



A REVIEW AND
COMMENTARY ON THE
**SMALL CLAIMS
COURT BILL 2015**



Published by:

The Kenyan Section of the International Commission of Jurists (ICJ Kenya)

Vihiga Road, Kileleshwa

P. O. Box 59743-00200 | Nairobi-Kenya

Office Tel: 020 208 4836/8 | Office Mobile: 0720 491 549

Fax: 020 387 5982

Email: info@icj-kenya.org | Website: www.icj-kenya.org

Facebook: <https://www.facebook.com/ICJ.Kenya>

Twitter: twitter.com/icjkenya

ISBN No. 9966-958-10-x

Design & Layout:

Willart Productions Limited,
Kamburu Drive, off Ngong Road
(opposite Transworld Radio).

Tel: 020 8097126

Cell: 0721 919 933, 0728 601385

Email: Info@willart.com

www.willart.com

ICJ KENYA

STRENGTHENING JUDICIAL REFORMS
VOLUME 15

A REVIEW AND COMMENTARY ON THE
SMALL CLAIMS COURT BILL 2015

ACKNOWLEDGEMENT

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) would sincerely like to thank all those who have contributed towards the publication of this report. ICJ Kenya is grateful to Godfrey Musila for conducting the research and collating information whose findings informed this report.

A special thank you is also due to the members of ICJ Kenya, the Council and the Access to Justice Programme team comprising of Anita Nyanjong, Teresa Mutua, Tabitha Kimotho and Victor Holi for their continued work around judicial reforms and access to justice.

The publication of this report was made possible through the generous support of the Royal Danish Embassy in Nairobi through the Drivers of Accountability Programme (Kenya) to whom we are most grateful.

Thank you all

George Kegoro
Executive Director

EXECUTIVE SUMMARY

This report reviews the Small Claims Court Bill, 2015 (SCC). In its statement of objects and reasons, the principal objective of the Bill is stated to be: 'to give effect to Article 48, 159 and 169 of the Constitution'. According to the Statement, it is provided that an attempt is made to establish a court that 'which shall resolve disputes informally, inexpensively and expeditiously in accordance with the principles of law and natural justice.'

The report reviews, and makes recommendations in relation to various aspects covered in the draft law: constitutional basis for jurisdiction (personal, pecuniary, subject matter and geographic); institutional design; various issues relating to SCC staff and; procedure of the SCC.

As a context, and constitutional basis for small claims courts, various provisions that create substantive rights, and constitutional principles are outlined. These include the right to access to justice, fair administrative action, fair hearing, right to information, principles relating to the exercise of judicial authority including alternative dispute resolution (ADR).

Small claims courts, with an initial pecuniary jurisdiction of KES 100,000, have the objective of facilitating access to justice by expanding the reach of the justice sector across the country to areas un-served by the existing courts. They will operate, according to the bill, a simplified procedure and provide flexibility in decision-making. The ICJ Kenya hopes that the Bill can be further improved based on the recommendations made and that the legislative process will be fast-tracked.

PART I:

INTRODUCTION

The section reviews the Small Claims Court Bill, 2007. Small claims courts provide an opportunity to expand the reach of the formal justice system and to facilitate access to justice for a category of claimants currently unable to access judicial services for various reasons. Small Claims Courts were considered as part of the reforms of the justice sector undertaken since the early 1990s. For various reasons however, the bills drafted by the Law Reform Commission were not enacted. The adoption of the rights-based Constitution of Kenya 2010, which contains a freestanding right to access to justice, calls for renewal of efforts to expand access to justice. In addition to the substantive right of access to justice, the Constitution recognises and mandates the judiciary to apply Alternative Dispute Resolution (ADR) in its adjudicative functions, in addition to dispensing justice without undue regard to procedural technicalities.

Approach to review

1. The draft text of the Draft Bill is reviewed to establish 1) whether it complies with the constitution and 2) for 'technical appropriateness'. The first aspect of the review has two planks. First, the constitutional anchor for small claims courts is identified, taking into consideration the structure of the courts established under the constitution. The second plank relates to the constitutionality of various provisions in the Bill. While this report does not discuss any relevant national values and principles detailed in article 10, it is appreciated that national values and principles underpin this review in keeping with constitutional imperative that they inform policy making and legislative processes as well as the application and interpretation of the same. The Bill of Rights is central to the review, in view of Article 19.1 of the Constitution, which establishes a mandatory framework for all governmental policies, including economic, social and cultural. With respect to the rights implicated in the review, particular reference is made the right to access to justice,¹ the right to a fair hearing,² the right to fair administrative action³ and the right to access information.⁴

1 Art 48 Constitution of Kenya, 2010

2 Art 50 Constitution of Kenya, 2010

3 Art 47 Constitution of Kenya, 2010

4 Art 35 Constitution of Kenya, 2010

2. The second aspect of the review focuses on technical aspects of the Small Claims Courts Bill. The technical review, which is conducted in comparative perspective with anecdotal reference to relevant aspects of South African's experience with SCC, adopts a thematic approach. Key themes considered include: the legal and policy framework of the SCC; establishment of the SCC; jurisdiction (personal, geographic and subject matter); structure and institutional framework of the SCC; role of various actors including adjudicators, clerks, and the Chief Justice.

Constitutional Anchor and the place of SCC within the Court System

3. The Constitution (Art 162) establishes a system of courts consisting of superior courts (Supreme Court, Court of Appeal and High Court) and subordinate courts. In terms of Art 169, subordinate courts consist of magistrate's courts, Kadhis courts and courts martial (169.1). Parliament is empowered to establish other subordinate courts or tribunals (Art 169.2). ***This provision, together with the provisions that mandate ADR and the constitutional rights outlined below, provides a constitutional anchor for the proposed SCCs, which may be designated as magistrate's courts or such other constitutionally compliant designation.***

The Right to Access to Justice

4. The 2010 Constitution of Kenya contains several provisions related to issues around access to justice. Article 48 includes a new right, specifically, the right of access to justice. The provision mandates the state to facilitate access to justice to all on an equal basis. The right to access to justice bundles several rights, including the right to access culturally appropriate, procedurally friendly, inexpensive (economically accessible) and physically accessible justice. In terms of physical access, the state should ensure that judicial services can be accessed around the country. SCC proffer an opportunity to extend the reach of judicial services to around the country particularly to the poor and marginalised, often located at the fringes of society in economic and geographical terms.

5. *It is recommended that when SCC are designed and operationalized, cost, geographic accessibility; cultural appropriateness and; procedural fairness should inform the process.*⁵
6. *With respect to filing fees, it is recommended that claims before SCC should be exempt.*
7. *It is further recommended that procedures relating to the interaction between the SCC and court users as well as among court users themselves should be accessible and simple (see recommendation below on prescribed forms).*

Fair Hearing

8. The right to a fair hearing, which applies to both criminal and civil cases, includes the right to an independent, impartial court or tribunal and the right to access or be afforded, particularly in criminal cases, relevant facilities to mount an effective defence.⁶ The right to a fair hearing is protected in art 50 (1) of the Constitution, which enacts 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.'
9. *For conformity with Art 50.1 of the constitution, SCC must be independent of all improper influences, and guarantee an impartial and procedurally fair adjudication process. This is a concern of institutional design to which further reference is made below.*

Fair Administrative Action

10. Art 47.1 of the Constitution provides that every person has the right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

5 It is noteworthy that the SCC Bill makes no provision for filing fees. In relation to enforcement of an order of the SCC, filing fees are to be paid by the losing respondent (s 40(6)); no award of costs by SCC (s 35) except for judgment in default of appearance (s 33) and cost awards by High Court in relation to appeals of SCC awards (s 47(2));

6 See Bangalore Principles on Judicial Conduct, 2002.

11. With respect to the content of the right, it can be forcefully argued that Article 47 entails the right: to be given (written) reasons, to an impartial arbiter and to be afforded an opportunity to advance one's case. In essence, article 47 is substantively about procedural fairness in decision-making relating to acts regarded as 'administrative', which ordinarily excludes *policy decisions* and the exercise of prerogatives of the executive (including County Executive), *legislative work* of Parliament (including country legislatures) and *adjudicative work* of the Judiciary.⁷ In general, decisions of the executive, legislature and judiciary that affect the right of individuals are *administrative action* to which Art 47 applies. There is need for legislation to further elaborate on this.⁸
12. The courts have interpreted the right to administrative action to extend to proceedings of the Judicial Service Commission as they relate to removal/dismissal of judges in line with Art 168 of the Constitution.⁹ This right and the Court's reasoning in *Mutava* should apply with equal force to the disciplinary and removal proceedings of magistrates as stipulated under the Third Schedule to the Judicial Service Act of 2011 as well as to all other SCC staff.
- 13. Procedural guarantees provided for in Third Schedule to the Judicial Service Act of 2011 in relation to dismissal of magistrates (and other judicial officers that may preside over SCC) appear sufficient, and in keeping with the constitutional right to fair administrative action. Consideration should also be given to extending their application to (pro bono) advocates or lawyers that may be appointed to serve as SCC adjudicators. Proceedings for their removal must comport with Art 47.1.**

7 See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1 cited by *Mutava* at para 88 et seq

8 See in the case of South Africa, the Promotion of Administrative Justice Act (PAJA), which provides lists of qualifying action.

9 *Joseph MbaluMutava v Attorney General & another* [2014] eKLR

Access to Information

14. The right to access to information is critical in any democratic dispensation, and by extension the administration of justice. The courts have held that in line with article 35 (1)(i), any citizen has the right, upon application through prescribed procedures, to have access to information held by public bodies and agencies subject only to reasonable restrictions (governed by Article 24 of the Constitution).¹⁰ The second limb of the right to access information (see Art 35(1) (ii) is that one has a constitutional right to access information held by any individual or entity when such information is required for the exercise and protection of constitutional rights.
15. It is recommended that institutional design should make provision for access to information held by SCC or relating to the SCC taking into consideration the likely users of these courts. Such information is not limited to the Registry but extends to such other information relating to the daily administration, and running of the SCC.

Constitutionally Mandated Alternative Dispute Resolution

16. Article 159(3) of the Constitution, which mandates the establishment of or recourse to alternative dispute resolution mechanisms and methods, provides additional substantive basis for the creation of SCC. It [Article 159] of the Constitution details the principles of judicial authority that must guide the exercise of judicial authority by courts and tribunals established by and under the Constitution. As part of these principles, those exercising judicial authority are required to adopt approaches that incorporate alternative dispute resolution mechanisms. In this regard, Article 159 2(c) provides that:

In exercising judicial authority, the courts and tribunals shall be guided by the following principles — alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).

10 See *Nairobi Law Monthly Company limited v Kenya Electricity Generating Company & 2 others* [2013] eKLR

17. These provisions also constitute formal recognition of traditional justice and dispute resolution mechanisms which employ ADR methods. In spite of this formal recognition coupled with a constitutional mandate for their inclusion, traditional dispute resolution and justice mechanisms have, more than three years since the promulgation of the Constitution, have remained outside formal debates and processes of judicial reform.

18. SCCs provide one avenue of implementing ADR as mandated by the constitution. Consideration could be given to linking traditional justice and conflict resolution mechanisms foreseen in Art 159(2) and (3) to SCC.

19. It is further recommended that current initiatives by the judiciary, CIC and CSOs relating to alternative justice mechanisms should reflect on how these articulate with formal ADR methods.

20. It is not in doubt that traditional dispute resolution mechanisms play a critical role in Kenya in terms of access to justice and resolving disputes that enhances security and peaceful co-existence within and among communities in various parts of the country. Several studies conducted by civil society organisations and academics illustrate this well.¹¹ The reach of formal justice remains short and unsatisfactory. Even as the judiciary makes efforts to expand the geographic reach of formal justice as part of ongoing reforms, there is a preference in some parts of the country for informal justice far apart from the necessity question. For a range of reasons, including those cited immediately above, traditional dispute resolution and alternative justice systems (sometimes loosely referred to by a variety of names: community justice, informal justice systems, indigenous justice systems; and non-state justice systems) will continue to fill important gaps in the delivery of justice, securing communities and enhancing peaceful co-existence within and among communities.¹²

¹¹ See for instance studies conducted by ICJ Kenya, FIDA and Legal Resource Foundation.

¹² Current manifestations of these systems in Kenya include: structures headed by council of elders (e.g. *NjuriNcheke, WazeewaMtaa, Kayas, Abagada* etc); 2) structures presided over by the Chief/Assistant-Chief (supported by village elders and; 3) (District) Peace Committees (pioneered in several parts of the country and organized around Provincial Administration).

- 21. While quick and practical models can be employed, it is recommended that a study into the feasibility of linking SCC to alternative justice mechanisms should be conducted based on current work by CSOs.***
22. The next part of this report consists of the technical review of the SCC Bill. It considers among other key issues, jurisdiction, institutional design, rights of parties and procedure.

PART II

TECHNICAL REVIEW

Personal Jurisdiction

23. Section 16(2) restricts the personal jurisdiction to natural persons, by providing that ‘the right to lodge any claim falling within the jurisdiction of the Court is restricted to natural persons.’ The same applies in South Africa where only a natural person may institute a claim in a SCC under South Africa’s Small Claims Act of 1984 (see s 7.1). A legal person can only be a defendant¹³ There is merit, however, in our proposal that personal jurisdiction be extended to legal persons, including partnerships and companies. We see no reason to differentiate in a case, for instance, where person A and B owe KES 70,000 and 80,000 for services or goods delivered to Mutiso and Company D respectively, yet only Mutiso can lodge a claim before a SCC. Equally,

24. It is recommended that the Bill provides for the right of corporate entities to institute claims before a SCC. Consideration should also be given to extending the right to lodge claims in an SCC to governmental entities such as parastatals as well as county governments.

Geographic Jurisdiction

25. Section 12(1) of the SCC Bill provides that the CJ shall determine and publish a notice in the Gazette designating the local limits of the jurisdiction of the SCC. Section 12(2) obliges the CJ to ‘ensure that such courts are accessible in every *sub-county* and progressively in other decentralized units of judicial service.’ The Bill does not state expressly that the SCC are to be established at the level of magistrates courts, although this is implied in proposed claim limits and current efforts by the Judiciary to install a magistrate court in each sub-county (former districts).

26. Considering the purpose and objectives of the SCC, it is recommended that SCC be established at the level of, or enjoy the status of an appropriate level within the magistracy as guided by claim limits (Bill sets this at KES 100,000) to be revised from time to time by the CJ by Notice in the Kenya Gazette.

13 Section 7.1 provides that only a natural person may institute an action in a court and, subject to the provisions of section 14 (2), a juristic [legal] person may become a party to an action in a court only as defendant.

27. The State of the Judiciary Report 2013-14 informs that there are at least 150 magistrates courts stations around the country, and a total 471 magistrates as of June 2013. It is unclear how many of the magistrates courts are District Magistrate's courts. The report decries the limited reach of formal justice, noting that to serve all the 285 districts (formerly sub-national political units which are now informally designated as sub-counties), an additional 172 magistrates' courts would have to be built, taking into consideration current distribution of magistrates courts. Reports also indicate that magistrates' courts are the mainstay in the delivery of judicial services and thus carry a disproportionate case backlog burden. Of the 657,760 cases pending in the courts by June 30 2013, 485,786 were in magistrates courts (see state of the Judiciary Report 2013/2014. p 29). It is thus evident that lack of capacity in terms of physical infrastructure and human resources as well as case backlog are key factors that should inform thinking around the establishment and rollout of a system of SCCs.

28. Since strategic planning will be critical to the viability of SCC, it is recommended that securing adequate levels of funding, including from donors should be prioritized. With respect to creation of SCC, consideration should be given to adopting an incremental approach in terms of which annual targets (of SCC to be established) are set and implemented. Creation of an SCC could entail reallocating work to serving magistrates, appointing and installing new magistrates in existing stations or posting magistrates (including newly appointed magistrates) to new courts to be built in un-served sub-counties.¹⁴

¹⁴ This approach has been adopted in South Africa, with the target of 384 SCC set to be achieved since the a Strategic Plan was adopted in 2003 to expand the reach of SCC from mostly white and urban areas to other un-served areas. See in this regard, DOJ, *Access to Justice for All: Annual Report 2013-2014 (2014)* 16; Se also DOJ, *Access to Justice for All: Annual Report 2012-2013 (20013)* 40.

Subject Matter Jurisdiction

29. With respect to subject matter jurisdiction, section 13 (1) of the SCC Bill provides that a small claims court shall have jurisdiction to hear and determine –

(a) a contract for sale and supply of goods services;

(b) a contract relating to money held and received;

(c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;

(d) compensation for personal injuries; and

(e) set-off and counterclaim under any contract.

30. On the scope of subject matter jurisdiction, we take the view that it should not be restrictive, and the guiding principle, should be that SCC can adjudicate *any claim of small value*. While in comparison to the 2007 draft bill s 13 of the current draft bill has broadened subject matter jurisdiction, it may not be entirely representative of the types of claims one encounters in most areas un-served by formal justice particularly in geographically marginalized parts of the country. The South African experience with SCC could be instructive. In terms of section 15 of the South African Small Claims Act, 1984, SCCs adjudicate the following claims: actions for the delivery or transfer of any property, movable or immovable; actions for ejection against the occupier of any premises or land within the area of jurisdiction of the court; actions based on or arising out of a liquid document or a mortgage bond (mortgage); actions based on or arising out of a credit agreement. It also includes what reads like a residual jurisdiction clause which confers upon SCC jurisdiction *over actions other than those already mentioned in this section [listed above], where the claim or the value of the matter in dispute does not exceed the amount stipulated by the Minister by Gazette Notice.*¹⁵ S 13(2) of the current bill can be interpreted as providing the basis for the SCC to adjudicate any civil claim. It

¹⁵ Some claims are however expressly excluded from the jurisdiction on SCC, see s 16 RSA SCC.

provides that ‘without prejudice to the generality of subsection (1) the Court may exercise any other civil jurisdiction as may be conferred under any other written law.’

31. *It is recommended that SCC's subject matter jurisdiction should extend to any civil claim involving a pecuniary interest not exceeding a stipulated amount as revised from time to time. In essence, claim amounts – rather than any particular categorization of civil claim – should determine the matters to be adjudicated by the SCC, which could include matters in respect of which special tribunals have been or could be established by law.*
32. *It is recommended that courts should view the list provided in s 13(1) as indicative of the types of claims that a SCC can adjudicate and determine and that their jurisdiction extends to any civil claim subject to established claim limits.*

Determination of SCC Award Limits

33. Section 13(3) and (4) provide respectively as follows:

The pecuniary jurisdiction of the Court shall be limited to Kenya shillings one hundred thousand.

Without prejudice to subsection (3), the Chief Justice may determine by notice in the gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit.

34. *It is recommended that section 13(4) should be revised to read that the Chief Justice may set, and adjust upwards, by notice in the Kenya Gazette, the claims limits of the SCC.*

Legal Representation

35. Section 22 of the Bill provides for the right to representation without specifying whether representation is by an advocate. As per s 22(2) of the Bill, the qualification for an authorized representative is 'knowledge of the case'. The generality of the criterion 'knowledge' would allow for representation by lawyers and non-lawyers, although a bar can be set requiring authorized representatives to have paralegal training as a minimum qualification. The provision is problematic in at least two ways. First, legal representation could militate against one of the objectives of establishing SCC, which is to facilitate access to justice by simplifying procedure as well as the language of the courts. Second, it could reproduce the inequalities that currently prevail in the courts where unrepresented litigants (or those represented by persons untrained in the law) are disadvantaged vis a vis those represented by lawyers.

36. It is recommended that the Bill should stipulate that for both natural and legal persons, there is no automatic right to legal representation, but provision for the right to representation at the appeal stage should be made. For legal persons, the Bill should stipulate that they shall be represented by a director or other nominated officer or representative.

Institutional Framework: Adjudicator, Registrars and Clerks

37. This part reviews sections of the Bill relating to the institutional framework of SCC.

Adjudicators

38. Adjudicators are appointed by the Judicial Service Commission but the Chief Justice may also 'designate any judicial officer to act as an Adjudicator' (s 7), appointed on fulltime or part-time basis. However, the bill does not detail the procedure relating to the appointment process. Presumably, the procedure applicable to the appointment of magistrates will apply. With respect to removal, section 57 provides that applies, with necessary modifications, the procedure applicable to the removal of and discipline of Magistrates to the discipline and removal of Adjudicators.
39. *With respect to conditions for eligibility, section 6 provides that to be eligible for appointment as an adjudicator, one must be a legal academic with at least five years of experience or an advocate of at least 3 years standing. Consideration could also be given to expanding the pool of those eligible to include retired magistrates.*¹⁶
40. *Whether or not adjudicators are remunerated,¹⁷ it is recommended that provision should be made for pro bono work by lawyers, legal academics and retired judicial officers with legal training. This may require flexibility in terms of appointment periods and stations of service. The Law Society of Kenya (LSK) should be actively involved in planning and working out plans for sourcing of adjudicators, including through mandated pro bono work.*

Registry and Registrars

41. On appointment of Registrars, s 7 provides that

the Judicial Service Commission shall, pursuant to Article 162(1) of the Constitution of Kenya appoint such number of Adjudicators, registrars and other officers of Small Claims Courts as may be necessary for the effective discharge of the functions of the Court.

¹⁶ In South Africa, the Minister of Justice appoints adjudicators (designated as commissioners) 'from the ranks of attorneys, advocates, retired magistrates and legal academics'. See, DOJ, *Small Claims Courts: Guidelines for Commissioners (2010)* 35.

¹⁷ In South Africa, the SCC system relies entirely on unremunerated work of adjudicators. See DOJ, *Small Claims Courts: Guidelines for Commissioners (2010)* 37.

42. Yet Article 162 of the constitution does not relate to appointment of judicial officers. Instead, the question of and appointment of judicial officers is conferred on the Judicial Service Commission under Article 172 (1) (c)
- 43. *It is recommended that the provisions in the 2007 Bill on the establishment of the registry and appointment of registrars and other SCC staff should be reinstated. These are ss 16 and 17.***
44. Section 16 of the Bill established an SCC registry in which records of the SCC are to be kept. Section 17 of the Bill made provision for the appointment of a Clerk/Registrar for each SCC 'and such officers as may be necessary for the proper functioning of small claims courts' by the Chief Justice. The Judicial Service Commission, which is mandated in the 2015 Bill to make the appointments can be inserted in the provision.
45. Section 9 provides for eligibility criteria. For one to be appointed as registrar, he or she must (a) hold a law degree with 5 years legal experience; or (b) is an advocate of the High Court of Kenya of at least 5 years standing and; 'has demonstrated competence in the performance of administrative duties for not less than two years.' It appears that experience as an administrator is an additional condition to (a) and (b).
46. In South Africa, the clerk and other SCC staff (including assistant clerks, interpreters, and legal assistants) are appointed by the magistrate of the district in which the seat of a court is situated.¹⁸
47. Consideration could be given to delegating the power to appoint SCC registrars and SCC staff to the Chief Registrar to the Judiciary in consultation with the most senior magistrate in each respective area of jurisdiction.¹⁹

18 Ss 11(1) and (2) SCC Act.

19 In South Africa, the clerk and other SCC staff (including assistant clerks, interpreters, and legal assistants) are appointed by the magistrate of the district in which the seat of a court is situated. Ss 11(1) and (2) SCC Act

Procedure and Evidence

48. In addition to mandating the use of ADR, Art 159(2) of the Constitution obliges courts to administer justice without undue regard to procedural technicalities. In view of the fact that the scope and complexity of rules applied by courts and tribunals impedes access to justice for particular categories of litigants, efforts to simplify rules or to design adjudication processes tailored to those previously excluded should facilitate access to judicial services. In this regard, s 34 stipulates that the Court shall not be bound by the strict rules of evidence.
49. The general rule stipulated in s 15 (4) of the SCC Bill 2007 to the effect that 'A small claims court shall determine the dispute according to the substantial merits and justice of the case and in doing so shall have regard to the law but shall not be bound to give effect to strict legal forms or technicalities' comported with Art 159(2) of the Constitution.
- 50. It is recommended that s 15 of the SCC Bill 2007 should be reinstated.***
51. On the informality of procedure operated by SCC, the Memorandum of Objects and Reasons states that:

The principal objective of this Bill is to give effect to Article 48, 159 and 169 of the Constitution. In furtherance of the said objective; the Bill proposes to establish a Small Claims Court, which shall resolve disputes informally, inexpensively and expeditiously in accordance with the principles of law and natural justice (emphasis added).

52. The stated objective of setting up SCC that adopt an informal approach to adjudication by the SCC is not reproduced in the text of the Bill. It is our view that the approach should not only be informal, but also non-adversarial. In view of the objectives of SCC, which include dispensing accessible, and expeditious justice, while operating simplified procedure, SCC adjudicators have to play an important role in proceedings, which must, as of necessity adopt

an inquisitorial rather than adversarial format which features an enhanced role for judges than is customary in the common law tradition.

53. Although s 21 of the Bill does not characterize proceedings before SCC as inquisitorial, it mandates an informal conduct of proceedings. In terms of s 21(1) of the Bill, the court may also *on its own motion*, or on request of any party, summon any witness or require the production of any document. Moreover, the Court can ‘inquire into any matter, which it may consider relevant to a claim, whether or not a party has raised it’(s 26(2)). This is descriptive of elements of the inquisitorial judicial tradition.
- 54. *Taking into consideration the fact that the Kenyan legal system follows the common law tradition, and associated adversarial approach to litigation, it is recommended that emphasis should be placed on the need to adopt in formal and inquisitorial adjudicative methods in training of magistrates, registrars and clerks.***
55. It is the ICJ Kenya’s view that the SCC procedure detailed in the Bill from lodging of complaints to final determination of claims align with constitutional principles on the exercise of judicial function (Art 159(2)(d)) which obliges courts to administer justice without undue regard to procedural technicalities.

SCC Review powers and the right to appeal and Supervision by HC

56. S 44 of the bill donates power to the adjudicator to review his/her own decision on specified grounds while s 41 provides for the right to appeal, which lies to the High Court. In terms of the constitution, the High Court also has jurisdiction to interpret the constitution (Art 165.2.d) and enforce the Bill of Rights (Art 165.2b). For its part, Article 165(6) of the Constitution grants the High Court supervisory powers over ‘subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function’. This provision provides a basis for the HC to clarify the law and guide SCCs on constitutional and human rights issues that may arise in claims proceedings before them. Once a decision is reached on a constitutional or human rights issues raised by the SCC, the claim

is remanded back to the SCC for final determination. Although provision for a right to an appeal could be anachronistic in the sense that it negates the efficiency of decision-making by SCC, expeditious justice and simplicity of proceedings (it prolongs the process, and burdens the HC), it is perhaps the most efficient route especially in matters that implicate a constitutional question. The best approach would be to create a right to appeal to a magistrate's court ranked higher than the SCC, with referrals to the HC by the SCC (court of first instance) or higher magistrates court (RM or SRM) in cases where a constitutional questions are implicated.

57. It is recommended that the bill be revised to make provision for the right to appeal to a magistrate's court higher than then SCC rather than the High Court. It is further recommended that the Bill should be revised to make provision for referral of appropriate cases to the High Court.

Operationalising the SCCs: Institutions and Approach

58. It was noted above that formal justice has limited reach and that lack of resources – human and physical infrastructure – bedevil administration of justice. Equally, case backlog disproportionately impacts magistrates courts, the geographic distribution of which is unclear. This section briefly reflects on the operationalization of SCCs.
59. Given the great demand for judicial services in many parts of the country, it is necessary to prioritize areas of greatest need. It is thus critical to develop a strategic plan for the operationalization of SCC, which details among others establishment plan, funding sources, mapping of the country and identification of pilot sites. Pilot stations could be chosen based on various characteristics for purposes of drawing lessons for the bigger project. These should include new SCCs in geographically marginalized areas with the greatest need for judicial services, urban and peri-urban areas and rural areas. For the pilot stations, several magisterial stations can be chosen, with magistrates presiding of SCC during the pilot phase.

60. In terms of *institutional framework*, National Steering Committee headed by the CJ and/or Chief Registrar working with CJ and Chief Registrar is proposed. The JSC can serve as the National Steering Committee. Among the functions of the NSC would be to develop SCC a strategic plan for the operationalization of detailing among others, establishment plan and funding sources.

Rules, Policies and Administrative Guidelines

61. Section 60 mandates the Chief Justice to makes rules of practice and procedure of court.

62. It is recommended that the making of rules be guided by the need to achieve simplicity of procedure, a core objective to achieving accessible justice and expeditious justice.

63. To facilitate training and to guide adjudicators and registrars, the Judiciary Training Institute should be mandated to develop Guidelines for Adjudicators and Guidelines for Registrars Clerks.²⁰

20 See for instance, RSA DOJ, Small Claims Courts: Guidelines for Clerks (2010)

PART III

RECOMMENDATIONS

64. It is recommended that when SCC are designed and operationalized, cost,²¹ geographic accessibility; cultural appropriateness and; procedural fairness should inform the process.
65. With respect to filing fees, it is recommended that claims before SCC should be exempt.
66. It is further recommended that procedures relating to the interaction between the SCC and court users as well as among court users themselves should be accessible and simple (see recommendation below on prescribed forms).
67. For conformity with Art 50.1 of the constitution, SCC must be independent of all improper influences, and guarantee an impartial and procedurally fair adjudication process. This is a concern of institutional design to which further reference is made below.
68. Procedural guarantees provided for in Third Schedule to the Judicial Service Act of 2011 in relation to dismissal of magistrates (and other judicial officers that may preside over SCC) appear sufficient, and in keeping with the constitutional right to fair administrative action. Consideration should also be given to extending their application to (pro bono) advocates or lawyers that may be appointed to serve as SCC adjudicators. Proceedings for their removal must comport with Art 47.1.
69. It is recommended that institutional design should make provision for access to information held by SCC or relating to the SCC taking into consideration the likely users of these courts. Such information is not limited to the Registry but extends to such other information relating to the daily administration, and running of the SCC.
70. Given that SCCs provide one avenue of implementing ADR as mandated by the constitution, consideration should be given to linking traditional justice and conflict resolution mechanisms foreseen in Art 159(2) and (3) to SCC.

21 It is noteworthy that the SCC Bill makes no provision for filing fees. In relation to enforcement of an order of the SCC, filing fees are to be paid by the losing respondent (s 40(6)); no award of costs by SCC (s 35) except for judgment in default of appearance (s 33) and cost awards by High Court in relation to appeals of SCC awards (s 47(2));

71. It is further recommended that current initiatives (study) by the judiciary, CIC and CSOs relating to traditional justice mechanisms should reflect on how these articulate with formal ADR methods.
72. While quick and practical models can be employed, it is recommended that a study into the feasibility of linking SCC to traditional justice mechanisms should be conducted based on current work by CSOs.
73. It is recommended that the Bill provides for the right of corporate entities to institute claims before a SCC. Consideration should also be given to extending the right to lodge claims in an SCC to governmental entities such as parastatals as well as county governments.
74. Considering the purpose and objectives of the SCC, it is recommended that SCC be established at the level of, or enjoy the status of an appropriate level within the magistracy as guided by claim limits (Bill sets this at KES 100,000) to be revised from time to time by the CJ by Notice in the Kenya Gazette.
75. Since strategic planning will be critical to the viability of SCC, it is recommended that securing adequate levels of funding, including from donors should be prioritized. With respect to creation of SCC, consideration should be given to adopting an incremental approach in terms of which annual targets (of SCC to be established) are set and implemented. Creation of an SCC could entail reallocating work to serving magistrates, appointing and installing new magistrates in existing stations or posting magistrates (including newly appointed magistrates) to new courts to be built in un-served sub-counties.²²

22 This approach has been adopted in South Africa, with the target of 384 SCC set to be achieved since the a Strategic Plan was adopted in 2003 to expand the reach of SCC from mostly white and urban areas to other un-served areas. See in this regard, DOJ, *Access to Justice for All: Annual Report 2013-2014 (2014)* 16; See also DOJ, *Access to Justice for All: Annual Report 2012-2013 (2013)* 40.

76. It is recommended that SCC's subject matter jurisdiction should extend to any civil claim involving a pecuniary interest not exceeding a stipulated amount as revised from time to time. In essence, claim amounts – rather than any particular categorization of civil claim – should determine the matters to be adjudicated by the SCC, which could include matters in respect of which special tribunals have been or could be established by law.
77. It is recommended that courts should view the list provided in s 13(1) as indicative of the types of claims that a SCC can adjudicate and determine and that their jurisdiction extends to any civil claim subject to established claim limits.
78. It is recommended that section 13(4) should be revised to read that the Chief Justice may set, and adjust upwards, by notice in the Kenya Gazette, the claims limits of the SCC.
79. It is recommended that the Bill should stipulate that for both natural and legal persons, there is no automatic right to legal representation, but provision for the right to representation at the appeal stage should be made. For legal persons, the Bill should stipulate that they shall be represented by a director or other nominated officer or representative.
80. With respect to conditions for eligibility, section 6 provides that to be eligible for appointment as an adjudicator, one must be a legal academic with at least five years of experience or an advocate of at least 3 years standing. Consideration could also be given to expanding the pool of those eligible to include retired magistrates.²³
81. It is recommended that the provisions in the 2007 Bill on the establishment of the registry and appointment of registrars and other SCC staff should be reinstated. These are ss 16 and 17.
82. It is recommended that s 15 of the SCC Bill 2007 should be reinstated.

23 In South Africa, the Minister of Justice appoints adjudicators (designated as commissioners) 'from the ranks of attorneys, advocates, retired magistrates and legal academics'. See, DOJ, *Small Claims Courts: Guidelines for Commissioners (2010)* 35.

83. Taking into consideration the fact that the Kenyan legal system follows the common law tradition, and associated adversarial approach to litigation, it is recommended that emphasis should be placed on the need to adopt informal and inquisitorial adjudicative methods in training of magistrates, registrars and clerks.
84. It is recommended that the bill be revised to make provision for the right to appeal to a magistrate's court higher than then SCC rather than the High Court. It is further recommended that the Bill should be revised to make provision for referral of appropriate cases to the High Court.
85. It is recommended that the making of rules be guided by the need to achieve simplicity of procedure, a core objective to achieving accessible justice and expeditious justice.
86. To facilitate training and to guide adjudicators and registrars, the Judiciary Training Institute should be mandated to develop Guidelines for Adjudicators and Guidelines for Registrars Clerks

Published by

The Kenyan Section of the International
Commission of Jurists (ICJ Kenya)

P.O Box 59743-00200

Nairobi Kenya

Tel: 254-020 - 2084836/8

Mobile: 254-720-491549, 254 733-491549

Email: info@icj-kenya.org

Website: <http://www.icj-kenya.org>