its decisions align with the Act's objectives of preventing land fragmentation and promoting sustainable agriculture.

On equitable remedies to affected parties in case of a dispute, there is need to codify constructive and proprietary estoppel remedies in the Act. This will provide a legal basis for protecting purchasers in case of vendor default or instances of bad faith from either party. Additionally, judicial officers must be continuously trained and updated in the current trends of law particularly in interpreting and applying the LCA in a manner that is consistent with articles 10 and 159 of the Constitution of Kenya which emphasizes equity, fairness and justice.

The timely and adequate implementation of these recommendations will provide immediate solutions to some of the challenges bedevilling its interpretation and application. The future of statutory interpretation in Kenya lies in adopting a purposive approach that balances strict statutory compliance with equitable principles. This approach is particularly important in land transactions, where rigid application of the law can lead to significant injustices. Enhancing judge's understanding of equitable principles, educating stakeholders including landowners, purchasers and practitioners on the importance of LCB consent, enhanced collaboration between the Legislature and the Judiciary during the law making process and applying comparative insights from countries such as the UK will significantly aid in developing a balance LCA legal regime that not only adheres to constitutional dictates but ensures sustainable in agriculturally related land transactions.

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PART B

A Mother's Unyielding Fight to Reclaiming Happiness and Justice

By: Margaret Kimani*

Abstract

This is the true story of Mary (a pseudonym name), an orphan and mother of four children. Mary was assisted by community-based paralegals in Nakuru, Kenya to secure justice. Her story is one of strength, resilience and hope in justice. It serves as an inspiration to others who may be facing unimaginable challenges and how legal empowerment can be a tool for transformation.

Mary was married to John. She has always been a kind-hearted woman who loved her husband and family unconditionally. As time passed, things started to change. Her husband became increasingly aggressive and controlling, and his parents started to criticize her for not being a good wife. She felt vulnerable and alone. As a result, she became ill and was hospitalized and underwent surgery at PGH hospital in Nakuru. Her husband resisted to support her in any way thus leaving no option but for her siblings to take charge. However, upon returning home, she found that her mother-in-law had locked up her matrimonial home and taken custody of her four children, including her disabled child. She was not allowed to see her children or access her home. Her heart ached for her children, and she often broke down in tears, praying that they would one day be reunited. She made several attempts to regain custody of her kids through the area chief, village elders and pastors without success. Their system was slow and unhelpful. Distressed by the situation, she sought legal advice from Kituo cha Sheria.

Mary's fundamental rights were violated. In Kenya, if children are taken away from their parents unwillingly and without legal justification, several rights exist under the Constitution of Kenya (2010), the Children Act (2022), and international conventions. Article 53(1)(e) of the Constitution states that every child has the right to parental care and protection, which includes the equal responsibility of both parents to provide for the child. In the same vein, section 6(2) of the Children Act (2022) reinforces this right by stating that a child shall not be separated from their parents unless it is necessary for their best interests. Following the intervention of community paralegals, Mary and her children are now a happy family living in her matrimonial house. She is grateful for what Kituo cha Sheria accomplished in her life.

This story examines the legal struggles of Mary (a pseudonym name), a mother who was denied access to her children and matrimonial home. It analyses the role of legal empowerment in securing justice. It also highlights the legal and procedural barriers faced by women like Mary in custody disputes and the interventions available to restore parental rights.

Introduction

During a storm, there is always a glimmer of hope especially for the one suffering lady named Mary. In the face of illness, Mary found herself admitted to the Nakuru General Hospital. Her life became entangled in a web of emotional turmoil, physical exhaustion, and financial strain. Little did she know that upon her return home, she would be confronted

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with her worst nightmare. Her house was locked, her beloved children were gone. Worst of all, her own husband had conspired with his mother to forcibly evict her from her matrimonial home. Mary refused to succumb to despair. This heart-wrenching tale takes us on Mary's journey as she sought solace and justice, eventually finding happiness and peace. The story chronicles Mary's arduous journey and the transformative power of justice. As Elizabeth Edwards said, "She stood in the storm, and when the wind did not blow her way, she adjusted her sails."

A Winning Battle

A wise man once said, "However, long the night, the dawn will break". Mary's life was once a sanctuary of love, but it soon turned into a battlefield of emotional torment. Betrayed by those she trusted, silenced by indifference, and wounded by abuse; her spirit withered under the crushing weight of suffering. Yet, even in the depths of despair, she refused to be defeated. In her darkest hour, she found the courage to seek justice, believing that the law could restore the dignity and peace stolen from her heart. Her journey was not just about survival—it was about reclaiming her voice, strength and right to healing.

Mary had always believed that nothing could break the bond between a mother and her children. She had nurtured and cared for her children Nimrod, Abigael, Ben, and Noran with unwavering love. But one fateful day, her world came crashing down. Without warning or legal authority, her mother-in-law stormed into her home and took her children away.

Mary stood frozen in disbelief. How could the very person she trusted with her family become the one to shatter it? She had always been a devoted wife and mother. But now she was being treated as if she had no say in her own children's lives.

Desperate for help, Mary sought guidance from a paralegal at Kituo cha Sheria, who listened carefully to her plight. The paralegal sighed, knowing too well how often such injustices occurred. "Mary," she said gently, "Kenyan law is on your side. No one, not even your mother-in-law, has the right to take your children away from you without a court order." She pulled out a copy of the Children Act, 2022, flipping to section 8(1), which clearly stated that "*every child has the right to parental care and protection and shall not be separated from his or her parents except in accordance with the law and in the child's best interests"*. Mary's rights had clearly been violated.

Tears welled up in Mary's eyes as she thought of her youngest, Nimrod. Born with special needs, he required constant attention and care. Without her, who would ensure he received the support he needed? The paralegal nodded knowingly. "Under *section 18 of the Persons with Disabilities Act, 2003*, children like Nimrod are entitled to special protection and medical care. You have every right to demand his return and ensure his well-being."

The more Mary learnt, the more determined she became. "What can I do?" she asked,

gripping the arms of her chair.

"You can seek a custody order under section 28 of the Children Act, 2022," the paralegal advised. "This will legally affirm your right to have your children returned to you. You can also file an application for a production order in the Children's Court which will compel your mother-in-law to present the children before the Court."

Mary listened intently, absorbing each word. The paralegal continued, "You can also report the matter to the Children's Department and the police under section 250 of the Penal Code, which criminalizes unlawful detention of children. And since Nimrod has a disability, we can involve the National Council for Persons with Disabilities (NCPWD) to advocate for his immediate return."

For the first time in weeks, Mary felt hope. The law was not just a collection of words on paper—it was her shield, her weapon against injustice. She straightened her back and wiped her tears.

"I'm ready to fight for my children," she declared. With the paralegal's help, Mary began her legal battle. She was no longer just a grieving mother—she was a warrior, armed with the law and determined to bring her children home.

Determined to fight back and reclaim what was rightfully hers. The legal team provided the necessary expertise and compassion to navigate the complex legal landscape ahead as she secured the custody of her children, particularly her vulnerable and disabled child. At the Kituo Cha Sheria, Mary found a compassionate team of paralegals and lawyers who recognized the urgency and emotional turmoil she was experiencing. They extended their unwavering support, providing her with legal advice, guidance, and a glimmer of hope amidst her darkest days. Armed with their expertise we began her battle to regain her children and her home.

With the help of a paralegal, Mary strategically formulated a plan to confront the unjust actions taken against her. Together, all the necessary evidence was gathered to demonstrate her role as a caring and responsible mother. Witnesses, such as friends were willing to assist and even give testimonies if they were required. They went ahead to the schoolteachers who complained about Mary's children lack motivation especially on family days or academic days where a parent had to attend their meeting. This was because only their grandmother was inconsistent in attending the meetings due to her busy schedule. This entire occurrence directed us toward one agenda which was to reunite Mary with her beloved children and to give her back her home.

Mediation played a crucial role in resolving Mary's case, demonstrating the effectiveness of Alternative Justice System (AJS) methods. These approaches were not only faster and more amicable but also ensured that justice was served without unnecessary confrontation. In

Kenya, the Constitution under article 159(2)(c) encourages the use of alternative dispute resolution mechanisms, including reconciliation, mediation, arbitration, and traditional dispute resolution, if they do not contravene the Bill of Rights.

Mary's case took an unexpected turn when her husband falsely alleged that she was an unfit mother. He claimed that she had abandoned her children without ensuring their well-being, despite knowing that she would be hospitalized. However, these accusations were baseless, and Mary successfully defended herself using SMS messages and testimonies from friends, proving that she had acted responsibly. As she presented her case, the mood in the room gradually shifted in her favour, and sympathy began to lean towards her pursuit of justice.

As the mediation process continued, it became evident that Mary's mother-in-law was at the heart of the conflict. She was heavily dependent on her son's financial support and saw Mary's children as a means to continue benefiting from his resources. She resisted returning the children to their mother, fearing the loss of financial security.

After days of perseverance and legal deliberations, the Kituo cha Sheria legal team presiding over the case acknowledged the injustices Mary had suffered. A decision was made in her favour, mandating the immediate return of her children and granting her access to her matrimonial home. The resolution was facilitated with the help of village elders, aligning with cultural traditions where a woman returning to her home must be accompanied by elders and received by her husband if she had previously been sent away.

A date was set for Mary's return, and on that day, she was escorted by her aunties and uncles back to her home. The paralegals were present to witness the emotional reunion. A short cultural ceremony was conducted, after which her husband welcomed her and the children back. The moment was filled with relief, love, and restoration. The pain and suffering Mary had endured were gradually replaced by happiness and serenity.

Beyond the emotional and legal struggles, Mary faced financial hardship. She had lost her job, accumulated debts, and yearned for economic independence to provide for her children. Seeking legal advice became a vital step in regaining control of her financial stability. With the support of her husband, community-based savings groups (merry-go-rounds), and small organizations, Mary was able to start a grocery shop. This venture provided a source of income that not only supported her family but also complemented her husband's earnings.

With her children finally back under her care, Mary's home was once again filled with laughter and joy. Her victory against deceit and manipulation stood as a testament to resilience, hope, and justice. Her story became an inspiration for other women facing similar struggles, proving that with determination, support, and the right legal interventions,

justice can prevail.

Mary's unwavering determination and the support she received from the legal justice office propelled her toward victory. A quote says, *"A child who is carried on the back does not know how far the journey is,"* . Mary had walked that path and emerged stronger.

Through the Alternative Justice System (AJS) and mediation, her case highlighted the role of community-led dispute resolution, as upheld in Article 159(2)(c) of the Kenyan Constitution. Justice prevailed under the Children Act 2022, prioritizing her children's well-being, and the Matrimonial Property Act, reaffirming her rightful place in her home.

Mary's truth exposed the lies against her, proving that resilience and courage can restore dignity and hope. Justice may take time, but it never disappears.

Mary's case underscores the importance of strengthening community legal empowerment mechanisms and enforcing constitutional protections on custody disputes. It highlights that successes that can be achieved where legal empowerment programmes are implemented to ensure women can assert their rights effectively.

Synergizing efforts to enhance legal empowerment in cases of Mala in se

By: Muguongo G. Kungu*

Abstract

When inheritance disputes arise, especially concerning land ownership, the complexities of legal empowerment, alternative justice systems (AJS), and access to justice come into sharp focus. The case of Wilfridah Waheto and Kinyua Wahome (not their real names) illustrates these challenges vividly.

Waheto initially believed she was entitled to inherit part of her family land, only to later discover that the land legally belonged to her brother, Kinyua. Their illiterate mother had "acquired" properties and instructed her literate son to process the legal deeds. Upon completion, however, the properties were registered under his name. Kinyua maintains that he lawfully purchased the properties, providing documented proof and purchase records. His argument is that, given his employment with the colonial government in the late 1950s, he had the financial means to acquire these lands, while Waheto asserts that the land originally belonged to their mother and was meant to be shared.

Due to the introduction of green cards in the 1970s, proving land ownership status before this period becomes legally tenuous. Waheto and multiple community witnesses claim that their mother's dying wish was for her daughter to receive 3¾ acres of the original 20-acre parcel. Despite this, no legal instruments existed to enforce this wish. The community upheld the position that the land was indeed their mother's and that Kinyua was merely a beneficiary. However, with land ownership legally documented in Kinyua's name, conventional legal channels provided no recourse for Waheto.

Faced with an impasse, Waheto sought assistance from various avenues, including the National Government Administration Officers (NGAO), the Nakuru National Land Commission (NLC) Coordinator, and the Nakuru Law Courts Court-Annexed AJS. However, these entities could not compel Kinyua to subdivide the land in Waheto's favour. It was only with the intervention of Kituo Cha Sheria that an alternative justice approach was developed, utilizing the provisions of Article 159(2) as read with sub-section (3) of the Constitution of Kenya 2010, alongside Article 67(2) (e), the AJS policy provisions, and the Access to Justice for the Indigent project.

Through this collaborative effort, a redress mechanism was created that was both legally sound and socially acceptable. This case underscores the essential role that legal empowerment and AJS play in resolving land disputes where conventional legal avenues fall short. By bridging the gap between formal law and community-based justice, organizations like Kituo Cha Sheria ensure that justice is served equitably, reinforcing the principle that access to justice should be available to all, regardless of legal literacy or financial means.

1.0 Introduction

"Our mother instructed you to transfer the ownership of 3¾ acres bordering the river to me as this was the portion of land she intended for me and my children to settle, but you are now grabbing it for yourself. God is watching you!", said Wilfridah Waheto in a heated debate between herself and her brother in the presence of the four Nakuru Law Courts AJS panelists that were presiding over the land dispute.

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The case arose from a brother and a sister with a 31-year age difference, children of Mwariri Wahome and Njuguna Wahome. It was the steadfast position of Kinyua Wahome that Waheto's statement was her conspiracy conjured to defraud him of a big chunk of his twenty acres in Ndege Ndimu, Lanet area Nakuru East, within Nakuru County, Kenya.

2.0 Ownership of the Land according to Each Party

The Petitioner argued that her mother was part of a settlement scheme group from the 1930s to the late 1950s, during which time she worked tirelessly to remit small instalments of money over the years. As a result, she was eventually awarded ownership of two shares of land, one measuring 16¼ acres and the other 3¾ acres. Because of her advanced age and inability to read or write, she chose to send her son as a representative to handle payments on her behalf.

The Petitioner alleges that, in a blatant act of disrespect and breach of trust towards their mother, her brother used the funds she provided for share payments to register himself in the group and obtain a passbook in his name. He then deceived their mother by claiming the shares still belonged to her, while they were awarded to him.

The title deeds for these shares were not issued until the 1990s when they were issued in the name of Kinyua Wahome to the surprise of Mwariri Wahome. At this time, Mwariri had grown too old and weary to contest the tenancy ownership of the shares. Moreover, every little document right from group meeting minutes to the membership list, names on the receipts during conveyance and every single documented procedure required for processing ownership, were all in the Respondent's name.

"My brother has over the years devised an ingenious scheme in plain sight. Given that records in the land's office do not extend past 1979, there is no credibility to my accusation. However, the truth remains that my mother and other women her age, who were members of the group, know the truth." Said Waheto as she ended her statement, before the panel. Kinyua an eloquent 88 year old started by saying, "When a ripe fruit sees an honest man, it falls!" Words that at that time brewed suspense but over time started to make sense as he gave his statement. Kinyua produced documents from an old dusty leather bag and out came his colonial government GEMA passbook that revealed he was a bicycle repairer by the year 1956 which he argues was a lucrative business. He then produced his mother's passbook which revealed that she was a housewife.

"Given that my mother was a housewife, and indeed a sick woman as rightly deponed by my beloved sister in her statement, where did she get enough money, to buy 20 Acres of land in that time?" asked Kinyua. Kinyua produced cheque books and cheques dated as early as 1954 written to him from his bicycle clients proving that he was well on his way to wealth in the early sixties.

Kinyua claimed that when he bought the shares in question, his sister hadn't been born yet. He presented copies of the title deeds for both lands and all the receipts from 1963 to the present that related to payments for processing fees, land rates, and tenancy payments. He questioned whether his sister could prove that the documents were forged or that he had taken the land from their mother as she alleged.

He also argued that he had provided for their mother and sister for 50 years on the 3¾-acre property and stated that witnesses could attest to their mother's dying wish for him to have the smaller piece of land they lived on. This led to tense exchanges with his brother, Waheto, about the ownership of the land. The session chairperson tried to calm the situation, but Kinyua ended the discussion by leaving, ending further attempts to censor the conversation.

3.0 Kituo Cha Sheria's Approach

After learning about the proceedings from his peers, the late Ibrahim Ogeto, the Nakuru County Coordinator for Kituo cha Sheria, took the initiative to coordinate a joint approach to promote a better communication environment. He worked with the National Land Commission Coordinator Nakuru, Mr. Ngombe Wambugu from the local Apostolic Faith Church, a researcher from Laikipia University, and esteemed members of the Nakuru Community Justice Centre. Together with the AJS session champion for the case, they formed a strong panel to address the Kinyua vs. Waheto case.

The consultant advised that Mr. Kinyua would only be reachable through traditional Kikuyu customary channels. According to Kikuyu customary law, when the elders of the Kikuyu council send a representative to inform you of their visit, refusing their visit is not permitted. The purpose of their visit is not questioned by the recipient. This differs from the civil procedure rules, which involve serving legal documents to inform you about the nature of the court summon and the details of the accusations against you.

Mr. Kinyua agreed to meet the panel on the morning of August 17, 2023. This tradition is well-known among the ethnic community, and those unaware of it are advised with the sayings "*Mūūki nīwe wūūkagana na ndeto*" (The comer comes with the agenda) and "*Ūrīa aregaga wīto nī mūkīgū*" (He who refuses a call is a fool), which are part of Kikuyu language and culture. These sayings play a significant role in guiding social interactions and, in this case, those involved in matters of justice. As there was no legal recourse for Waheto, the elders decided to pursue Waheto's inheritance through a Kikuyu ceremony called "*Kuhorohia*".

The ceremony is essentially a restorative process aimed at healing and improving relationships between conflicting parties. It involves dialogue and a cleansing ritual to remove any negative energies. Some people may associate the word "ritual" with negative connotations, but the aim here is to promote community and healing. In this specific case, two animals were taken to the accused party's compound to ask for forgiveness for using culturally inappropriate means to gain an advantage from Kinyua. If the host (Kinyua) understands the purpose of the visit, he accepts the 'ewe berries' and urine of the goats, symbolizing the willingness to engage in a conversation about reconciliation. After reconciliation, the male goat is slaughtered and eaten by all members of the clan, while the female goat is left to continue bringing offspring to the homestead. This symbolizes the idea that peace leads to prosperity, while conflict leads to poverty.

In the cultural and social structures of the Kikuyu, the firstborn son assumes the role of leader in the absence of the father. He is responsible for ensuring the safety, security, and provision for his siblings and mother. Although Waheto often clashed with her brother, she acknowledged that Kinyua took care of all their basic needs. He provided them with

shelter, food, clothing, and a means of livelihood, and ensured Waheto completed her education up to O-levels/Form Three.

Even after Waheto had her children and her marriage ended due to irreconcilable differences, Kinyua welcomed her back. He offered her shelter and land to live on within his estate, close to their mother, without any conditions, since their father had passed away long ago. However, their cohabitation was not without conflict, primarily due to disputes over the land. According to government records, Kinyua was the sole proprietor of the land where Waheto and her children had settled.

This situation, along with the perception that "she did not come home, she did not come to me to ask for land, but instead backstabbed me by tarnishing my good name," led to resentment and anger. This resulted in frequent arguments, threats, and occasionally even threats of grievous harm or murder.

Kinyua felt deeply unappreciated by his sister and decided to build a dam next to her house to force her to vacate quietly. This action was taken after she had prepared the same land for cultivating potatoes. This was his way of expressing his anger, and it led to her taking him to court. She went through the area chief, the Assistant County Commissioner, and the National Land Commission, and she also reported him to the police multiple times.

The eldest members of the community, with the assistance of Kituo Cha Sheria and its resources, held three meetings to mediate the conflict. During these sessions, the two adversaries, who had not shared a meal in twenty-three years, not only dined together but also feasted and buried a relative in unison—something rare, as typically, the deceased were buried by their own families before the sessions. The joy of sipping hot tea on cold August and September evenings around the bonfire, alternating between Kinyua's and Waheto's houses, was a topic of conversation in the village for weeks.

This agreement among the elders, Kinyua, and Waheto aimed to foster harmony and tranquility. It was seen as a first step toward discussions about land sharing. However, until those talks took place, the justice Waheto sought in court remained elusive.

4.0 Discussion

It is important to remember the following text:

"Mala in se" is a Latin phrase used in law to refer to crimes that are inherently evil and wrong, such as murder and rape. These are actions that are considered wrong even without the existence of a specific law against them.

It is my argument that the case we discussed during the AJS session qualifies as an example of a "mala-in-se" case. Hoodwinking Mwariri was morally wrong, but there is no way to legally punish Kinyua. The fact that the community supports Wilfridah Waheto's position further strengthens this argument.

In theory, Waheto should be able to secure a portion of the land as her mother's gift, even in her mother's absence, to provide for her children. However, in practice, there is no legal way to prove the truth of her claim. We often encounter cases like this where we cannot find resolution and peace, and they weigh heavy on our hearts.

The question of access to justice is envisioned in article 48 of the Constitution of Kenya which states that, "The state shall ensure access to Justice to all persons and if any fee is required, it shall be reasonable; and shall not impede access to Justice." Further, the provisions of article 159 (2) (c) as read with (3) ((2) provide as follows:

> In exercising judicial authority, the courts and tribunals shall be guided by the following principles…
>
> … (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); …
>
> (3) Traditional dispute resolution mechanisms shall not be used in a way that-- (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.

In this case, we practically applied these provisions of the Constitution of Kenya to address the dispute between Kinyua and Waheto. The adoption of Alternative Justice Systems Policy enabled us to arrive at a just decision using customs and culture of the Kikuyu ethnic community. In so doing, a fair outcome was achieved that involved AJS practitioners. I would love to see a world with AJS and alternative dispute resolution jurisprudence arising for decisions reached being documented just as in formal court judgments. This would go a long way in promoting social transformation through access to justice as envisioned by the Hon. Chief Justice Martha Koome.

Recommendations: Promoting legal empowerment and Justice Delivery in Kenya

In line with the Justice Needs and Satisfaction in Kenya Report (2017), the following recommendations are necessary to promote access to justice.

1. Enhance Access to Justice for the Most Vulnerable

Kenya's justice system must prioritize affordable and accessible justice journeys for marginalized groups, particularly low-income communities who often face barriers to legal empowerment. Many individuals do not recognize that their problems can have legal solutions, and existing pathways to justice remain inaccessible due to financial constraints, lack of legal awareness, and distance from formal institutions. To address this, justice should be treated as a basic public service—similar to healthcare and education—ensuring that every Kenyan, regardless of economic status, can seek fair and timely resolution of disputes.

2. Adopt a Holistic Justice Journey Approach

Data reveals that formal courts alone cannot meet the demand for justice, as many disputes are resolved outside the formal system. A hybrid strategy is needed—one that integrates formal, informal, and alternative justice mechanisms. Justice sector policies should focus on improving legal pathways in four key areas: crime, land, family, and employment disputes. This requires cross-sector collaboration, ensuring that lawyers, community leaders, social workers, and mediators work together to provide end-to-end justice services.

3. Strengthen the Link between Formal and Informal Justice

Informal justice systems—including community elders, religious leaders, and mediation panels—play a critical role in legal problem-solving, particularly in rural areas. Recognizing and enhancing these systems can bridge the gap between legal empowerment and dispute resolution. A seamless justice ecosystem should be developed, where formal and informal mechanisms complement each other. Hybrid legal service providers—offering legal advice, mediation, and follow-up support—can ensure that millions of Kenyans receive efficient, affordable, and context-sensitive justice services.

Conclusion

The *Waheto -vs- Kinyua case* highlights the urgent need to rethink justice delivery in Kenya. The limitations of formal litigation—from prohibitive costs to evidentiary challenges—underscore the necessity of Alternative Justice Systems (AJS) and alternative dispute resolution.

By implementing these reforms, Kenya can position itself as a leader in justice innovation, ensuring that every citizen—regardless of income or location—can access fair, efficient, and culturally relevant legal solutions. There is no need to reinvent the wheel; rather, we must build upon the insights from justice surveys and existing frameworks to enhance the promotion of Alternative Justice Systems (AJS) and the inculcation of restorative justice education in schools. The Kenya Institute of Curriculum Development (KICD) and the Continuing Legal Education (CLE) programs should integrate AJS principles and legal empowerment strategies, ensuring that future generations develop a justice-oriented mindset. By reinforcing legal literacy, restorative practices, and community-based dispute resolution, Kenya can create a justice system that is proactive, inclusive, and future-ready.

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The financial assistance of the International Development Research Centre (IDRC) is greatly acknowledged

IDRC · CRDI
International Development Research Centre
Centre de recherches pour le développement international

Canada

ISBN 978-9914-9465-6-7