



Pro Bono Practices and Opportunities in Kenya¹

INTRODUCTION

Equal access to justice remains a challenge for most people in Kenya. Aside from the limited provision of state-funded legal aid, a large number of Kenyans have few options to access the judicial system with proper representation. The majority of pro bono legal services are provided by non-governmental organizations (“NGOs”), which are located mainly in large cities, and which lack the resources and capacity to represent the large number of Kenyans in need of legal advice. Without representation, most Kenyans are unable to manoeuvre the legal system because of the complex legal procedures, lack of education regarding legal rights and the court system, financial impediments or other time and resource constraints. Kenya faces significant challenges in implementing a legal system that serves its population adequately, but it is making strides in the right direction.

OVERVIEW OF THE LEGAL SYSTEM

Constitution and Governing Laws

Kenya’s Constitution proclaims that “the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”² The Constitution also provides that every person “has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”³ Despite this constitutionally mandated right to equal access to justice, many Kenyans cannot access the country’s justice system because they are unaware of their basic rights, the courts are structured in a way that does not facilitate equal access to all, and legal services are unaffordable to most of the country’s population.⁴

The Courts

Types and levels of courts

Kenya’s legal system contains elements of English common law, Kenyan statutory law, customary law and religious law (mainly Islamic law).⁵ Pursuant to section 3(2) of the Judicature Act, the courts are to be “guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.” The court structure in Kenya operates at two levels: namely, the superior and subordinate courts. The superior courts consist of the Supreme Court, the Court of Appeal, the High Court, the Employment and Labor Relations Court, and the Environmental and Land Court.⁶

The Supreme Court is the highest court in the judicial system of Kenya, having appellate jurisdiction over appeals from cases concluded by the Court of Appeal, whilst the Court of Appeal has jurisdiction over appeals from the High Court, and other courts and tribunals. In addition, the Supreme Court has exclusive original jurisdiction over matters relating to presidential elections, and issues advisory opinions on matters

¹ This chapter was drafted with the support of Kaplan & Stratton.

² The Constitution of Kenya, 2010, § 48.

³ The Constitution of Kenya, 2010, § 50(1).

⁴ P. Mbote and M. Akech, Kenya: Justice Sector and the Rule of Law, Open Society Foundations, March 2011 at 156, available at <http://www.opensocietyfoundations.org/reports/kenya-justice-sector-and-rule-law> (last visited on September 4, 2015).

⁵ Id at 42.

⁶ The Constitution of Kenya, 2010, § 162(1).



concerning County Governments, in any cases involving the interpretation or application of the Constitution and in matters of general importance. The remaining superior courts consist of special courts that have the same status as the High Court, and have jurisdiction over matters relating to employment and labor relations, environmental laws and land rights.⁷

In addition to the superior courts, the Constitution provides for subordinate courts.⁸ Subordinate courts consist of Magistrates' courts, Kadhis' courts, court martial, and any other court or local tribunal established by an Act of Parliament. The traditional, or Kadhis', courts are presided over by a local chief and a council of elders who profess the Islamic religion and have knowledge of Islamic law. These courts have jurisdiction over limited types of proceedings relating to personal status, marriage, divorce or inheritance.⁹

Appointed judges

Pursuant to section 166 of the Constitution, the Chief Justice and Deputy Chief Justice of the Supreme Court are to be appointed by the President, in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly. All other judges are appointed in accordance with the recommendation of the Judicial Service Commission. Judges have a fixed term tenure, which expires at the age of 70, but judges may elect to retire at any time upon turning 65.¹⁰ In addition, the Chief Justice shall only hold office for a maximum of ten years, following which the Chief Justice may continue in office as a judge of the Supreme Court (unless the mandatory age of retirement is reached beforehand).¹¹

The Practice of Law

Education and Licensure

A qualified lawyer in Kenya is referred to as an advocate of the High Court. A person is qualified for admission as an advocate of the High Court upon passing the relevant examinations from a recognized university, obtaining a law degree from a university or institution that the Council of Legal Education may from time to time approve,¹² and then being admitted to the Kenyan bar.

Pursuant to sections 22 and 23 of the Legal Education Act, a legal education provider must provide instruction and examination in certain "core courses" at the degree and post-graduate (professional) diploma level (e.g., contract law, the law of evidence, constitutional law, professional ethics etc.). As a requirement under the Legal Education Act, at the professional level, a pupillage (of at least six months' attachment) with a qualified advocate is mandatory.

The Council for Legal Education, established under the Legal Education Act,¹³ is responsible for regulating and supervising legal education and training in Kenya. Under the Advocates Act (Continuing Legal Education) Regulation, the Law Society of Kenya introduced continuing legal education ("CLE") for

⁷ The Constitution of Kenya, 2010, § 162(2).

⁸ The Constitution of Kenya, 2010, § 169(1).

⁹ The Constitution of Kenya, 2010, § 170.

¹⁰ The Constitution of Kenya, 2010, § 167(1).

¹¹ The Constitution of Kenya, 2010, § 167(2) and (3).

¹² Initially, only the University of Nairobi and Moi University, offered law degree courses. However, an increasing number of public and private Kenyan universities now offer law degree courses and several private universities plan to introduce law courses in the future: P. Mbote and M. Akech, Kenya: Justice Sector and the Rule of Law, Open Society Foundations, March 2011 at 116. See also: <http://www.cle.or.ke/status-of-universities/> (last visited on September 4, 2015).

¹³ Legal Education Act, 2012, section 8, available at <http://www.cle.or.ke/acts-of-parliament/> (last visited on September 4, 2015).



advocates in 2004.¹⁴ CLE programs emphasize ethical as well as practical and professional aspects of legal practice and every member of the Law Society must obtain no less than five CLE units annually.¹⁵

Demographics

According to the Law Society of Kenya, there are more than 8,000 practising lawyers in the country.¹⁶ It has been estimated that the ratio of lawyers to the general population is approximately one lawyer for every 5,500 people.¹⁷ These lawyers work for law firms, companies, the government, non-profit organizations, academic institutions and as sole practitioners.

Legal Regulation of Lawyers

Lawyers in Kenya are primarily monitored and regulated by the Law Society of Kenya under the Advocates Act. The Law Society was established by an Act of Parliament in 1948,¹⁸ to maintain and improve the standards of conduct and learning among the members of the Kenyan legal profession. The Law Society provides CLE to practising attorneys and assists the government and the courts in matters affecting the legislation, administration and practice of law in the country.

The Advocates Act is the key statute for the admission and regulation of advocates.¹⁹ It also governs Kenyan legal practice through the establishment of the Complaints Commission,²⁰ which has the power to investigate complaints against lawyers, and the Disciplinary Tribunal. Most complaints are dealt with by the Complaints Commission, but serious matters (e.g., professional misconduct, including disgraceful or dishonorable conduct incompatible with the status of an advocate) may be considered by the Disciplinary Tribunal.²¹ The Disciplinary Tribunal has wide-ranging powers to investigate and discipline such misconduct.

LEGAL RESOURCES FOR INDIGENT PERSONS AND ENTITIES

The physical distance between the Kenyan population, particularly indigent citizens living in remote districts, and legal service providers is one of the most significant barriers to justice in Kenya. Most lawyers reside in cities and major towns, leaving the rural population without access to legal services.²² In addition, the cost of legal services for much of the Kenyan population is prohibitive. As noted by the Kenyan Solicitor General in January 2014:²³

¹⁴ Advocates Act (Continuing Legal Education) Regulation, 2004, regulation 11.

¹⁵ Advocates (Continuing Professional Development) Rules, 2014, regulation 4(a). See also: <http://www.lsk.or.ke/index.php/practicing-certificates> (last visited on September 4, 2015).

¹⁶ The Law Society of Kenya, Strategic Plan 2012-2016, April 2012, available at <http://www.lsk.or.ke/images/downloads/lsk%20strategic%20plan%202012-2016.pdf> (last visited on September 4, 2015).

¹⁷ P. Mbote and M. Akech, Kenya: Justice Sector and the Rule of Law, Open Society Foundations, March 2011 at 114.

¹⁸ The Law Society was initially formed in 1948 under section three of the Law Society of Kenya Ordinance, 1949. That Act was later repealed by the current Law Society of Kenya Act, which came into force on October 30, 1992.

¹⁹ Qualifications for admission as an advocate are prescribed in section 12 of the Advocates Act, 2012.

²⁰ Advocates Act, 2012, section 53.

²¹ Advocates Act, 2012, section 60. See also: <http://www.lsk.or.ke/index.php/for-the-public> (last visited on September 4, 2015).

²² P. Mbote and M. Akech, Kenya: Justice Sector and the Rule of Law, Open Society Foundations, March 2011 at 114.

²³ D. Odunga, "Kenyans set for free legal services," Daily Nation, January 20, 2014, available at <http://www.nation.co.ke/news/Legal-Aid-Bill-2013-Constitution-/-/1056/2152852/-/126ut9d/-/index.html> (last visited on September 4, 2015).



“Very few Kenyans who need legal services can afford to pay for them, and most are ignorant of their legal rights. ... Millions are in need of legal services but are unable to afford the specialised knowledge and skills of the legal professionals.”

The Right to Legal Assistance

The Constitution declares that every person has the right to a fair trial which includes, among other things, the right “to choose, and be represented by, an advocate, and to be informed of this right promptly.”²⁴ However, in a human rights report from 2014, it was noted that there were many instances in which indigent defendants did not have legal representation.²⁵

“The vast majority of defendants could not afford representation and were tried without legal counsel. ... The lack of a formal legal aid system seriously hampered the ability of many poor defendants to mount an adequate defense. Legal aid was available only in major cities where some human rights organizations, notably the Federation of Women Lawyers (FIDA), provided it.”

State-Subsidized Legal Aid

The Legal Aid Bill, 2013 (“**Bill**”) was previously before the Parliament of Kenya, but was recently withdrawn, because it was not tabled before Parliament for a second reading. According to parliamentary standing orders, once a bill is withdrawn it cannot be enacted, and would have to be re-introduced into Parliament.²⁶

If enacted, this Bill could have provided for a national legal aid service and legal aid fund.²⁷ Many of the significant gaps in pro bono services and legal aid in Kenya might have been addressed by the functions assigned to such a legal aid service, including:²⁸

- administering a national legal aid scheme that is accessible, efficient, sustainable, reliable and accountable;
- facilitating the settlement of disputes through alternative dispute resolution methods;
- undertaking and promoting research in legal aid, legal awareness and access to justice for the poor and marginalized;
- promoting and providing legal aid support for public interest litigation;
- promoting the establishment and working of legal aid clinics in institutions of higher learning, universities, colleges and other institutions; and
- raising legal awareness and facilitating legal representation, particularly among vulnerable and marginalized groups.

Although legal aid would not have been available for certain types of matters,²⁹ for many other legal proceedings, including criminal trials, constitutional references, public interest litigation and matters

²⁴ The Constitution of Kenya, 2010, § 50(2)(g).

²⁵ U.S. Department of State, Country Reports on Human Rights Practices for 2014 – Kenya, 2014, available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236370#sthash.qcxWD1k8.dpuf> (last visited on September 4, 2015).

²⁶ It is not clear why the Bill was not tabled before Parliament for a second reading. Some media reports claimed that the Bill was poorly drafted, having significant errors of form and grammar: P. Bowry, “Return faulty Bill on legal aid to draughtsmen,” Standard Digital Media, February 12, 2014, available at http://www.standardmedia.co.ke/article/2000104473/return-faulty-bill-on-legal-aid-to-draughtsmen?articleID=2000104473&story_title=return-faulty-bill-on-legal-aid-to-draughtsmen&pageNo=1 (last visited on September 4, 2015).

²⁷ Legal Aid Bill, 2014, section 4(1), available at <http://kituochasheria.or.ke/wp-content/uploads/2014/05/Draft-Legal-Aid-Bill-2014.pdf> (last visited on September 4, 2015).

²⁸ Legal Aid Bill, 2014, section 6.



involving breaches of fundamental rights and freedoms, legal aid would have been available.³⁰ It also appears from the text of the draft Bill that, subject to certain exceptions, legal aid could have been available for other types of civil proceedings.³¹

The enactment of a legal aid bill would be the culmination of an increasing focus on human rights' issues relating to the rule of law and access to justice in Kenya. Since 2003, Kenya has made significant strides in improving equal access to justice by establishing:

- the Kenya National Human Rights and Equality Commission, which is charged with enhancing the promotion and protection of human rights;³²
- the National Commission on Gender and Development, which promotes gender equality throughout society;³³ and
- the National Cohesion and Integration Commission, of which one of its objectives is to facilitate and promote equal opportunity and acceptance of diversity.³⁴

In 2007, the government created the National Legal Aid (and Awareness) Program (“NALEAP”) to oversee, coordinate, monitor and provide policy direction regarding a legal aid program under the auspices of the Ministry of Justice. However, in a recent report, the UN Human Rights Committee, while welcoming the introduction of NALEAP, also regretted that “access to legal aid and courts is unduly constrained by lack of funding for a legal aid scheme and physical accessibility factors,” and noted concerns that a comprehensive legal aid bill has not yet passed into law.³⁵

Alternative Dispute Resolution

Besides the formal court system, other dispute resolution mechanisms are used by Kenyan citizens to pursue grievances and conflicts, including mediation and arbitration. Mediation by community elders has also been said to be preferable because of the relatively lower cost and ease of access, compared to formal court structures; however, such forums may not permit a party to be represented by an advocate of his or her choosing. Accordingly, it has been recommended that the government institutionalize such forms of dispute resolution (which would ease the backlog in the formal court system) and ensure that traditional justice systems adhere to constitutional norms of equality and non-discrimination.³⁶

²⁹ Including taxation, the recovery of debts, insolvency proceedings and defamation: Legal Aid Bill, 2014, section 30.

³⁰ Legal Aid Bill, 2014, section 29(3).

³¹ Section 39(1) of the Legal Aid Bill, 2014, provides: “Where a party to civil proceedings is granted legal aid, the legal aid service provider under the grant shall immediately give notice of that fact to every other party to the proceedings, and to the Registrar of the relevant court.”

³² See <http://www.knchr.org/> (last visited on September 4, 2015).

³³ See <http://www.ngeckkenya.org/> (last visited on September 4, 2015).

³⁴ See <http://www.cohesion.or.ke/> (last visited on September 4, 2015).

³⁵ United Nations Human Rights Committee, Concluding observations adopted by the Human Rights Committee at its 105th session, July 9-27, 2012 – Kenya at ¶19, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5 (last visited on September 4, 2015).

³⁶ P. Mbote and M. Akech, Kenya: Justice Sector and the Rule of Law, Open Society Foundations, March 2011 at 174-176.



PRO BONO ASSISTANCE

Pro bono Opportunities

Non-Governmental Organizations

The majority of pro bono legal assistance in Kenya is provided by NGOs that offer assistance to marginalized groups. As discussed in further detail below, these organizations include the Federation of Women Lawyers, The CRADLE, the International Commission of Jurists in Kenya, Kituo Cha Sheria, the Public Law Institute and KELIN Kenya.

NGOs in Kenya are presently registered and regulated under the Non-Governmental Organizations Co-ordination Act, 1990 (the “**NGO Act**”). The NGO Act defines an NGO as:³⁷

“a private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which is organised nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services to be registered as an NGO under the Act.”

An NGO’s branch office will house regional expatriate staff who will be seconded to the NGO and house any assets the NGO may need. Under the NGO Act, the entity’s assets would be protected from mandatory asset divestiture requirements on the winding-up of operations.

It is likely that the NGO Act will be repealed in the near future (but currently remains in force). On January 14, 2013, the President of Kenya assented to the Public Benefit Organizations Bill, 2013. This bill (signed into law as the Public Benefit Organizations Act, 2013 (the “**PBO Act**”) and published in the Kenya Gazette on January 25, 2013) seeks to regulate non-profit organizations, including NGOs registered under the NGO Act. Upon the publication of its commencement date in the Kenya Gazette, the PBO Act will come into force and the NGO Act will stand repealed.

In 2013, the Statute Law (Miscellaneous Amendments) Bill, 2013 sought to amend part of the PBO Act by providing that a public benefit organization shall not receive more than 15% of its total funding from external donors. Such amendment to the PBO Act, which was ultimately dispensed with and is no longer being considered by Parliament, is likely to negatively affect several NGOs who receive the majority, if not all of their funding, from external donors.

Based on Schedule 3 of the V.A.T. Act of 2009, social welfare services provided by registered charitable organizations or NGOs whose income is exempt from taxation, are also exempt from the application of value added taxes for the provision of legal assistance.³⁸

Federation of Women Lawyers (“**FIDA Kenya**”)

FIDA Kenya is a non-profit, non-partisan membership-based NGO committed to the creation of a society that is free from all forms of discrimination against women. They address their mission by providing pro bono advice to indigent women, engaging in legal, policy and legislative reform, monitoring the implementation of treaties, researching issues related to women’s rights, and educating women about their rights. FIDA Kenya has assisted women through various programs and initiatives, including training women to represent themselves in court. The primary areas of law that they cover are succession and inheritance, family law, employment cases and land disputes involving discrimination on the basis of sex, cases involving gender-based violence and other public interest cases. FIDA Kenya has established a

³⁷ Non-Governmental Organizations Co-ordination Act, 1990, section 2.

³⁸ See <http://www.revenue.go.ke/vat/pdf/VATAct2009.pdf> at 66 (last visited on September 4, 2015).



country-wide pro bono lawyer's scheme and engages in legal awareness activities and alternative dispute resolution.³⁹

The CRADLE

The CRADLE is a non-profit NGO committed to the protection, promotion and enhancement of the rights of children, especially girls. The organization was started by a group of Christian lawyers to respond to the need for the provision of legal assistance to children and it works to enhance children's access to justice. The CRADLE's activities include running a legal aid program, advocating for policy and legislative enactments protecting children's rights, researching, monitoring and documenting issues related to children's rights, and building awareness of children's rights.

International Commission of Jurists in Kenya ("ICJ-Kenya")

ICJ-Kenya is a non-profit, non-partisan membership-based NGO with over 300 members who are dedicated to the legal protection of human rights in Kenya. The organization has a permanent secretariat with a team of full-time lawyers charged with running its programs. ICJ-Kenya's objectives include improving access to justice and protection of human rights, increasing citizen empowerment, investing in the development and involvement of key stakeholders, and increasing awareness of human rights.

Kituo Cha Sheria

Kituo Cha Sheria is a national membership-based NGO founded by lawyers committed to helping disadvantaged and poor people who cannot afford the cost of legal services. Established in 1973, it was the first legal aid center in Kenya and focuses on empowering marginalized and poor people to access justice through legal aid education, advocating for equitable access to justice, establishing community partnerships, and undertaking public interest litigation. The organization provides legal advice regarding family law, land disputes, employment and labor disputes, landlord and tenant issues, criminal offences, accident claims, rape cases, women's rights issues, and refugee issues. Kituo Cha Sheria is largely dependent on donors and lawyers who volunteer their services, which can make its ability to provide consistent levels of service unpredictable. The organization is headquartered in Nairobi, has a branch office in Jogoo Road and a regional office in Mombasa, in addition to an established network of volunteer lawyers in major towns throughout the country.

Public Law Institute ("PLI")⁴⁰

PLI is an NGO that was created by the National Council of Churches of Kenya and the Law Society of Kenya to promote human rights and the rule of law in Kenya. PLI's activities include providing legal representation and services to the poor and disadvantaged, and protecting consumer and environmental rights. PLI also provides legal education through publications, workshops, seminars and paralegal training programs. The organization has 12 lawyers on staff and relies heavily on volunteers.

KELIN Kenya ("KELIN")

KELIN was registered as an NGO in 2001. It is a human rights organization working to protect and promote HIV-related human rights in Kenya. The NGO's objective is to undertake advocacy and provide leadership in enhancing human rights approaches in health, as well as HIV strategies and programs. KELIN does this by providing legal services and support, training professionals on human rights, engaging in advocacy campaigns that promote awareness of human rights issues, conducting research, and influencing policy that promotes evidence-based change. KELIN works with vulnerable and often marginalized groups such as people living with HIV and at-risk populations. It also engages with key stakeholders, policy makers and involves itself in the process of policy development and reform in order to improve protection against health and HIV-related human rights violations for such groups.

³⁹ P. Mbote and M. Akech, Kenya: Justice Sector and the Rule of Law, Open Society Foundations, March 2011 at 162.

⁴⁰ O. Ooko-Ombaka, "Education for Alternative Development: The Role of the Public Law Institute, Kenya," Third World Legal Studies, vol. 4 article 11, 1985, available at <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1130&context=twls> (last visited on September 4, 2015).



Law Society of Kenya

One of the key components of the Law Society's strategic plan is to increase the availability and quality of legal services, and generally improve access to justice in the country.⁴¹ As noted in its strategic plan, the key outcome of a pro bono legal scheme would be to enhance access to justice for the indigent and marginalized in society.⁴² The Law Society of Kenya, in conjunction with the judiciary of Kenya, offers annual legal aid and pro bono services over a number of days at its branches throughout Kenya. In Nairobi, lawyers advise pro bono clients at the grounds in the High Court of Kenya and Milimani Law Courts.

The Law Society has set a performance objective of engaging 600 Kenyan lawyers in pro bono services by 2016,⁴³ although it is not readily apparent whether this goal will be achieved in the desired timeframe.

University Legal Clinics and Law Students

Some Kenyan universities have established legal aid clinics that allow students to provide pro bono assistance during their legal studies. This is a relatively recent development, arising from the growing acceptance of incorporating practical skills into legal education. This recognition can be traced back to 1994, following the establishment of the Moi University Faculty of Law. Through the Moi University Legal Aid Clinic, students can render legal advice and routine legal assistance to indigent clients.⁴⁴

By using legal education as a tool for engaging and assisting the public, students can also learn to be competent lawyers committed to the provision of quality legal services and the ideal of social justice. Moi University aims to revive and revamp its legal aid clinic so as to provide legal aid services to at least five indigent persons a month.⁴⁵

HISTORIC DEVELOPMENT

It has been noted that several legal aid systems in Kenya have previously been piloted. However, the adequacy of such legal assistance has been criticized.⁴⁶ Pro bono assistance has also historically been available under the Civil Procedure Act, which allows indigent people access to the courts by filing a "pauper brief." However, it has been noted that such applications are dependent on the availability of lawyers to take up the brief.⁴⁷

Barriers to Pro bono and Participation in the Formal Legal System

According to research by the Kenya AIDS NGO Consortium in 2004, many Kenyans do not seek justice through the Kenyan legal system for reasons including:⁴⁸

⁴¹ The Law Society of Kenya, Strategic Plan 2012-2016, April 2012, at ¶4.1.3.

⁴² The Law Society of Kenya, Strategic Plan 2012-2016, April 2012, at 41.

⁴³ The Law Society of Kenya, Strategic Plan 2012-2016, April 2012, at ¶7.3.

⁴⁴ T.O. Ojienda and M. Oduor, "Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya," International Journal of Clinical Legal Education, vol. 2 p.49-63, June 2002, available at <http://www.northumbriajournals.co.uk/index.php/ijcle/article/view/123> (last visited on September 4, 2015).

⁴⁵ See <http://www.mu.ac.ke/law/index.php/departments/legal-aid-clinic-externship#mission.vision-objectives> (last visited on September 4, 2015).

⁴⁶ Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law, Access to Justice in Africa and Beyond: Making the Rule of Law a Reality, 2007 at 13.

⁴⁷ P. Mbote and M. Akech, Kenya: Justice Sector and the Rule of Law, Open Society Foundations, March 2011 at 159.

⁴⁸ K. Kalla and J. Cohen, Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services, Open Society Initiative for East Africa, April 2007 at 8, available at <http://www.soros.org/reports/ensuring-justice-vulnerable-communities-kenya> (last visited on September 4, 2015).



- the high costs associated with legal proceedings, including court filing fees and physically attending court proceedings;
- lack of physical access to court buildings – many of Kenya’s counties have only one magistrate to serve the entire county;
- an intimidating formal court atmosphere, replete with technicalities and complex procedures; and
- significant delays in resolving matters before the courts, with civil matters taking between two and six years on average to conclude, and frequent adjournments.

There are also procedural challenges to the provision of public interest litigation. Courts have frequently used the doctrine of *locus standi* to defeat a number of initiatives aimed at securing the public interest through litigation. In addition, it has been reported that discovery laws are not clearly defined, handicapping defense lawyers, and the absence of established rules for presenting evidence can result in case dismissals for lack of evidence.⁴⁹ Often defense lawyers may not have access to government-held evidence before a trial, and there are reports that the government may invoke the Official Secrets Act as a basis for withholding evidence.

On the other hand, the Constitutional and Human Rights Division of the High Court has affirmed that costs should not be awarded against a party who has litigated an unsuccessful public interest proceeding against the state. In *John Harun Mwau & Others v Attorney General & Others* (Nairobi Petition No. 65 of 2011) [2012] eKLR, the court stated at [180]:

“In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant.”⁵⁰

One of the barriers to pro bono assistance is the statutory prohibition on advocates charging amounts below those stipulated under the Advocates Act, through the Advocates Remuneration Order. Under the Advocates Act, it is prohibited for a lawyer to agree or accept remuneration less than the Order. Although this provision is designed to prevent lawyers undercutting each other, it is also prejudicial to clients. Unless clients can afford to pay the set rates of remuneration, they may have to forego legal representation.⁵¹

Immigration regulations affect the ability of foreign-qualified lawyers to provide pro bono services. Foreign lawyers must obtain the requisite work permit in order to offer pro bono services in Kenya, and must also obtain a clearance letter from the Law Society.

Professional indemnity in Kenya is governed by the Advocates (Professional Indemnity) Regulations, 2004 made under the Advocates Act. Every advocate (enrolled in the Kenyan Bar) practising on his own behalf or in partnership is required to purchase a policy of “professional indemnity cover”, the value of which shall be not less than 1,000,000 Kenya shillings (approximately \$ 9,881). This cover is to be used to compensate clients for loss or damage in respect of any civil liability or breach of trust by the advocate or the advocate’s employees. The Regulations are silent on whether the requirement for professional indemnity includes pro bono clients; however, as the Regulations do not distinguish between paying clients or pro bono clients and the advocate’s duty of care to all clients is the same, it seems that pro bono clients would be covered by such professional indemnity.

⁴⁹ U.S. Department of State, Country Reports on Human Rights Practices for 2014 – Kenya, 2014, available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236370#sthash.qcxWD1k8.dpuf> (last visited on September 4, 2015).

⁵⁰ This was adopted in *Amoni Thomas Amfry & Another v The Minister for Lands & Another* (Nairobi Petition No. 6 of 2013) [2013] eKLR at [25].

⁵¹ P. Mbote and M. Akech, Kenya: Justice Sector and the Rule of Law, Open Society Foundations, March 2011 at 159.



Pro bono Resources

The following organizations may provide pro bono opportunities for lawyers:

- FIDA Kenya: <http://www.fidakenya.org> (last visited on September 4, 2015)
- The CRADLE: <http://www.thecradle.or.ke> (last visited on September 4, 2015)
- ICJ-Kenya: <http://www.icj-kenya.org> (last visited on September 4, 2015)
- Kituo Cha Sheria: <http://www.kituochasheria.or.ke> (last visited on September 4, 2015)
- KELIN Kenya: <http://kelinkenya.org/> (last visited on September 4, 2015)
- Law Society of Kenya: <http://www.lsk.or.ke/> (last visited on September 4, 2015)

CONCLUSION

While Kenya currently lacks a substantial legal aid system, there have been noticeable improvements in the past few years. Individuals without adequate legal representation often lack knowledge of the legal system and fundamental rights, face insurmountable costs and await the outcome of legal proceedings caused by extensive procedural delays. Currently, the Kenyan government only provides limited legal aid, although the passage of a comprehensive Legal Aid Bill would do much to bridge the significant gaps in the existing legal aid system.

NGOs attempt to fill the need for legal representation, but often face resource and capacity constraints. In order for Kenyans to truly have equal access to justice, the government needs to increase its commitment to providing and financially supporting legal aid, and make systematic and procedural changes to reduce the barriers to accessing justice.

September 2015

Pro Bono Practices and Opportunities in Kenya

This memorandum was prepared by **Latham & Watkins LLP** for the **Pro Bono Institute**. This memorandum and the information it contains is not legal advice and does not create an attorney-client relationship. While great care was taken to provide current and accurate information, the Pro Bono Institute and Latham & Watkins LLP are not responsible for inaccuracies in the text.