

SIMPLE JUSTICE FOR SMALL CLAIMS BY MWANANCHI

a. Introduction

Access to justice, an essential element of the rule of law and democracy enshrined under Article 48 of the Constitution 2010, remains a mirage for most Kenyans, especially the indigent, regardless of the efforts by actors in the Justice Sector to ensure that this fundamental right is realised. The enactment of the Small Claims Act 2016 (SCA2016) provided for the establishment of Small Claims Courts; subordinate courts meant to expedite resolution of disputes relating to small monetary claims through informal and affordable avenues with adherence to the principals of law and natural justice.

The need to incorporate these conceptual imperatives in the administration of civil justice is in recognition of the fact that intricate rules of procedure, systemic delay and excessive expense impede delivery of civil justice. The implementation of the SCA2016 will therefore enhance access to justice by expanding the reach of the formal justice system to areas un-served by the existing courts and to facilitate access to justice for a category of claimants currently unable to access judicial services for various reasons.

b. The 2016 Bill

The Bill embraced the principle that the cost of resolving a dispute should be proportional to its magnitude, value, importance and complexity to facilitate equal access to civil justice¹. The Courts are therefore be characterised by (a) simplified procedures²; (b) adjudication over disputes in accordance with their magnitude, value, importance or complexity; or (c) the adoption of appropriate market mechanisms and ADR strategies to much the magnitude, value, importance and/or complexity of the disputes in issue in accordance with the principle of proportionality. That in mind, the Act actualizes the provisions of Article 48 and 169 of the Constitution by establishing Small Claims Courts with pecuniary jurisdiction of KES 200,000 only in civil cases and not criminal offences. However, the Chief Justice may determine the pecuniary jurisdiction in a Gazette Notice.³ The courts are to be accessible in every county, as well as in other decentralized units of judicial service delivery. They shall be guided by the constitutional principles that guide other courts that are established in the Constitution under Article 169 mandating Parliament to establish other subordinate courts or tribunals.

In perspective, the courts will provide a system shift from the usual adversarial to a near-Inquisitorial System. The courts will be presided over by flexible, active and engaging adjudicators instead of judges or magistrates who are perceived to be rigid, strict, and unfriendly. They will be qualified full-time or a part-time lawyers with a minimum 5 years' experience. The courts will only handle civil disputes and are designed to reduce the backlog of cases.⁴ Essentially, they will handle, *inter alia*, claims relating to contracts for sale and supply of goods and services, contracts relating to money held and received, liability in respect to loss or damage of property and compensation for personal injuries. Besides cases of property

¹ Goldschmid op. cit. note 47.

² Bangalore Principles on Judicial Conduct, 2002.

³ Small Claims Court Act Section 12(3).

⁴ Government of the Republic of Kenya The Judiciary *Report of the Sub-Committee on the Ethics and Governance of the Judiciary* op. cit. note 24.

damage, the courts will help suppliers to claim payments from companies, the government or individuals faster than higher courts. Particularly, family cases, divorce, claims based on defamation, libel, slander, malicious prosecution, land disputes, employment and labour relations will not be admissible.

The courts are designed to ensure simplicity of procedure accessibility, cost friendliness and cultural appropriateness. The Courts will control their own procedure which will be simple; technical rules about evidence need not be used. Only individuals will be allowed to file cases in the courts. An individual a case cannot use a lawyer but would appear personally to argue the case or a representative e.g. Paralegals. The claimant or defendant must reside or carry on business within the local limits of the jurisdiction of the Court; the subject matter of the claim must be situated within the local limits of the jurisdiction of the Court; the contract to which the claim relates must either have been made or be intended to be performed within the local limits of the Court; the cause of action must have arisen within the local limits of the Court. The Act does not preclude a person from lodging a claim that is within the jurisdiction of the Small Claims Court in any other court if they elect to do so. Corporate bodies can only participate in the court as defendants. Particularly, the Act doesn't provide for provision for filing fees. Regarding enforcement of an order of the Court, filing fees are to be paid by the losing respondent, no award of costs except for judgment in default of appearance and cost awards by High Court in relation to appeals of the Court's awards. Cases are mandated to be heard and decided within a day thus reducing hearing periods.⁵ Any party who is not satisfied with the decision of the adjudicator can appeal to the High Court. English and Kiswahili may be used, and the courts are encouraged to make it possible for people to use other "indigenous" languages if necessary. This helps to promote understanding of the court processes, procedure and proceedings.

The SCCA2016 provides for establishment of a court system that will revolutionise the access to justice. They will place mechanisms that are friendly, cost effective, and accessible to the common citizen. However, much still needs to be done to ensure its implementation including; set-up of the courts, the choice of impartial and approachable adjudicators, awareness creation in the community, funding for proper operations, the use of ICT, capacity building for adjudicators, research on best practices, and broadening of the mandate of the Courts to include pertinent local issues.

c. The Act

The Small Claims Court was established through the **Small Claims Court Act,2016** which is yet to be operationalised. The backbone of the establishment of the Small Claims Court is Article 169 (1)(d) of the Constitution of Kenya,2010 which provides for subordinate courts established by Acts of Parliament. The Small Claims Court (Amendment) Bill,2020 amended the Small Claims Court Act,2016 on the matters of pecuniary jurisdiction of the court, representation of parties before the court and the adjournment of matters before the court. Below is an analysis of the amendments to the Act

⁵ Section 34(1)

Analysis of the Amendments to the Small Claims Court Act

CURRENT PROVISIONS	AMMENDMENTS	COMMENTS
Section 12(3)-The pecuniary jurisdiction of the Court shall be limited to two hundred thousand shillings.	Section 12(3) will be amended by deleting the words 'two hundred thousand shillings' and submitting therefore the words 'one million shillings'	-This will broaden the pecuniary jurisdiction of the Small Claims Court hence reducing the backlog from the magistrate's courts. However, it may also cause backlog in the Small Claims Courts because disputes of one million shillings and below represent a large number of disputes filed in the subordinate courts. In addition to these claims of huge amounts of money such as one million shillings will necessitate the invocation of strict rules of evidence and this will defeat the purpose of the Act.
<p>20. (1) A party to the proceedings shall appear in person or where he or she is unable to appear in person, be represented by a duly authorised representative.</p> <p>(2) The representative referred to in subsection (1) shall not be a legal practitioner.</p> <p>(3)A Court shall, before permitting a person to act as a representative under subsection (1), satisfy itself that the person has sufficient knowledge of the case and sufficient authority</p>	<p>Section 20 will be amended by</p> <ul style="list-style-type: none"> a) by deleting sub-section (2); and b) in sub-section (3), by inserting the words 'where the representative is not a legal practitioner' immediately after the words 'under sub-section (1)' 	<p>Deleting subsection (2) leaves room for advocates to be representatives of persons who appear before the small claims court. This will promote the right to a fair trial as enshrined in Article 50(2)(g) of the Constitution which includes the right to legal representation. However, in some instances this may end up complicating the matter for those representing themselves. This may lose the spirit of the Act as it was intended to ease the procedure for those representing themselves such as through the exclusion of the strict rules of evidence. Therefore it is prudent that the adjudicators of the court ensure that the simplified</p>

to bind the party being represented.		procedures of the court are complied with.
34.(3) The Court may only adjourn the hearing of any matter under exceptional circumstances which shall be recorded.	Section 34 will be amended by deleting sub-section(3) and substituting therefore with the following sub-section: (3) The court may allow up to three adjournments of the hearing of any matter on reasonable grounds which shall be recorded and may, in exceptional circumstances, allow other adjournments.	This will promote access to justice as enshrined under article 48 of the Constitution in instances where the litigants have compelling reasons to seek an adjournment, however, it may also be used as a tool for those litigants who may want to use delay tactics. The adjudicators must therefore exercise their discretion wisely.

d. What challenges does the Act pose for Mwananchi?

The amendment to Section 12(3) of the Small Claims Act to increase the pecuniary jurisdiction of the Act is problematic to the common mwananchi taking into account the problems already faced by our courts in dealing with the backlog of cases. The amendment will cause a backlog of cases in the Small Claims Court thus the cases of mwananchi will not be resolved in an expeditious manner. In addition to this, increasing the amount from KES 200,000 to KES 1 Million will hamper the access to justice of the mwananchi because in the current state of our economy 1 Million is a lot of money and hence a dispute of such an amount of money has to be subjected to the strict rules of evidence. The amendment of section 20 that brings legal practitioners on board in representation of the litigants in court may lead to lengthened litigation that is coupled with complex procedures.

On the flipside, the amendment to section 20 that allows advocates to appear before the small claims court to represent the litigants will promote access to justice for parties to a claim who opt to be represented by advocates even in the simplified nature of the courts. However, the adjudicators of these courts will have to ensure that the simplified nature of these courts will have to be complied with in order to protect the reason the Small Claims Courts were established to provide inexpensive and expedited justice.

e. A Call for Collaboration

Civil Society Organizations should engage in advocacy efforts mainly targeted to influence policies and decisions at different levels including county, national, regional and international levels. The programme should implement advocacy through a combination of strategies including lobbying, activism, awareness creation and capacity building, research, surveys, media outreach, social media campaigns, community-based dialogues, and public interest litigation for advocacy.

First, CSOs should conduct a baseline research and survey to provide information on the best practices to implement the set-up of the court, and the level of perception and confidence of the Small Claims Courts. This will provide content and information that shall inform the process of establishment of the courts through-out the country as well as development of Information, Education and Communication materials to be distributed to communities. Importantly, it will inform the inclusion of the Small Claims Courts into existing utile structures like the Court User Committees. Further to that, CSOs can contribute towards the choice and vetting of the adjudicators and further provide capacity building trainings to ensure that they are well equipped for their work. CSOs can further carry community-based dialogues to create awareness and civic education on the existence, procedure and processes of the Small Claims Court.

The inclusion of media and the use of social media campaigns will ensure that the highest number of citizens are sensitised on pertinent issues. This will also facilitate response and feedback from the community regarding the functionality and efficiency of the Courts through narratives and stories developed by media practitioners working in print, broadcast media as well as the blogosphere. Training of these media personalities is mandatory to ensure efficiency in monitoring impact of the Courts. Lobbying and activism will also be pertinent to ensure that Article 50 of the Constitution is observed; that the Small Claims Court must be independent from all improper influences and guarantee an impartial and procedurally fair adjudication process.

CSOs can also engage in Public Interest Litigation to inform changes in policies and practices in the Small Claims Courts arena.

In conclusion, CSOs needs to implement the various advocacy initiatives mentioned above to clearly convince the public that the courts are informal, welcoming, affordable, accessible, and friendly to all including the indigent.