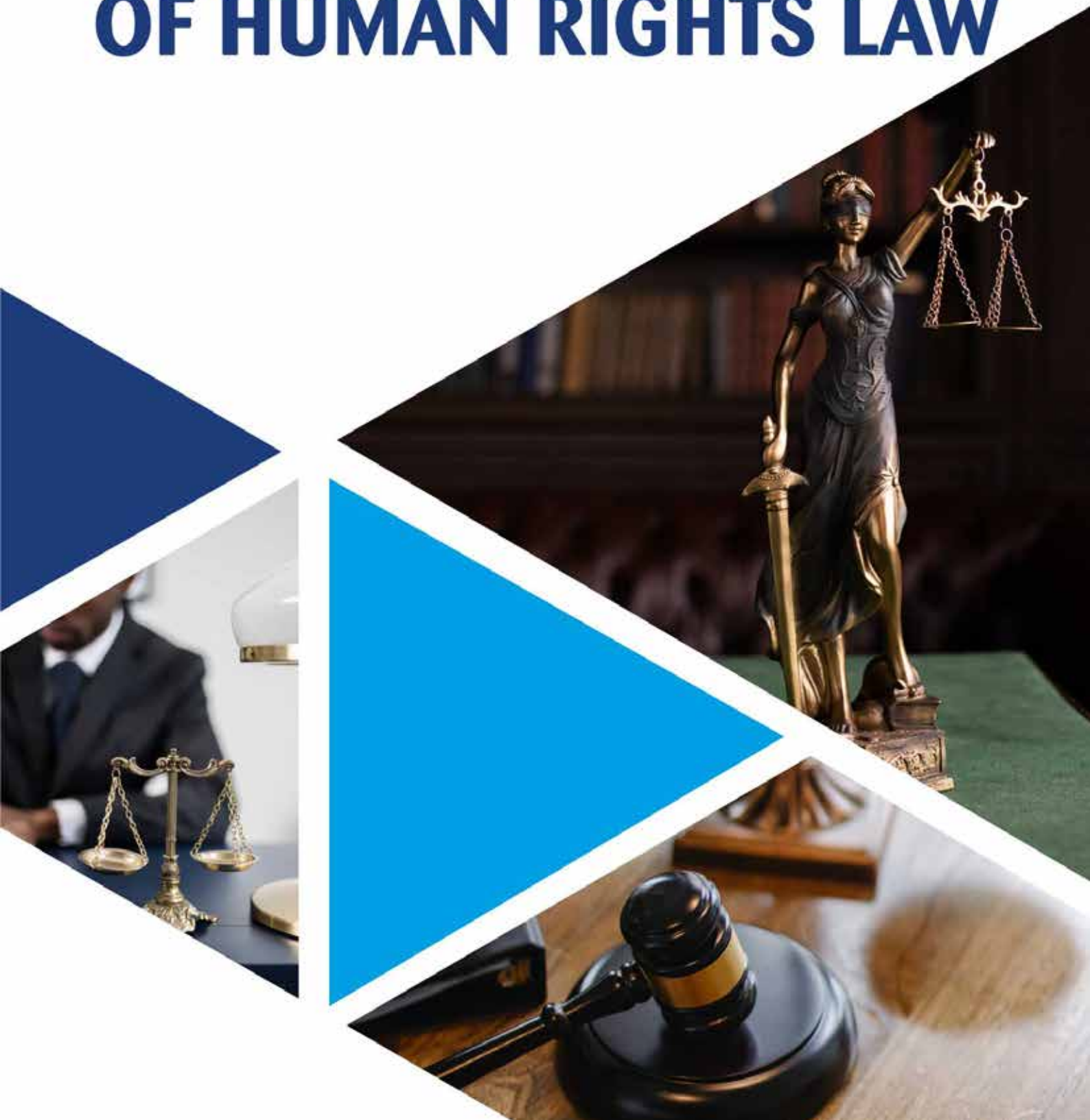


# SIMPLIFIED VERSIONS OF HUMAN RIGHTS LAW





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Finally, we wish to thank our development partner, CS Mott Foundation, for the generous financial support towards this publication's development.

Signed



Protas Saende  
Chairperson  
ICJ Kenya



## FOREWORD

ICJ Kenya has developed a strategic plan for 2021-2024, which outlines the organisation's roadmap and goals for the defined period. This road map is geared towards realising a vision of a just, inclusive, and equitable society where everyone lives in dignity. In the strategic plan, the organisation has committed to strengthening access to justice and legal redress for poor, marginalised and/or minority communities as a core thematic focus that will promote human rights, democratic governance, justice, and the rule of law in Africa.

Paralegals play an integral role in promoting access to justice for indigent and marginalised persons at the grassroots level. They are familiar with local power dynamics and customs. In addition to this, they possess basic knowledge of laws and formal justice institutions' procedures. They devise flexible and innovative solutions to justice problems on behalf of their communities. Their ability to translate complex legal concepts into local languages has made them particularly useful in raising awareness of rights, policies, and laws.

Since 1996, ICJ Kenya has coordinated six paralegal networks based in Kwale, Taita Taveta, Meru, Kitui, Trans Mara and Laikipia counties in Kenya. These paralegal networks have been crucial in promoting and protecting human rights at the grassroots. One of the ways they have achieved this is by providing legal assistance to low-income earners whose rights have been violated or persons in conflict with the law.

ICJ Kenya has developed this easy reference guide for use by paralegals in resolving day-to-day conflicts in the community. These specific laws were identified by analysing the monthly reports sent by the paralegals to the organisation on the nature of cases they were handling. We hope this resource will enhance paralegals' knowledge of fundamental law and increase access to quality legal aid that responds to the community's needs.

Signed



Elsy C. Sainna  
Executive Director  
ICJ Kenya



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A close-up photograph of a wooden gavel and a brass scale of justice resting on a wooden desk. The gavel is in the foreground, and the scale is in the background. The text "LEGAL AID ACT, NO. 6 OF 2016" is overlaid on the bottom left of the image.

# LEGAL AID ACT, NO. 6 OF 2016



## 1.1 Introduction

The primary goal of the Legal Aid Act is to enhance access to justice, and by so doing, it gives effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution.

Article 19 (2) of the Constitution recognises the importance of protecting human rights in terms of preserving one's dignity, promoting social justice, et cetera.

Article 48 requires the government to ensure that justice is accessible to everyone.

Article 50 (2) (g) and (h) of the Constitution, on the other hand, provide for the right of representation and obligates the state to assign a person an advocate to assist in legal representation.

The Legal Aid Act further establishes the National Legal Aid Service, legal aid and legal aid fund.

## 1.2 Definition of Key Terms

### Section 2

Some of the important concepts found in the Act include:

“accredited paralegal” means a person approved by the National Legal Aid Service to provide paralegal services under the supervision of an advocate or an accredited legal aid provider;

“aided person” means a person who is granted legal aid, including:

- (i) a person who is granted legal aid temporarily; and
- (ii) a person whose grant of legal aid has been withdrawn.

“alternative dispute resolution” means settling a dispute by means other than through the court process and includes negotiation, mediation, arbitration, conciliation and the use of informal dispute resolution mechanisms;

“grant of legal aid” means a grant of legal aid under this Act and includes any amendments to that grant;

“indigent person” means a person who cannot afford to pay for legal services;

“legal aid” includes —

- (a) legal advice;
- (b) legal representation;
- (c) assistance in —
  - (i) resolving disputes by alternative dispute resolution;
  - (ii) drafting of relevant documents and effecting service incidental to any legal proceedings; and
  - (iii) reaching or giving effect to any out-of-court settlement;
- (d) creating awareness through the provision of legal information and law-related education; and
- (e) recommending law reform and undertaking advocacy work on behalf of the community;



“legal aid clinic” means a law clinic accredited by the Service or offered by an accredited legal aid provider;

“legal aid provider” means —

- (a) an advocate operating under the pro bono programme of the Law Society of Kenya or any other civil society organization or public benefit organization;
- (b) a paralegal;
- (c) a firm of advocates;
- (d) a public benefit organization or faith-based organization;
- (e) a university or other institution operating legal aid clinics; or
- (f) a government agency, accredited under this Act to provide legal aid;

“paralegal” means a person employed by the Service or an accredited legal aid provider who has completed a training course in the relevant field of study in an institution approved by the Council of Legal Education;

### 1.3 The Primary Goal of the Act

#### Section 3

The main aim of this Act is to create a governance framework to promote access to justice.

#### How does the Act facilitate access to justice?

The Act seeks to promote access to justice by doing the following:

- (i) ensuring affordable and accessible legal services to those who are unable to afford;
- (ii) establish a legal aid scheme;
- (iii) promotion of legal awareness;
- (iv) support community legal services by funding justice advisory centres, education, and research; and
- (v) promote the use of alternative dispute resolution methods.

### 1.4 Guiding Principles

#### Section 4

In carrying out its functions, the National Legal Aid Service is guided by the following principles; namely:

- (i) the principles of governance set out in Article 10 of the Constitution;
- (ii) the principles of the public service set out in Article 232 of the Constitution;
- (iii) the principles of impartiality, gender equality and gender equity;
- (iv) the principles of inclusiveness and non-discrimination;
- (v) protection of marginalized groups;
- (vi) the rules of natural justice; and
- (vii) treaty or convention ratified by Kenya, relating to the provision of legal aid.



## 1.5 National Legal Aid Service

### **Sections 5 to 8.**

The National Legal Aid Service is the institution with the primary responsibility to ensure the implementation of this Act.

The headquarters is in Nairobi, although the Service is allowed to devolve and establish offices in all the 47 counties for countrywide presence.

### **What are the powers of the National Legal Aid Service?**

The National Legal Aid Service has powers similar to those of companies, and as such, it can do the following:

- (i) Sue and be sued;
- (ii) Own properties such as land, vehicles, office equipment etc.;
- (iii) Perform other functions that a corporation is allowed by the law to carry out.

### **What are the functions of the National Legal Aid Service?**

In promoting access to justice, the National Legal Aid Service has numerous functions, and some of them include:

- (i) To establish and administer a national legal aid scheme;
- (ii) To formulate policies on legal aid and advise the government accordingly;
- (iii) Encourage the use of alternative dispute resolution methods;
- (iv) Regulate the education, training and certification of paralegals; and
- (v) Promote and supervise the establishment of legal aid services in universities, colleges and other institutions;

## 1.6 Board of National Legal Aid Service

### **Sections 9 to 23**

The Board is in charge of running the day-to-day activities of the National Legal Aid Service.

### **Composition of the Board**

The Board is made of 12 members whose appointments must adhere to the principles of equality, non-discrimination, regional balance and the 2/3 gender rule.

The chairperson and the vice-chairperson of the Board shall be of the opposite gender.

The members are:

- (i) The chairperson who is appointed by the President;
- (ii) a judge of the High Court nominated by the Chief Justice;
- (iii) the Principal Secretary (PS) responsible for matters relating to justice;
- (iv) The PS in charge of finance;
- (v) The PS is responsible for interior and co-ordination of National Government;
- (vi) the Director of Public Prosecutions;
- (vii) A representative of the Law Society of Kenya;
- (viii) A nominee of the Kenya National Commission on Human Rights;
- (ix) one person nominated by the Council for Legal Education from among universities



- with an operational, legal aid clinic;
- (x) one person elected by a joint forum of Public Benefit Organizations;
- (xi) A representative of the National Council of Persons with Disabilities; and
- (xii) The Director of the Board.

### **What are the qualifications for appointment as a member of the Board?**

One is qualified to be appointed as a member of the Board if the person meets the requirements below:

- (i) A Kenyan citizen;
- (ii) Compliant with Chapter Six of the Constitution;
- (iii) Holds a university degree recognised in Kenya;
- (iv) Has seven years of experience in the relevant field; and
- (v) Has a good standing in the society.

### **Who is disqualified from being appointed as a member of the Board?**

An individual is not qualified for appointment as a member of the Board if the person:

- (i) is a member of a governing body of a political party or an employee of a political party;
- (ii) is an un-discharged bankrupt;
- (iii) has been convicted of a criminal offence and sentenced to a term of imprisonment of not less than six months;
- (iv) Has been removed from office for contravening the provisions of the Constitution or any other written law.

### **What are the functions of the Board?**

As already explained, the Board's overall mandate is to manage the daily operations of the National Legal Aid Service.

To perform this role effectively, the Board has some specific functions, and they include:

- (i) formulate and review the policies of the Service;
- (ii) ensure that the Service performs its functions;
- (iii) monitor and evaluate the performance of the Service;
- (iv) appoint, train, discipline and remove members of staff from the Service;
- (v) set and monitor standards for the establishment and operations of legal aid schemes;

### **What are the powers of the Board?**

In order to function effectively, the Board has the powers to:

- (i) control, supervise and administer the assets of the Service responsibly;
- (ii) determine the capital and recurrent expenditure and for the reserves of the Board;
- (iii) receive any grants, gifts, donations etc. and disburse accordingly;
- (iv) open and manage banking accounts for the funds of the Service;
- (v) invest any of funds not immediately required for its purposes.

### **Tenure of Office**

#### **What is the meaning of tenure of office?**

This refers to the terms and conditions under which a person holds an office.

#### **What are the tenure requirements for the Board members?**

The following are the tenure conditions for holding office:

- (i) The chairperson holds office for a single non-renewable term of 6 years;
- (ii) A Board member except for the Principal Secretaries and the LSK representative is appointed for a single non-renewable term of 5 years;



- (iii) The chairperson and members of the Board shall serve on a part-time basis.

### **Under what circumstances can an office become vacant?**

The Act sets out several grounds on which office of a Board member may become vacant; including if the holder:

- (i) dies;
- (ii) stops being a member of the nominating body;
- (iii) is absent from three consecutive meetings of the Board without reasonable cause;
- (iv) resigns from office by notice in writing to the Cabinet Secretary;
- (v) becomes unable to perform due to physical or mental incapacity;
- (vi) is incompetent in their functions;
- (vii) declared bankrupt;
- (viii) violates Chapter Six of the Constitution; or
- (vii) is convicted of a criminal offence and sentenced to imprisonment for a term of not less than six months.

### **What happens when an office falls vacant?**

Whenever there is a vacancy, the Cabinet Secretary is required by the Act to do the following:

- (i) notify every vacancy in the Gazette within fourteen days of the occurrence of the vacancy;
- (ii) invite nomination of a replacement by the nominating bodies within fourteen days from the date of the Gazette Notice;
- (iii) appoint a new member to fill the vacancy within seven days from the date of receipt of the nominations; and
- (iv) an appointment to fill a vacancy shall be for the remainder of the term of the member being replaced and the new member shall be eligible for reappointment;

### **Procedures of the Board**

The following are the procedures of the Board:

- (i) A vacancy in the Board does not affect the legality of any decisions made by the Board;
- (ii) The business and affairs of the Board to be conducted in line with the Schedule;
- (iii) On the advice of the Salaries and Remuneration Commission, Public Service Commission may determine the remuneration of the Board members.
- (iv) The Board is independent.

## **1.7 Management and Staff of National Legal Aid Service**

### **Sections 24 to 28**

The National Legal Aid Service management is made of the Director who is the Secretary to the Board and the Chief Executive Officer of the Service and the secretariat.

#### **1.7.1 The Director**

The Director is an ex officio member with no right to vote at any meeting of the Board. With the board's approval, the Director may delegate his or her powers or functions to another person or member.

The Director holds office for a 3-year term and is eligible for re-appointment for one further term.



### **What are the qualification for a Director?**

For a person to qualify as a Director, one must meet the following conditions:

- (i) is a citizen of Kenya;
- (ii) has been an advocate of the High Court of Kenya for at least seven years; and
- (iii) meets the requirements of Chapter Six of the Constitution.

### **What are the responsibilities of the Director as a CEO of Service?**

As the CEO, the Director is responsible for:

- (i) implementing the decisions of the Board and managing the secretariat;
- (ii) manage and disburse funds from the Legal Aid Fund.

### **On what grounds can the Director be removed from the office?**

The Board can remove the Director on the grounds that:

- (i) becomes unable to perform due to physical or mental incapacity;
- (ii) is incompetent in his or her functions;
- (iii) declared bankrupt;
- (iv) violates Chapter Six of the Constitution.

The Director must be informed in writing of the reasons for the intended removal and given a chance for fair hearing.

## **1.7.2 Staff of the National Legal Aid Service**

The staff is the secretariat of the Service whose work is to provide administrative, secretarial and other assistance to the Service.

### **What is the composition of the staff of the Service?**

The secretariat comprises of professionals, technical and administrative officers, support staff appointed by the Board or seconded by Public Service Commission on the request of the Board. The secretariat is to be remunerated by the Board in consultation with the Salaries and Remuneration Commission.

## **1.8 The Legal Aid Fund**

### **Sections 29 to 34**

The Legal Aid Fund is managed by the Services and consists of money allocated by Parliament; grants, donations, loans, etc.

### **How is the Legal Aid Fund to be used?**

The Funds may be used to do the following; to:

- (i) pay for the expenses incurred in representing persons granted legal aid under the Act;
- (ii) pay the legal aid providers for their services and other expenses;
- (iii) meet the expenses of the operations of the Service.

### **Accounting for Legal Aid Fund**

The Board is obligated to prepare the estimates of the revenue and expenditure of the Service 3 months before the start of a financial year.



The Service may invest the Fund with the approval of the Cabinet Secretary.

The Service is required to submit to the Auditor-General the books and records of accounts for auditing.

## 1.9 Legal Aid Services

### Sections 35 to 39

#### What are some of the principles guiding the provision of legal aid services?

Legal aid services are to be provided based on the following principles:

- (i) It is the government to foot the expenses of those who qualify for legal aid services.
- (ii) The nature of cases to be covered are civil and criminal cases, children matters, the constitution and public interest cases, et cetera.
- (iii) It must be cost-effective and efficient.
- (iv) The Service is required to determine the legal needs of indigent persons and disadvantaged communities.
- (v) The Service is to establish priorities for providing legal aid and formulate policies.

#### Who is eligible for legal aid?

For one to qualify for legal aid services, such an individual must meet the following conditions:

- (i) Indigent;
- (ii) Resident in Kenya;
- (iii) A Kenyan citizen;
- (iv) A child;
- (v) A refugee;
- (vi) A victim of human trafficking;
- (vii) A stateless person;
- (viii) An internally displaced person.

In order to receive the legal aid services, one must apply to the National Legal Aid Services in the manner prescribed by the law.

#### What factors do the National Legal Aid Services consider when providing legal aid?

There are factors that the National Legal Aid Services must consider when deciding to provide legal aid to list of persons outlined above, namely:

- (i) the cost of the proceedings in relation to the expected benefits, i.e. is it justifiable, has a probability of success etc;
- (ii) availability of resources;
- (iii) the provision must be sustainable, i.e. must meet the present and future demands;
- (iv) nature, seriousness and importance of the case in question;
- (v) the conduct of the person warrants legal aid assistance;
- (vi) the proceedings relate to a matter that is of public interest;
- (vii) the person may suffer losses, damages or injustice if not provided with legal aid;
- (viii) involve expert cross-examination of witnesses or other complexity;

#### In what civil cases is legal aid not given?

- (i) Companies, corporations, NGOs;
- (ii) Taxes;



- (iii) Recovery of debts;
- (iv) Bankruptcy or insolvency; and
- (v) Defamation.

## 1.10 Use of Alternative Dispute Resolution

### Section 39

The National Legal Aid Service may recommend that those benefiting from legal aid use alternative dispute resolution methods to solve their cases.

#### Who may provide ADR?

An ADR service may be provided by a National Legal Aid Service employee or by a person or institution that the National Legal Aid Service engages.

## 1.11 Application for Legal Aid

### Sections 40 to 55

#### What is the procedure for applying for legal aid?

A person wishing to get legal aid must apply to the National Legal Aid Service:

- (i) in writing;
- (ii) apply before the final determination of the case by a court or a tribunal;
- (iii) the National Legal Aid Service is to assess one's qualification for legal aid.

#### Who may apply for legal aid?

An application for legal aid may be made by:

- (i) The applicant himself;
- (ii) any other person or institution that the applicant in writing authorizes.

#### How is the officer in charge of a detention facility responsible for legal aid?

The officer in charge of a prison, police station, remand home for children is required by the Act to:

- (i) ensure that every person held in such a facility is informed about the legal aid to establish whether the person desires to seek legal aid;
- (ii) maintain a register containing the names and response of those seeking to get legal aid;
- (iii) ensure that the legal aid application form is filled out by the person seeking legal aid and informs the National Legal Aid Service within 24 hours.

It is an offence to obstruct or stop one from applying for legal aid.

#### What are the duties of the Court?

The court has several roles to play in legal aid such as:

- (i) inform the accused of his or her right to legal representation;
- (ii) inform the National Legal Aid Service to provide the accused with the legal aid;
- (iii) determine whether substantial injustice might be due to the un-representation of the accused; and
- (iv) lack of legal representation will not stop the proceedings against the accused.



## Decision of the National Legal Aid Service on application for legal aid

The National Legal Aid Service has the prerogative to make several decisions on the application of legal aid, which include:

- (i) grant legal aid to the applicant subject to certain terms and conditions;
- (ii) refuse to grant legal aid to the applicant;
- (iii) if a grant for legal aid is given, the Service must specify the legal aid provider and the amount of the grant.
- (iv) consider the application for legal aid without undue delay within 48 hours of receipt;
- (v) the decision to grant legal aid or refuse the grant must be in writing;
- (vi) vary any decisions already made.

## How is the legal aid provider to notify other parties?

The legal aid providers are responsible for notifying other parties including the Registrar of the court in the following instances:

- (i) where a party to a civil matter is granted legal aid;
- (ii) when a new party joins the case; and
- (iii) if the grant of legal aid is withdrawn.

## Notification of change in circumstances

An applicant for legal aid or an aided person is required to notify the National Legal Aid Service of the following changes:

- (i) any increase in the income;
- (ii) any change in the address of the applicant aided person or the assisting person;

## What are the penalties for failing to give notice of change in circumstances?

Failure to notify the National Legal Aid Service of the changes may attract the following penalties:

- (i) the aided person risks losing legal professional privileges associated with the case;
- (ii) cancellation of the legal aid services to the aided person;
- (iii) the aided person may be compelled to reimburse the money spent in the case.
- (iv) an advocate or legal aid service provider who intentionally misleads the National Legal Aid Service may be disqualified or compelled to refund the money if already paid.

## 1.12 Review of legal aid grant

### Sections 49 to 51

An application for legal aid or an aided person may apply to the National Legal Aid Service to review the grant of legal aid.

## When can the National Legal Aid Service review its decision for an aided person?

The National Legal Aid Service may review any decision touching on the following issues:

- (i) any conditions imposed on a grant of legal aid;
- (ii) the suspension or cancellation of the accreditation of a legal aid provider;



- (iii) any amount payable by the applicant under the grant of legal aid;
- (iv) the appointment of a legal aid provider;
- (v) withdrawal or variation of the conditions of the grant.

After review, the National Legal Aid Service may reject the application, vary the terms of the grant or review its decision to grant legal aid.

### **When can the National Legal Aid Service review its decision for a legal aid provider?**

Any legal aid provider who is aggrieved by the amount payable for legal aid service is free to apply to the National Legal Aid Service to review the decision.

## **1.13 Withdrawal of legal aid**

### **Sections 52 to 53**

### **What is the National Legal Aid Service needed to do when withdrawing legal aid?**

Where the National Legal Aid Service intends to withdraw the legal aid:

- (i) it is required to notify both the aided person and the legal aid provider of such decision in writing;
- (ii) The notice must contain the intention to withdraw, the reasons for withdrawal and one's right to review the decision
- (iii) The aided person and the legal aid provider are at liberty to object to the withdrawal of the legal aid within 14 days.
- (iv) The National Legal Aid Service must notify the aided person, the legal aid provider and the Court within seven days of the date on which the withdrawal takes effect.

### **What are the consequences of the withdrawal of legal aid?**

The following are what happens if the National Legal Aid Service decides to withdraw the legal aid:

- (i) The withdrawal does not affect the obligations of the aided person under the grant, the rights of the Service to enforce any decisions or any of its obligations under the grant;
- (ii) the legal aid provider has the right to recover from the aided person any relevant monies;
- (iii) the legal aid provider is to apply for Court's permission to stop providing legal aid services.

### **Termination of legal aid providers' mandate by aided person**

The aided person can terminate the services of the legal aid provider by writing to the National Legal Aid Service who must provide another legal aid provider.

The National Legal Aid Service must notify the legal aid provider whose services have been terminated within seven days to allow the provider to respond and the termination must be handled fairly.

### **Appeal to High Court**

An applicant, an aided person or a legal aid provider who is aggrieved by a decision of the



National Legal Aid Service may appeal to the High Court within thirty days of the decision.

## 1.14 Accreditation of Legal Aid Providers

### *Sections 56 to 68*

A person or an organisation must be accredited or approved by the National Legal Aid Service to provide legal aid services.

#### **What is the criteria for accrediting legal aid providers?**

In consultation with the LSK, the AG, DPP and other persons, the National Legal Aid Service is responsible for developing the criteria for accrediting legal aid providers.

Anyone seeking to be accredited as a legal aid provider is required to apply to the National Legal Aid Service in a prescribed form.

#### **Register of accredited legal aid providers**

The National Legal Aid Service is required to maintain a register of accredited legal aid providers containing:

- (i) the personal details and contact addresses of all accredited legal aid providers;
- (ii) the nature of services to be provided by the legal aid providers;
- (iii) the number of cases being handled by the legal aid provider;
- (iv) The accredited legal aid providers register must be publicised and made available to be public at police stations, courts, prisons, etc.

## Obligations relating to professional conduct

#### **How does the National Legal Aid Service regulate the conduct of the legal aid providers?**

There are various rules set out in the Legal Aid Act to regulate the professional conduct of the legal aid providers. These relate to:

- (i) the protection of the rights and interests of an aided person;
- (ii) duties to the aided person, the Service, court or tribunal;
- (iii) taking reasonable steps to protect the interests of the Service and the aided person
- (iv) conflict of interest;
- (v) compliance with the rules of confidentiality;
- (vi) in the case of professionals, the duty to comply with the ethical standards of their respective professional bodies; and
- (vii) probity and ethical conduct.

#### **Records, monitoring and evaluation**

Any accredited legal aid provider must provide legal service and keep proper records of activities undertaken on behalf of an aided person to assist the National Legal Aid Service in monitoring and evaluation.



## Suspension of accreditation

### On what grounds can a legal aid provider be suspended?

An accredited legal aid provider may be suspended for the following reasons:

- (i) breach of conduct;
- (ii) convicted for an offence;
- (iii) fails to keep proper records of activities undertaken on behalf of an aided person or to provide legal services;

Any suspended legal aid provider must be notified within 7 days of the suspension, and the legal aid provider shall stop providing the services.

The legal aid provided may apply to the Service to review the suspension.

## Cancellation of accreditation

### On what grounds can the accreditation of a legal aid provider be cancelled?

Apart from suspend a legal aid provider, the National Legal Aid Service can also cancel the accreditation of such a person if:

- (i) the accreditation was obtained by mistake, fraud, undue influence or misrepresentation;
- (ii) does not meet the accreditation criteria;
- (iii) fails to provide the required services;
- (iv) adjudged bankrupt;
- (v) convicted of an integrity related offence.

Any legal aid provider whose accreditation is cancelled must be notified within 7 days of the cancellation and the legal aid provider shall stop providing the services.

The legal aid provider may apply to the Service for the review of the cancellation.

## Legal advice and assistance by paralegals

An accredited paralegal employed by the Service or supervised by an accredited body may provide legal advice and assistance as required by the Act.

The paralegal is not to demand for payment for the services he or she gives from an aided person and to do so is an offence.

## 1.15 Enforcement of Conditions of Legal Aid Grant

### Sections 69 to 71

The enforcement of the legal aid grant deals with the terms for providing the funds, recovery of costs and benefits and enforcement of judgements.

### What are the terms for providing funded services?

An aided person receiving legal aid is obligated to do the following:

- (i) pay a fee as required by the Service;



- (ii) pay the cost of the services if able to do so from his or her financial resources;

## **Recovery of costs and benefits**

The National Legal Aid Service or an advocate is entitled to recover costs awarded following assistance offered to an aided person.

## **Enforcement of judgment**

A legal aid provider is free to enforce a judgment or an out-of-court settlement in order to recover the proceeds of proceedings.

### **1.16 Award of Costs in Civil Suits**

#### ***Sections 72 to 74***

#### **What are rules governing the award of costs by the court?**

- (i) Generally, when an aided person loses the case, the court shall not award costs against him or her unless in exceptional cases;
- (ii) The Service shall not be liable to pay costs ordered against an aided person by the court;
- (iii) Generally, an aided person is not required to provide security for costs unless specified; and
- (iv) The Service shall not be liable to pay security of costs ordered against an aided person.

### **1.17 Payment for Legal Aid Services**

#### ***Sections 75 to 81***

The Legal Aid Act sets out the following guidelines for the payment of legal aid services:

- (i) Service sets fees payable to legal aid providers in consultation with relevant professional bodies;
- (ii) When determining the fees payable, the Service is required to consider the sustainability of the legal aid scheme, reasonableness, accessibility et cetera;
- (iii) The legal aid provider shall claim for payment in line with the Act.
- (iv) The National Legal Aid Service is to approve for payment claims made by legal aid providers.
- (v) The National Legal Aid Service may refund excess payments made by the aided person.

### **1.18 Miscellaneous Provisions**

#### ***Sections 82 to 87***

This part relates to the duty to privileged information or confidentiality, the Service's obligation to file annual reports and other reports to the Cabinet Secretary, offences under this law, delegation of power and the publishing of the Legal Aid Guide.



A photograph of a man in a white shirt and glasses holding a large umbrella with a black and white circular pattern over a woman in traditional Maasai attire. The woman is wearing a red beret, a blue and yellow shuka, and a colorful beaded necklace. She is smiling and looking down. Other people are visible in the background, including a woman in a colorful patterned dress and a man in a blue shirt.

# **MARRIAGE ACT, NO. 4 OF 2014**



## 2.1 Introduction

The Marriage Act combines the existing marriage laws into a single legislation. Currently, there are five types of marriages in Kenya. They include Christian, Civil, Customary, Hindu, and Islamic Marriages. The Act is set out in thirteen parts, which deals with various aspects.

Part one is Preliminary, while Part two bears the General Provisions. Parts three, four, five, six and seven deal with Christian, Civil, Customary, Hindu and Islamic Marriages, respectively. Appointments of Registrar's and Registration of Marriages are the object of Parts eight and nine.

Matrimonial Disputes and Proceedings, Rights of Action and Maintenance of Spouses occupy Parts ten to twelve. Part thirteen is on Offences and Penalties, while Part fourteen is on miscellaneous provisions.

## 2.2 Definition of Key Terms

### Section 2

"child" means an individual who has not attained the age of eighteen years;

"cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage;

"court" means a resident magistrate's court established under section 3 of the Magistrates' Courts Act (Cap. 10);

"dowry" means any token of stock, goods, money or other property given or promised in consideration of an intended marriage;

"faith" means an association of a religious nature and, in the case of any system of religious beliefs which is divided into denominations, sects or schools, any such denomination, sect or school;

"matrimonial proceedings" means proceedings instituted under Part IX and include proceedings for the payment of maintenance or custody of children instituted independently of a petition for a declaratory decree or annulment, separation or divorce;

"monogamous marriage" means a marriage whose character has been converted to a monogamous marriage by a declaration made under section 8, including an originally polygamous or potentially polygamous marriage;

"party", in relation to a marriage, an intended marriage or a purported marriage, means a spouse in a marriage, or the intended spouse to a marriage or purported spouse in a marriage;

"polygamy" means the state or practice of a man having more than one wife simultaneously;

"prohibited marriage relationship" has the meaning assigned to it in section 10;

"Registrar" means a person appointed under section 50 of this Act;



“spouse” means a husband or a wife; and

“witness” means to be present at, to observe, and to attest to the celebration of a marriage by signing one’s name to or putting one’s mark on a marriage certificate.

## 2.3 Concept of Marriage

### Section 3

#### What is marriage and how is it different from cohabitation?

Marriage refers to a voluntary union between a man and a woman, whether a monogamous union or a polygamous one. Generally, a marriage is expected to last until death unless on the death of a spouse or if divorce happens.

To cohabit refers to a situation where an unmarried couple lives together in a long-term relationship that resembles a marriage.

#### 2.3.1 Types Marriages in Kenya

### Section 6

There are five types of marriages in Kenya: Christian, Civil, Customary, Hindu and Islamic marriages. Christian, Hindu and civil marriages are monogamous while Islamic and customary marriages are polygamous in nature.

#### 2.3.2 Status of Parties to a Marriage

### Section 3

In a marriage, every party has equal rights. Even when their marriage comes to an end, the parties still have equal rights and this is normally in terms of the division of properties acquired during marriage, obligations towards children and so on.

In other words, neither gender; man nor woman shall be disadvantaged or discriminated on any grounds when their union collapses. Otherwise, a widow or a widower is free to remarry.

#### 2.3.3 Requirements for Recognising a Marriage

### Section 6

#### What conditions must a marriage meet in order to be recognised by the law?

To be considered lawful and recognised by the Marriage Act, a marriage must meet the following requirements:

- (i) A person can only get married when he or she attains the age of eighteen;
- (ii) Any marriage must be witnessed by two witnesses excluding Pastor, Sheikh or the person who officiates the marriage;
- (iii) All marriages must be registered with the Registrar of Marriages and a marriage certificate issued as proof that the union exists;



- (iv) A person in a monogamous marriage cannot contract another marriage;
- (v) Generally, a person in a polygamous marriage cannot contract a monogamous marriage;
- (vi) A polygamous marriage can be converted into a monogamous one where both parties agree voluntarily and allowed only where the man has one wife; the marriage officer witnessed the conversion, signed by the couple, and a new certificate issued to the converted couples.

## Failure to recognise a Union as marriage under the Marriage Act

A relationship between a man and a woman might fail to be recognised by the statute as marriage if their union is either prohibited under the law, void or voidable.

## What are the examples of prohibited marriages in Kenya?

The Marriage Act prohibits the following marriages:

- (i) Marriage between aunts, cousins, nephews, uncles, parents, sisters, brothers; grandparent, child, or grandchild of spouses or former spouse is prohibited;
- (ii) Marriage between an adopted person and the one adopting;
- (iii) Marriages that are forbidden by customary laws;
- (iv) Marriage between two people who are considered to have half-blood relationships;
- (v) However, marriages amongst cousins professing Islamic faith are not prohibited.

## When is a marriage void in law?

**“The term void means not binding. When one says that a marriage is void, it means that the marriage cannot be recognised by the law because was not contracted in compliance with the requirements set out in the Marriage Act.”**

In a void marriage, the married parties are treated as if there was no marriage at all and this may happen under the following circumstance:

- (i) If one party in the marriage is below the age of eighteen;
- (ii) If one party in the marriage has an existing marriage;
- (iii) In a situation where consent is not given freely;
- (iv) When one party fails to attend the ceremony;
- (v) In an instance of mistaken identity;
- (vi) If an unauthorized person leads the union;
- (vii) Parties enter the marriage for fraudulent purposes.

## Under what circumstances is a marriage voidable?

**“Voidable refers to a transaction or action that is valid but may be cancelled by one of the parties to the transaction. Hence, a marriage can be termed voidable if either party; man or the wife obtains a court order to cancel it and thereby rendering it invalid.”**



A voidable marriage is valid when entered into and remains to be valid until a party obtains a court order nullifying the relationship. Some of the grounds on which a marriage can be declared voidable include:

- (i) At the date of marriage, either party was and has remained incapable of consummating
- (ii) Recurrent incidences of insanity
- (iii) No notice was given
- (iv) Notice of objection not yet withdrawn
- (v) Unlicensed person officiated
- (vi) Failure to register the marriage

## 2.4 Christian Marriages

### *Sections 17 to 20*

#### **What is a Christian marriage?**

A Christian marriage occurs mostly where a party is a Christian.

#### **How is a Christian marriage officiated?**

Christian marriages are conducted by a marriage officer, a licensed church minister appointed by the Registrar. After a marriage has been celebrated, a marriage certificate is completed and signed.

#### **Is the celebration of a Christian marriage stoppable?**

Yes! The officiation of a Christian marriage can be stopped.

A person who knows of an obstacle or hindrance to the intended marriage may give a written notice of objection to the person in charge of the public place of worship where marriage notice has been posted.

The written notice should include the name of the objector, relationship with the either party, and the reasons for objection to the marriage. The objectors may withdraw the notice at any time in writing.

The person in charge of a public place of worship should hear the objection immediately and if he considers that the objection requires a further hearing, postpone the marriage ceremony until the objection is determined in accordance with church regulations.

The objection must be determined within a reasonable period, not more than seven days after hearing the objection.

Any dissatisfied party is free to appeal to court within fourteen days.

#### **Can a union conducted outside Kenya be recognised as a Christian marriage?**

A Christian marriage conducted outside the country can be recognised by the Marriage Act.

In order to be acknowledged by the law, such a union must fulfil the following requirements:

- (i) It must be shown that the marriage was contracted according to the laws of the country



- of celebration and is consistent with provisions on Christian marriages under the Act at time of marriage;
- (ii) The parties had capacity to marry under the law of country where marriage was celebrated;
  - (iii) Or, both parties had the capacity to marry, if at the time of the marriage any party to the marriage was domiciled in Kenya Christian marriages at embassies, high commissions or consulate in Kenya.

## 2.5 Civil Marriages

### **Sections 24 to 42**

This kind of marriage is celebrated by a registrar.

### **How a Civil marriage conducted?**

In a situation where parties intend to marry under this part, they should give a written notice of not less than twenty-one days or more than three months to Registrar and person in charge of place of where they intend to marry.

### **What are requirements in the Notice to contract a Civil marriage?**

The notice should include:

- (i) The names, age and residence of intended parties, names (if known and alive) of parents plus residence.
- (ii) A declaration by parties not in a prohibited relationship e.g. cousins, nephew, aunt,
- (iii) The date and venue of marriage.
- (iv) Marital status of each party: if divorced, copy of decree and if widowed, copy of death certificate of former spouse.
- (v) The Registrar to publish notice of intention to marry at the proposed venue

### **Is the officiation of a Civil marriage objectionable?**

The celebration of a civil marriage can be stopped or objected to if an individual has an obstacle or hindrance to the intended marriage.

The person objecting may give a written notice of objection.

### **How is the objection determined?**

The person in charge of a venue is expected to hear the objection immediately.

Alternatively, if he considers that the objection requires a further hearing, he ought to postpone the marriage ceremony until the objection is determined in accordance with the regulations. Objections must be determined within reasonable period, not more than seven days after hearing the objection.

Any dissatisfied party has the legal remedy and can appeal to court within seven days.

No marriage ceremony will be undertaken until the appeal has been heard and determined. The appeal Court is required to hear and determine appeals expeditiously and the court may hear and determine despite failure of party to appear before it.



A person who lodges baseless or fraudulent objections risks being fined Kshs. 1 Million or 5 years in jail term.

In situations where there is no objection, a certificate of no impediment will be issued by the registrar.

### **Can a union conducted outside Kenya be recognised as a Civil marriage?**

Kenyans or non-citizens may celebrate marriages in Kenyan missions in foreign countries in presence of the Registrar or his delegate.

A marriage celebrated abroad is valid in Kenya:

- (i) If the parties had capacity to marry in Kenya;
- (ii) If the marriage was contracted in accordance with the law of the foreign country, is consistent with the laws of Kenya;
- (iii) And the parties had capacity to marry.

### **Parties to a Civil marriage can arrange to live apart**

Unlike other forms of marriages, parties to civil marriages can agree to live apart for one year. An agreement to live apart is acceptable in law, enforceable and must be filed in court.

The court can vary or set aside the agreement where circumstances have changed materially since signing.

The parties may apply for court to determine status of the marriage at expiry of the year.

## **2.6 Customary Marriages**

### **Sections 43 to 45**

A customary marriage is one which is celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage and usually involves payment of a token amount that is sufficient to prove marriage.

### **Steps to follow when contracting a Customary Marriage**

The parties intending to contract a customary marriage must notify Registrar within three months of completing steps required to complete marriage as per the community.

The notice must specify customary law applied and declare that the necessary customary requirements completed and contain a declaration by the two parties that necessary customary requirements have been undertaken.

The declaration should contain signatures or personal marks of two adult witnesses who played crucial cultural roles in the marriage.

Some of the prerequisites before the notification to confirm are that:

- (i) Both parties must be 18 years old at time of marriage;
- (ii) Marriage between person outside prohibited relationships;



(iii) and both parties freely consent.

## 2.7 Hindu Marriage

### *Sections 46 to 47*

This form of marriage is specific to people who practice the Hindu faith.

#### **How is Hindu marriage celebrated?**

A Hindu marriage is officiated by a person authorized by the Registrar and in accordance with the Hindu religious rituals of a party to the marriage.

## 2.8 Islamic Marriage

### *Sections 48 to 49*

This type of marriage is specific to people to practice the Islamic faith.

#### **Contracting a marriage under Islamic Law**

A marriage under this part is officiated by a Kadhi, sheikh or imam as may be authorized by the Registrar and celebrated in accordance with Islamic law.

Most importantly, any provision of this Act which is inconsistent with Islamic law and practices shall not apply to persons who profess the Islamic faith.

## 2.9 Appointment and Functions of Registrar of Marriages and Marriage Officers

### *Sections 50 to 52*

The Registrar of Marriages is appointed by the Cabinet Secretary

#### **What are the functions of Registrar of Marriages?**

The primary functions of the Registrar of Marriages in Kenya are as follows:

- (i) To perform civil marriages
- (ii) Register all marriages;
- (iii) Issue marriage certificates for all registered marriages;
- (iv) Certificates of no impediment where no objection to marriage;
- (v) Determine rules governing customary marriages;
- (vi) May appoint marriage officers at national, county levels;
- (vii) Diplomatic staff of Kenya to celebrate civil marriages abroad;
- (viii) Ministers of faith as marriage officers according to traditions of their faith;
- (ix) Registration of Marriages.

#### **Other than the Registrar of Marriages, who else can officiate marriages?**

Apart from the Registrar of Marriages, the following individuals can also preside over a marriage ceremony:



- (i) Diplomatic staff of Kenya to celebrate civil marriages abroad
- (ii) Ministers of faith as marriage officers according to traditions of their faith.

## 2.10 Registration of Marriages

### *Sections 53 to 63*

After a marriage has been celebrated, the person officiating the marriage shall forward a copy of the certificate of marriage to the Registrar within fourteen days of the celebration of the marriage for the registration of that marriage.

The Registrar then confirms that the marriage complies with the provisions of this Act. Marriages celebrated abroad may be registered on application, where marriage complies with the Act.

Again, Marriage certificate issued in other country may be considered as proof, certified translation where certificate not in the official languages (Swahili or English).

The Registrar shall then register the marriage and issue a certificate of marriage to the parties to a marriage celebrated.

### **How can one prove that a marriage exists?**

A marriage can be proved by:

- (i) a certificate of marriage;
- (ii) a certified copy of a certificate of marriage;
- (iii) an entry in a register of marriages;
- (iv) a certified copy of an entry in a register of marriages;
- (v) Where a marriage is celebrated in a public place of worship, and registration was not required, by an entry in a register kept at that place of worship.

## 2.11 Matrimonial Disputes and Matrimonial Proceedings

### *Sections 64 to 75*

#### 2.11.1 Dissolution of Christian marriages

Before one resolves to end a Christian marriage, the parties are expected to first seek reconciliation from available church bodies where marriage was celebrated.

### **What are the grounds for dissolving a Christian marriage?**

A Christian marriage can be dissolved on grounds of:

- (i) acts of adultery;
- (ii) cruelty, whether mental or physical on the petitioner or children; or
- (iii) desertion for at least three years;
- (iv) exceptional depravity;
- (v) Irretrievable breakdown of the marriage.



### 2.11.2 Dissolution of Civil Marriages

Generally, parties to civil marriage may not petition court before 3 years since celebration of marriage.

#### **On what grounds can one end a Civil marriage?**

A party to a civil marriage may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds:

- (i) adultery by the other spouse;
- (ii) cruelty by the other spouse;
- (iii) exceptional depravity by the other spouse;
- (iv) desertion for at least three years; or
- (v) irretrievable breakdown of the marriage e.g. (insanity, imprisonment for life or 7+ years).

There are situations when a marriage is considered to have irretrievably broken down. Some of these situations are:

- (i) a spouse commits adultery;
- (ii) a spouse is cruel to the other spouse or child of the marriage;
- (iii) wilful neglect for at least two years;
- (iv) spouses have separated for at least two years;
- (v) desertion for at least three years;
- (vi) sentence of life imprisonment or seven years onwards;
- (vii) incurable insanity (certified by at least two doctors, one a psychiatrist);
- (viii) Any other ground that the court might consider appropriate.

### 2.11.3 Dissolution of Customary Marriages

The parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of the marriage. The process of mediation or traditional dispute resolution should conform to the principles of the Constitution.

#### **What are grounds for dissolving a customary marriage?**

A person intending to end a customary marriage may do so on the following grounds:

- (i) adultery;
- (ii) cruelty;
- (iii) desertion;
- (iv) exceptional depravity;
- (v) irretrievable breakdown of the marriage or
- (vi) any valid ground under the customary law of the petitioner.

### 2.11.4 Dissolution of Hindu marriages

A party to a Hindu marriage may petition the court for the dissolution of the marriage on grounds that:

- (i) The marriage has irretrievably broken down;



- (ii) Desertion;
- (iii) conversion to a different religion;
- (iv) rape, sodomy, bestiality or adultery;
- (v) cruelty;
- (vi) exceptional depravity on a spouse.

### 2.11.5 Annulment of Marriage

#### What is annulment of marriage?

In this context, it means that parties are treated as if they had never been married.

#### What are the reasons for annulment of marriage?

The grounds for annulment of marriage are:

- (i) The marriage's not been consummated since its celebration;
- (ii) Parties were unknowingly in a prohibited relationship; in the case of a monogamous marriage, one of the parties was married to another person at the time of the marriage;
- (iii) Consent was not freely given;
- (iv) A party to the marriage was absent at the time of the celebration of the marriage;
- (v) Pregnancy at the time of the marriage without the knowledge of the husband where the husband is not responsible for the pregnancy; or
- (vi) The other party suffers recurrent bouts of insanity at the time of the marriage and without the knowledge of the petitioner.

After consideration of these factors, the court may grant a decree of annulment in instances when:

- (i) The petition is made within 1 year of the celebration of the marriage;
- (i) At the date of the marriage the petitioner was ignorant of the facts alleged in the petition; and
- (i) The marriage has not been consummated since the petition was made to the court.

The impact of an annulment is that the parties treated as if they had never got married.

On the flipside, it does not render illegal anything done legally during the marriage and vice versa.

### 2.12 Maintenance of Spouse and other Reliefs

#### Sections 77 to 85

In situations when a person has refused to provide for the spouse, the court may order one to maintain spouse or former spouse.

#### On what grounds can a court order a person to maintain a spouse?

A court may order one to maintain a spouse in the following instances:

- (i) In case the person has deserted the other spouse or former spouse;
- (ii) During the course of any matrimonial proceedings;
- (iii) When granting or after granting a decree of separation or divorce;
- (iv) If, after presuming a spouse dead, the person is found alive.



### **Is a maintenance order revocable?**

A maintenance order can be revoked where the court is satisfied that the order was obtained as a result of a misrepresentation, mistake or where there has been a material change of circumstances.

### **Can maintenance be used for settlement of a debt or claim?**

Maintenance payable to a person cannot be used by that person to secure a loan or settle a debt owed to another person by the spouse being maintained.

Maintenance that has not been paid after the maintenance sum is due can be recovered as a civil debt.

## **Other Reliefs**

### **What are the other reliefs a court may grant aside from maintenance?**

The other reliefs that a court may grant to a spouse include:

- (i) An order to a party to refrain from molesting a spouse or former spouse.
- (ii) An order to restore conjugal rights.

## **2.13 Offences and Penalties**

### **Sections 86 to 92**

### **What are the offences and penalties for violating the Marriage Act?**

The offences and penalties for breaching the provisions of the Act are as follows:

- (i) A person that makes a false statement in the notice of intention to marry or notice of objection, liable to jail for maximum of two years or a fine of maximum two million shillings.
- (ii) A marriage to a person under eighteen years is prohibited and punishable by a jail term of 6 months maximum or fine maximum 50,000.
- (iii) Marriage of persons within prohibited marriage relationship jail for maximum 5 years or fine (i) maximum 300,000 and witnesses to such marriages liable to be charged.
- (iv) Marrying someone without the person's consent liable to jail for maximum 3 years or fine of 300,000 or both.
- (v) Unauthorized persons celebrating marriage relationship jail for maximum 3 years or fine of 300,000.
- (vi) Celebrating marriage without witnesses' jail for max 3 months or fine maximum 10,000
- (vii) Celebrating marriage where a notice of intention to marry has not been given is penalized by a jail term of 6 months maximum or fine maximum 50,000.
- (viii) Celebrating marriage where a notice of objection to the intended marriage has been given and the objection has not been withdrawn, dismissed or determined jail for max 6 months or fine maximum 50,000.





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**MATRIMONIAL  
PROPERTY ACT,  
NO. 49 OF 2013**

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### 3.1 Introduction

#### What is the primary object of the Matrimonial Property Act?

The primary aim of this law is to outline the rules providing for the rights and responsibilities of spouses in relation to matrimonial property i.e. the property acquired during marriage.

The Act is arranged in five parts namely the preliminary section, general provisions, matrimonial property, separate property and lastly, the part on the jurisdiction and procedure.

The enactment of the Matrimonial Property Act repealed the Married Women Property Act.

#### Does the Act apply to persons professing Islamic faith?

Generally, the Matrimonial Property Act does not apply to a person who professes the Islamic faith for all matters relating to matrimonial property may be determined in accordance with the Islamic law.

### 3.2 Definition of Key Terms

#### Section 2

There are a number of key terms that have been used in the law and they include the following:

“contribution” means monetary and non-monetary contribution and includes—

- (a) domestic work and management of the matrimonial home;
- (b) child care;
- (c) companionship;
- (d) management of family business or property; and
- (e) farm work;

“family business” means any business which—

- (a) is run for the benefit of the family by both spouses or either spouse; and
- (a) generates income or other resources wholly or part of which are for the benefit of the family;

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;

“matrimonial property” has the meaning assigned to it in section 6;

“spouse” means a husband or a wife.

### 3.3 Concept of Matrimonial Property

#### Sections 6 to 12

#### What is matrimonial property?

Matrimonial property refers to a property or asset acquired during the subsistence of the marriage.



### **What are the examples of matrimonial property?**

The examples of matrimonial properties include a matrimonial home, household goods and effects in such a home or any other immovable and movable property jointly owned and acquired by the spouse while married.

#### **3.3.1 Exclusion of a property from the definition of a matrimonial property**

Any property; movable or immovable, that is acquired by either party before marriage is not a matrimonial property.

A trust property and even those excluded by prenuptial agreement by the spouses shall also not constitute matrimonial property.

Nonetheless, one can apply to court to have a prenuptial agreement set aside if it is shown that the agreement was influenced by fraud, coercion or the agreement is manifestly unjust.

#### **3.3.2 Equal Status of Spouses**

A married woman has the same rights as a married man to hold property whether movable or immovable, sell it or deal with the property without being interfered with unreasonably in any way.

In case of any liabilities incurred by a spouse towards a property, the burden of that liability is carried by the spouse incurring it.

However, if the property becomes a matrimonial property, the liability will be shared equally between the spouses.

Otherwise, a spouse shall not be held liable, solely by reason of marriage, for any personal debt contracted by the other spouse prior to their marriage.

### **Is spousal consent needed when dealing with matrimonial property?**

The law prohibits a spouse from the dealing with a matrimonial property without the consent of the other spouse.

Accordingly, a matrimonial home cannot be mortgaged or leased without the written and informed consent of both spouses.

Again, no spouse can be evicted from the matrimonial home during the subsistence of marriage unless ordered by a court of law.

### **How does a property vest in a spouse?**

The ownership of matrimonial property vests in the spouses according to their individual contribution towards its acquisition.

In case of the dissolution of marriage, the property is divided between the spouses in accordance with their individual contribution.



When determining the division of the matrimonial property, the customary law of the spouses must be considered and in a manner that conforms to the provisions of the Constitution of Kenya, 2010.

### 3.3.3 Improvement of a Property acquired before Marriage

Where a spouse makes improvement of a property that was acquired before their marriage, such a party acquires a beneficial interest in the property equal to the contribution made.

## 3.4 Matrimonial Property in Polygamy

### Section 8

Where a matrimonial property is acquired by the man and his first wife; that is, the property was acquired before the man married another wife or wives, the right to such a property is retained equally by the man and the first wife only.

However, in instances where the matrimonial property is acquired by the man after he marries another wife, the property is regarded as being owned by the man and his wives; of course, considering the contributions made by them all in acquiring the property.

Again, where it is agreed by the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then such a wife is to own that matrimonial property equally with the husband without the participation of the other wife or wives.

## 3.5 Separate Property

### Sections 13 to 16

#### **Can a prenuptial agreement (agreement before marriage) affect one's property rights after marriage?**

Any agreement that is made between the spouses before marriage will not affect their respective rights to the matrimonial property, which they acquire in the course of their marriage.

#### **What is the effect of registering a property in the name of one spouse?**

Where a matrimonial property is registered in the name of one spouse, the spouse will be presumed or considered to hold the property in trust of the other spouse and that their beneficial interests in the matrimonial property are equal.

Also, where a spouse gives any property to the other spouse as a gift during their marriage, it is allowed by the law for anyone to assume that the property is jointly owned and does not belong absolutely to the gifted spouse.

## 3.6 Jurisdiction and Procedure

### Sections 17 to 19

Where there is a dispute in terms of one's share in the matrimonial property, a person is free to seek the attention of a court to assist in determining their property rights in that regard.



### **What is the procedure for matrimonial property action?**

A person seeking for a declaration of their rights to a contested matrimonial property must do so in the following manner:

- (i) The application must be made in accordance with the procedure prescribed by the Act;
- (ii) The application may be made as part of a petition in a matrimonial cause;
- (ii) The application may be made despite a petition in a matrimonial cause has not been filed.





# THE LAW OF SUCCESSION ACT, CAP 160

*Last Will and Testament*

of \_\_\_\_\_

I, \_\_\_\_\_, resident in the City of \_\_\_\_\_, State of Alaska, being of sound mind and disposing memory, and free from any and all undue influence, and fully understanding the nature and extent of the property I own, do hereby make, publish, and declare my Last Will and Testament, and do hereby revoke all former wills and testamentary dispositions made by me.

of Testament



## 4.1 Introduction

The Law of Succession Act basically specifies how the property or the estate of a deceased person is to be dealt with whether the deceased died having left a will or not.

The Act is divided into eight major parts including the preliminary section, wills, provisions for dependants, gifts in contemplation of death, intestacy, survivorship, administrations of estates and miscellaneous provisions.

## 4.2 Definition of Key Terms

### Section 3

Some of the important terms used in the Act are:

“administrator” means a person to whom a grant of letters of administration has been made under this Act;

“codicil” means a testamentary instrument made in relation to a will, explaining, altering or adding to its dispositions or appointments, and duly made and executed as required by the provisions of this Act for the making and execution of a will;

“competent witness” means a person of sound mind and full age;

“estate” means the free property of a deceased person;

“executor” means a person to whom the execution of the last will of a deceased person is, by the testator’s appointment, confided;

“free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;

“probate” means the certificate of a court of competent jurisdiction, that a will, of which a certified copy is attached in the case of a written will, has been proved a valid will, with a grant of representation to the executor in respect of the estate;

“wife” includes a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and “widower” shall have a corresponding meaning;

“will” means the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil.

## 4.3 Making a Will

### Sections 5 to 25

#### Who has the capacity to make a will?

Any person whether male or female who is an adult i.e. 18 years of age and is of sound mind has the capacity to make a will.



Nevertheless, a person's competence to make a will can be challenged in a court of law on grounds that the testator lacked sound mind at the time the will was made and when that happens, the burden of proof is on the person who alleges.

### **Can a will be void?**

To be void means not enforceable in law and a will or part of a will that is proved to have been made through fraud, coercion, induced by mistake et cetera is not legally binding.

#### **4.3.1 Forms of Wills**

A will can be made orally that is through the word of mouth or it can be written.

### **What are the requirements for an oral will?**

For an oral will to be acceptable in law, such a will meet the following conditions:

- (i) The testator must make the will in the presence of two or more competent witnesses.
- (ii) The testator must die within a period of three months from the date of making the will.
- (iii) In the case of an oral will made by a member of the armed forces during a period of active service, the oral will still be valid even if the testator died more than three months after the date of making the will.

### **When is an oral will not legally binding?**

An oral will is not legally binding in the following circumstances:

- (i) If it contradicts a written will that has not been revoked.
- (ii) If there is conflict in the testimony of witnesses regarding what the testator said when making the will unless the will are proved by a competent independent witness.

### **When is a written will said to be valid?**

A written will is acceptable in law if the following requirements are met:

- (i) If the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator.
- (ii) If the signature or mark of the testator, or the signature of the person signing for him, indicates that it was intended to give effect to the writing as a will.
- (iii) If the will is attested by two or more competent witnesses, each of whom must have seen the testator signing or affixing the mark to the will.

### **Can a will be revoked?**

To revoke means to cancel something or nullify it.

Accordingly, the testator is free to cancel, alter or revoke a will disposing of his free property

## **4.4 Provisions for Dependants**

### **Sections 26 to 29**

### **Who is a dependant?**

According to this Act, a dependant can be:

- (i) A wife or wives, or former wife or wives of the deceased.
- (ii) The children of the deceased or those maintained by the deceased immediately before he died;
- (iii) deceased's parents, step-parents or grand-parents;



- (iv) grandchildren, step-children, children whom the deceased had taken into his family as his own;
- (v) brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately before his death; and
- (vi) where the deceased was a woman, her husband if he was being maintained by her immediately prior to her death

### **When does the issue of reasonable provisions for dependants arise?**

This issue generally arises where the dependants have not been adequately provided for in the will or where the deceased passed on without leaving a will.

The court if satisfied that the deceased failed to make adequate provision for his dependants may make an order that reasonable provision be made in that regard out of the deceased's estate.

In order for a court to make such a determination the aggrieved party must petition the court.

### **What factors does a court consider when making an order for reasonable provision?**

Courts usually consider the following factors when making an order for reasonable provision:

- (i) the nature and amount of the deceased's property;
- (ii) any past, present or future capital or income from any source of the defendant;
- (iii) the existing and future means and needs of the dependant;
- (iv) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- (v) the conduct of the dependant in relation to the deceased;
- (vi) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
- (vii) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

## **4.5 Gift in Contemplation of Death**

### **Section 31**

#### **Is a gift given to a person by the deceased in contemplation of his death lawful?**

A gift awarded to someone by the deceased as he or she contemplated death may be valid or invalid.

#### **When is such a gift valid?**

Generally, a gift may be considered valid, despite the incomplete transfer of legal title, if:

- (i) the donor contemplated the possibility of death because of present sickness or impending danger;
- (ii) the donor gives a movable property which he could still dispose of by a will;
- (iii) the property or its title documents is delivered to the intended beneficiary;
- (iv) The donor gave the gift in a manner to show that he intended it to revert to him should he survive that illness or danger;
- (v) The donor dies from any other cause without having survived that same illness or danger; and
- (vi) the intended beneficiary survives the donor.



### **On what grounds can a gift be considered invalid?**

There are instances when a gift given in contemplation of death may be considered invalid or not legally binding. These grounds include:

- (i) If the death of the donor is caused by suicide;
- (ii) If the donor, at any time before his death, lawfully request for the return of the gift.

## **4.6 Intestacy**

### **Sections 32 to 42**

#### **What is intestacy?**

Intestacy arises where a person died without leaving a will or if he left a will, the will fails to specify how his free property is to be distributed to the beneficiaries.

A person who dies without leaving a will is called an intestate.

#### **What happens to the surviving spouse and the children where one died without a will?**

The surviving spouse of the deceased is entitled to:

- (i) the personal and household properties such as furniture et cetera of the deceased; and
- (ii) A life interest in whatever remains of the net estate, which, in case of a widow, may terminate if she remarries.

#### **What happens where there is a surviving spouse but no child?**

In case one has left one surviving spouse but no child or children, the surviving spouse is entitled to:

- (i) the personal and household properties of the deceased;
- (ii) the first Ksh. 10,000 out of the net estate or 20% of the net estate, whichever is the greater i.e. between the Ksh. 10,000 and the 20%;
- (iii) A life interest in whatever remains of the net estate, which, in case of a widow, may terminate if she remarries.

#### **What happens where there is a child or children but no Spouse?**

Where there is a child or children but no spouse, the estate is to devolve to the child or if there is more than one child, the property divided equally among the children.

#### **Where the deceased left no spouse or children**

Where the intestate has left no surviving spouse or children, the estate is to devolve in the following order of priority:

- (i) father; or if dead
- (ii) mother; or if dead
- (iii) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
- (iv) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
- (v) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
- (vi) devolves on the State if the above fails.



### **What happens where the intestate was polygamous?**

Where the deceased was polygamous, his personal and household effects, and the estate are to be divided among the houses according to the number of children in each house. Any wife surviving him is added as an additional unit to the number of children.

## **4.7 Presumption of Survivorship**

### **Section 43**

Where two or more persons have died in circumstances making it hard knowing who died first, the older one will be presumed to have died first followed by the younger one.

But, in the case of spouses, the spouses will be presumed to have died at the same time.

## **4.8 Application for Grant**

### **Sections 50 to 87**

### **What is a grant?**

A grant is the court's permission to deal with the estate of the deceased.

### **What is procedure for applying for a grant?**

According to the Law of Succession Act, the following requirements must be complied with when applying for a grant:

- (i) made in a prescribed form;
- (ii) signed by the applicant; and
- (iii) witnessed in the prescribed manner.

### **What are the information to include in the application for a grant?**

An application for a grant must contain information regarding:

- (i) the full names of the deceased;
- (ii) the date and place of his death;
- (iii) his last known place of residence;
- (iv) the relationship of the applicant to the deceased;
- (v) whether the deceased left a valid will;
- (vi) the present addresses of any executors appointed by any such valid will;
- (vii) the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased in cases of intestacy; and
- (viii) a full inventory of all the assets and liabilities of the deceased.

### **What are the additional information to the application in case of a will?**

If it is a written will, the original must attached to the application.

However, if the original will cannot be traced, lost, or destroyed or the original cannot be produced, then the application must be accompanied by either:

- (i) an authenticated copy of the will must attached; or
- (ii) the names and addresses of those people who are able to prove the will.

In case of an oral, the application must contain the names and addresses of the witnesses.





# **LAND ACT NO. 6 OF 2012**



## 5.1 Introduction

The Land Act No. 6 of 2012 was passed by parliament to help in the realization of Article 68 of the Constitution and among other things, to provide for the sustainable administration and management of land and land-based resources.

## 5.2 Application of the Act

The Land Act applies to all land falling under the following categories: **(Section 3)**

- (i) public Land;
- (ii) private Land;
- (iii) community Land.

### What are the guiding values and principles when it comes to land? (Section 4)

The guiding values and principles of land management and administration bind all State organs, State officers, public officers and all persons whenever any of them enacts, applies or interprets any provision of the Act, and makes or implements policies that could affect the public. The values and principles include:

- (i) equitable access to land;
- (ii) security of land rights;
- (iii) sustainable and productive management of land resources;
- (iv) transparent and cost-effective management of land;
- (v) conservation and protection of sensitive areas of the environment;
- (vi) elimination of gender discrimination in law, customs and practices related to land and property in land;
- (vii) encouragement of communities to settle land disputes through recognized local community initiatives;
- (viii) participation, accountability and democratic decision making within communities, the public and the Government;
- (ix) equality; affording equal opportunities to members of all ethnic groups;
- (x) non-discrimination and protection of the marginalized groups;
- (xi) democracy, inclusiveness and participation of the people; and
- (xii) alternative dispute resolution mechanisms in land dispute handling and management.

### What are the forms of ownership/tenure of land? (Section 5)

Land can be owned in the following forms:

- (i) freehold; (permanent, you can dispose it at will)
- (i) leasehold; (temporary holding)
- (i) partial interest as may be defined in any other law; for example, easement, which simply means right of way;
- (i) customary land rights.

### What are the methods of acquiring land in Kenya? (Section 7)

You can acquire a title to land through:

- (i) allocation; (granting land to be used in a specific manner)
- (ii) land adjudication process;
- (iii) compulsory acquisition; (By the government for the public good/interest)
- (iv) prescription;
- (v) settlement programs;
- (vi) transmissions;



- (vii) transfers;
- (viii) long term leases exceeding twenty one years created out of private land; or
- (ix) any other manner prescribed in an Act of Parliament.

### 5.3 Conversion of land

**(Section 9)** There are three categories of land; private, public and community. Any land can be converted from one category to the other. For example, public land can be converted to private land. Where there is public need, the public land can also be converted to community land. Any substantial/significant transaction that involves the conversion of public land to private land must be done with the approval of parliament or county assembly.

When it comes to private land, it can be converted to public land by compulsory acquisition, return to government after the expiry of a lease or transfers.

Community land may be converted to either private or public subject to the Community Land Act.

Where conversion of land takes place, the National Land Commission must keep a register showing all public land converted to private land, names and addresses of everyone whose land has converted to public through compulsory acquisition or expiry of lease, and community land converted to private or public.

### 5.4 Allocation of public land

**(Section 12)** Allocation simply means being granted rights to land for a specific purpose. The National Land Commission can allocate land on behalf of the National and county governments through methods such as public auction to the highest bidder, application restricted to a target group to improve their disadvantaged position, public notice of tenders or public request for proposals.

Land that has been identified for allocation must not be public land that can be affected by erosion or floods, public land that has been categorized as a forest or wild life reserve or within an environmentally sensitive area, natural or cultural features that has national value, among others.

Any public land allocated cannot be sold, sub-leased or sub-divided unless it is developed for the purpose for which it was allocated. If the land is not developed according to the terms and conditions in the allocation, the land will automatically revert back to the national or county government.

#### **What should the National Land Commission do before it allocate public land? (Section 14)**

The Commission must issue, publish or send notices to the public and interested persons before allocating any public land. The notification should be given at least thirty (30) days before offering the public land for allocation. The notice must have the terms and conditions. The public will have at least fifteen (15) days to comment.

The commission will also issue a thirty (30) days' notice to the governor in whose county land is proposed for allocation. This notice should be given before the allocation of public land.



## 5.5 Leases, Licences and Agreements for Public Land

### Can the National Land Commission issue temporary licenses? (Section 20)

The Commission is allowed to grant a person a licence to use undivided public land for a period not more than five (5) years. It will also stipulate the fees payable, the period of the agreement and conditions of the licence.

Before the licence expires, the occupant of the public land is allowed to remove any building or structure erected on the land. **(Section 21)**.

### What happens if the fees are not paid? (Section 22)

In this case, the commission is allowed to penalize the occupant of the land when the fees are not paid for one month after it becomes due, if any tax is not paid or if the occupant fails to follow the conditions of the licence.

## 5.6 General Conditions Relating to Leases, Licences and Agreements for Public Land

Where there is a grant or lease relating to public land, unless the agreements are clear, there will be an understanding that the grantor has full power to grant the land or lease it and the person given the land, paying rent and fulfilling the conditions of the lease must enjoy quiet possession of the premises without interruption by any person except where the law permits such interruption. **(Section 23)**

There is also a general understanding that the person granted the land shall pay rent and all taxes or rates that will be charged in respect of the lease. **(Section 24)**

### What happens if a person erects a structure or a building on leased public land? (Section 25)

If it is not expressly stated in the agreement, the building on public land where the lease is for a term exceeding thirty (30) years) will pass to the national or county governments without payment of compensation. In the case of a lease for a term not exceeding thirty years, the structures may be removed by the person granted the land within three months of the termination, otherwise than by forfeiture, of the lease unless the Commission elects to purchase those buildings.

Where the commission chooses to buy any building or structure, any disagreements will be solved through arbitration.

### Can a child hold a title to land? (Section 27)

Children can hold titles to land but through a trustee (someone to hold the property until the child attains 18 years). The child will be in the same position as an adult when it comes to liability and obligations to the land.

## 5.7 Community Land

**(Section 37)** All community land is managed in accordance with the Community Land Act.



## 5.8 Management of Private Land

### 5.9 Contracts over land

**(Section 38)** A contract is one of the important documents in a land transaction. In fact, nobody can file a suit related to land transaction unless the contract;

- (i) is in writing;
- (ii) is signed by all the parties to the transaction; and
- (iii) the signature of buyer and seller has been attested to by a witness who was present when the contract was signed by the parties.

### Can a seller of land regain possession of his/her land? (Section 39)

Where a buyer of land has taken possession of land but has breached any part of the contract, the seller may resume possession of the land peaceably or by obtaining a court order for possession of the land.

### 6.0 Procedure for obtaining order for possession

**(Section 41)** A seller who proposes to seek to regain possession of private land must serve a notice on the buyer informing the buyer:

- (i) of the nature and extent of the breach complained of by the seller;
- (ii) whether the seller considers that the breach is capable of being cured by the payment of a stated amount of money under the contract;
- (iii) whether the seller considers that the breach is capable of being cured by the buyer doing or desisting from doing anything or paying reasonable compensation or both;
- (iv) of the period within which the buyer must cure the breach, if the seller considers that the breach is capable of being cured; and
- (v) of the consequences where the buyer fails to cure the breach. If the seller does not consider that the breach can be cured, he/she can seek a court order to possess the land and cancel the contract.

### Transfers (Section 43)

An owner of land may transfer land or a lease to any person, with or without monetary implications through a document as the case may require. The transfer will be completed when there is registration of the person whom the transfer has been made to as the new owner.

### 6.1 Provisions on Leases

This part is leases, including the remedies and relief from sections 55 to 77. A lease is a land agreement that passes land for the possession and use by another person for a period of time. It could be six months, one year or even 10 years.

Any owner of private land can lease their land. For periodic leases, the term can be unspecified and there is no need for notice when terminating it. A short-term lease can be made for a period of less than two years or less without an option for renewal.

**Remedies and Relief:** An owner of land (lessor) has the right to forfeit the lease if the person given the lease is bankrupt or if it's a company it has been liquidated.



## 6.2 Compulsory Acquisition of Interests in Land

### *Preliminary notice (Section 107)*

Whenever the national or county government is satisfied that it may be necessary to acquire some particular land, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the National Land Commission to acquire the land on its behalf.

The Commission must recommend a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land.

### **Compensation to be paid (Section 111)**

If land is acquired compulsorily, a fair compensation must be paid promptly in full to all persons whose interests in the land have been determined/affected. The Commission makes rules to regulate the assessment of fair compensation.

Inquiry as to compensation will be made at least thirty days after publishing the notice of intention to acquire land. The notice of the inquiry will be published in the Gazette or county Gazette at least fifteen days before the inquiry.

### **Payment of compensation (Section 115)**

After notice of an award has been served on all the persons determined to be interested in the land, the Commission is required to promptly pay compensation in accordance with the award. Any person who has a disputed under the Land Act can refer it to the Environment and Land Court for determination.

## 6.3 Settlement Programmes

### **Establishment of settlement scheme (Section 134)**

The National Land Commission is mandated to implement settlement programmes by providing access to land for shelter and livelihood. Settlement programmes include, provision of access to land to squatters, persons displaced by natural causes, development projects, conservation, internal conflicts or other such causes that may lead to movement and displacement.

## 6.4 Land Settlement Fund

The fund is known as the Land Settlement Fund and it's administered by the National Land Commission. **(Section 135)**

### **Power of the Commission to create public rights of way (Section 143)**

The commission has powers to create a way/route that may be used by the public as a matter of right and public interest. A right of way can be created for the benefit of the national or county government, a local authority, a public authority or any corporate body to enable all such institutions, organisations, authorities and bodies to carry out their functions.

## 6.5 Jurisdiction of Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Land Act. **(Section 150)**



# **THE CHILDREN'S ACT, NO. 8 OF 2001**





## 5.1 Introduction

The Children's Act provides for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children. This law also stipulates guidelines for the administration of children's institutions and it is meant to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

The law respects the responsibilities, rights and duties of parents, members of the extended family and community large as provided for by local custom, legal guardians or other persons legally responsible for the child.

## 5.2 Definition of Key Terms

### **Section 2**

"child" means any human being under the age of eighteen years;

"child abuse" includes physical, sexual, psychological and mental injury;

"child of tender years" means a child under the age of ten years;

"children's remand home" means a remand home established under section 50 for the detention of children;

"Council" means the National Council for Children's Services established by section 30;

"Director" means the Director of Children's Services appointed under section 37;

"disabled child" means a child suffering from a physical or mental handicap which necessitates special care for the child;

"parent" means the mother or father of a child and includes any person who is liable by law to maintain a child or is entitled to his custody.

## 5.3 Rights and Welfare of the Child

### **Sections 3 to 22**

#### **What is the government's obligation in realising children's rights?**

The Kenyan Government is under duty to put in place necessary measures to ensure that every child realise his or her rights.

In handling any matter that concern children, the international, regional and national legal regime is guided by the need to advance the interests that afford children the most-friendly and favourable circumstances in their lives.



### **What is the meaning of the principle: best interest of the child?**

The best interest principle requires that in any matter where a child is involved, the child should be afforded best treatment and care.

### **What are rights of child recognised under the Children's Act?**

These rights and welfare of children are set out in the Act to include the following:

- (i) the right to education;
- (ii) the right to healthcare;
- (iii) protection from child labour;
- (iv) the right to name and citizenship or nationality;
- (v) a disabled child has the right to be treated with dignity, and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible; and
- (vi) children should be protected from harmful cultural rites, sexual exploitation and drug abuse.

## **5.4 Parental Responsibility**

### **Section 23**

Parental responsibility refers to the duties or obligations that the child's mother and father have towards their child or children.

Once a person has parental responsibility for a child, such a responsibility will not stop or end i.e. you cannot stop your parental obligations to a child once you accept such responsibilities.

### **What is the nature of parental responsibility in case of marriage?**

Where the father and the mother of a child are married to each other when a child is born, they shall have equal parental responsibility and neither can claim superior parental responsibility.

### **What happens where marriage occurs after a child is born?**

Where the father and the mother of a child were not married to each other at the time when the child was born but the two marries each other after the child's birth, they both have parental responsibility over the child with neither having a superior claim or right over the child.

### **What happens where no marriage takes place after a child is born?**

In a case where the father and the mother of a child were not married when the child was born and they have not married even after the birth of the child, the mother will be responsible to the child on first instance while the father may acquire parental responsibility through a court order or an agreement between him and the mother of the child.

### **What becomes of parental responsibility in case of cohabitation after child's birth?**

The father becomes responsible where the parents were not married at the time of birth but have cohabited after that for 12 months or the man has maintained or acknowledged paternity of the child.



## 5.5 Administration of Children's Services

### Sections 30 to 46

The following institutions are responsible administering the rights and welfare of children in Kenya:

**(i) The National Council for Children's Services:** This is established to supervise planning, financing and co-ordination of child rights and welfare activities, and to advise the Government children matters.

**(ii) The Director of Children's Services and Children's Officers:** The Director's duty is to safeguard the welfare of children and further assist in the establishment, promotion, co-ordination and supervision of services and facilities designed to advance the well-being of children and their families.

**(iii) Rehabilitation Schools and Remand Homes:** These institutions function to provide accommodation and facilities for the care and protection of children, and rehabilitate Children who are in custody.

**(iv) Charitable Children's Institutions:** refers to a home or institution established by a person, a religious organisation or a non-governmental organisation and approved by the National Council to care, protect, rehabilitate or manage children.

## 5.6 Children's Court

### Section 73

The Children's Court is a special court established to try all matters involving children whether criminal or civil.

### What is the jurisdiction of the Children's court?

The jurisdiction of the Children's Court is outlined in section 73 of the Act.

The Court performs the following functions:

- (i) conducting civil proceedings relating to parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children;
- (ii) hearing any charge against a child, other than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of eighteen years;
- (iii) hearing a charge against any person accused of an offence under this Act; and
- (iv) exercising any other jurisdiction conferred by this or any other written law

### How is the children's court different from the other courts?

The sitting of the court should be different from that of the adults, which shows that children are given special treatment from the other people and such emphasis is good because it seeks to protect children from infringement of their rights.

The magistrate has powers to clear the court where a court is taking evidence from persons who are under the age of eighteen years.



### Why are children's courts said to be lenient?

The courts are lenient on children so that before making an order with regard to a child, it has to have particular regards to the following matters:

- (i) the feelings and wishes of the child concerned with reference to the child's age and understanding;
- (ii) the child's physical, emotional and educational needs and in particular, where the child has a disability, the ability of any person or institution to provide any special care or medical attention that may be required for the child;
- (iii) the likely effect on the child of any change in circumstances;
- (iv) the child's age, sex, religious persuasion and cultural background; and
- (v) any harm the child may have suffered, or is at risk of suffering.

## 5.7 Child's Custody

### Sections 81 to 101

#### What is child's custody?

Custody is defined by the Act to mean parental rights and responsibilities relating to the possession of a child.

#### How does one get custody of a child?

One or more persons may make an application to court for an order granting the applicant the custody of a child.

#### What are factors considered by Children's Court when making a custody order?

The courts usually consider the following factors when deciding custody disputes between parents;

- (i) Welfare of the child;
- (ii) Religious persuasions of the child;
- (iii) Conduct of the parents;
- (iv) Wishes of the parents; and
- (v) Wishes of the child

## 5.8 Maintenance of Children

### Sections 81 to 101

Maintenance of a child is concerned with the welfare and upbringing of a child.

#### What are the orders for a child's maintenance?

The Children's court may make specific orders.

Sometimes, these orders are also called "**section 114 orders**" because they are found in section 114 of the Children's Act and they include:

- (i) An "access order". This order requires the person stay with the child to allow the child to visit, or to stay periodically with the person named in the order.
- (ii) A "residence order". This an order requiring a child to reside with a person named in the order



- (iii) An “exclusion order” is that order requiring a person who has used violence or threatened to use violence against a child to keep off the environment of the child.
- (iv) A “child assessment order.” This requires a child to be investigated or evaluated to assist the court in determining any matter concerning the welfare and upbringing of the child;
- (v) A “family assistance order.” This order requires a person appointed by the court to provide assistance such as advice, counselling and guidance to a child, his parents or custodian or guardians, the child’s relatives, or any person who the child is resides with.
- (vi) A “wardship order” requiring that a child be placed under the protection and custody of the court;
- (vii) A “production order” requiring any person who has a child in his or her custody to bring the child before the court.

## 5.9 Guardianship

### *Sections 102 to 111*

Guardianship is the legal relationship created when a person is given the care of minor children either by a will or through a court order.

The guardianship relationship gives the guardian certain rights and obligations regarding the child and doesn’t cut links between the child and the biological parents.

### **What is the role of a guardian?**

The guardian is tasked to take care of the food, shelter, medical care, education of the child and manage the child’s finances.

### **In what ways does guardianship end?**

Guardianships can end in any of the following circumstances:

- (i) Death of the child
- (i) Attainment of the age of maturity by the child
- (i) The court may terminate it if it is no longer beneficial to the child.
- (i) If the primary purpose of the guardianship was to administer the child’s finances, when the finances are exhausted.
- (i) If the guardian seeks the court to relieve him/ her of their duties. The court will then appoint another.

## 5.10 Children in need of Care and Protection

### *Sections 118 to 146*

The Children’s court has jurisdiction over a child in need of care and protection.

### **Who is a child in need of care and protection?**

Some of those instances when a child can be said to need care and protection are as follows:

- (i) when a child who has no parent or guardian;
- (ii) a child has been abandoned by his parent or guardian;
- (iii) when a child is found begging;



- (iv) a child whose parents or guardian find difficulty in parenting;
- (v) a female child who is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health;
- (vi) a child exposed to domestic violence;
- (vii) a child who has been sexually abused or is a threat of being sexually abused;
- (viii) and a child who is truant.

### **Court's orders for a child in need of care and protection**

The Children's court may make the following orders in case of a child is in need of care and protection:

- (i) An order that a child be returned to his parent, guardian or the person with parental responsibility for the child.
- (ii) An order committing such a child to a rehabilitation school suitable to the child's needs.
- (iii) An order requiring the Director of Children's Services to ensure the child is cared for where the child is a victim of armed conflict, civil disturbance et cetera.
- (iv) In a situation where a child is subjected to early marriage, the court can make an order rendering such marriage null and void, and requires the child to be placed under the care of a fit person and to return to school.
- (v) If the child is disabled, the court can make an order requiring the Director to take the necessary steps to ensure that the child is provided with care in line with his special needs.

## **5.11 Foster Care Placement**

### **Sections 147 to 153**

#### **What is foster care of a child?**

Foster care is the placement of a child with a person who is not the child's parent, relative or guardian.

The Director of Children's Services in conjunction with the manager of a rehabilitation school or charitable children's institution may place the child with a foster parent for a period which the director may vary from time to time.

The foster parent, while the child is in their care, has the same responsibilities in respect of the child's maintenance as though the child was their own.

## **5.12 Child Adoption**

### **Sections 154 to 183**

Adoption is the act of taking another person's child into a different family and treating him or her as a child of your own.



Further, adoption involves permanent care where there is end to legal relationship between a child and his biological parents and family and a new relationship is established between the child and his adoptive parents.

### **What is the role of the court in child adoption?**

The High Court has the powers to make an adoption order.

### **What are the primary requirements for child adoption in Kenya?**

Among the pre-requisite for adoption in Kenya are:

- (i) the child must be at least six weeks old;
- (ii) It is illegal to allow adoption if an adoption order for the child cannot be lawfully made in favour of the adopting person;
- (iii) Any child who is resident within Kenya may be adopted whether the child is a citizen or was not born in Kenya;
- (iv) An application for adoption must be accompanied by written consents to the making of an adoption order in respect of any child.

## **5.13 Child Offenders**

### ***Sections 184 to 193***

A child offender is a child who is accused and or has been found guilty of an offence by a children's court.

The Act establishes the Children's Court, which is a special subordinate court with the jurisdiction to hear any case where a child is charged of an offence.

### **How does the Children's court handle child offenders?**

The following points should be noted about the court's jurisdiction, namely:

- (i) the court is limited in cases where the child is charged with the offence of murder or when the child is charged with an adult.
- (ii) The sittings of the Children's Court are not open to the members of the public and hence the magistrate has power to clear the court in any proceedings against a child to achieve the best interests of the child as contemplated by the law.
- (iii) The court may order that the child be granted legal representation, where the child beforehand has none.



A close-up photograph of a person's hands, which are dark-skinned and appear to be of African descent. The hands are clasped together in front of the person, with the fingers interlaced. They are wearing silver-colored metal handcuffs. The person is wearing a dark blue or black short-sleeved shirt with a small, repeating floral or star-like pattern in a lighter color. The background is out of focus, showing what appears to be an outdoor setting with a light-colored wall or fence. The lighting is bright, suggesting daylight.

# **THE CRIMINAL PROCEDURE CODE, CAP 75**



## 6.1 Introduction

The Criminal Procedure Code is the law that outlines the procedures to be followed in criminal cases governed by Penal Code and other laws. These procedures are set out in eleven parts.

## 6.2 Definition of Key Terms

### *Section 2*

There are salient terms or concepts defined in this law, namely;

“cognizable offence” means an offence for which a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without warrant;

“drug related offence” means those drugs specified in Part V of the Dangerous Drugs Act (Cap. 245) and includes the possession, manufacture, distribution or receipt of any drug of any quantity whatsoever;

“non-cognizable offence” means an offence for which a police officer may not arrest without warrant;

“officer in charge of a police station” includes any officer superior in rank to an officer in charge of a police station;

“plea agreement” means an agreement entered into between the prosecution and an accused person in a criminal trial in accordance with Part IV;

“police officer” means a police officer or an administration police officer;

“prosecutor” means a public prosecutor or a person permitted by the court to conduct a prosecution;

“public prosecutor” means the Director of Public Prosecutions, a state counsel or the representative thereof;

“Registrar of the High Court” includes a Deputy Registrar of the High Court and a district registrar of the High Court;

“summary trial” means a trial held by a subordinate court under Part VI.

## 6.3 Powers of Courts

### *Sections 4 to 15*

#### 6.3.1 Jurisdiction of courts in Criminal Cases

Criminal offences may be tried by the High Court or any other subordinate court depending on the offence.



A subordinate court, which is categorized as a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.

### 6.3.2 Extension of a Court's Jurisdiction

Furthermore, The Judicial Service Commission may, by notice in the Gazette, extend the jurisdiction of any particular magistrate depending on the offence.

## 6.4 General Provisions on Arrest, Escape and Retaking

### Sections 21 to 65

#### What is required of a person making arrest?

When making an arrest the police officer or other person making it is expected to confine the body of the person to be arrested, unless the arrested person accepts to be in custody by word or action.

When a person refuses to get arrested, the police officer or the person making an arrest has the authority all means necessary to effect the arrest.

However, the person arrested cannot be subjected to more restraint than is necessary to prevent his escape.

#### What other powers does the person authorised to arrest have?

The person authorized to arrest also has the power to detain and search aircraft, vessels, vehicles and persons.

There are also specific situations like when a woman is supposed to be searched and where that is the case, the search should be made by another woman with strict regard to decency.

#### When can police officers can make arrests without warrants?

Some of these situations when arrests can be made without warrant are:

- (i) When a person commits a breach of peace in presence of a police officer
- (ii) A person who deserted the armed forces
- (iii) A person who obstructs a police officer on duty
- (iv) A person who is reasonable suspected of committing a felony
- (v) any person whom he finds in a street or public place during the hours of darkness and whom he suspects upon reasonable grounds of being there for an illegal or disorderly purpose, or who is unable to give a satisfactory account of himself;

When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence the officer in charge of the police station, he has to be produced in a court of law within twenty-four hours.



## 6.5 Prevention of Offences

### Section 43

Prevention of crime is an important provision in the Criminal Procedure Code and section 43 in this regard particularly touches on security for keeping peace.

When an individual is likely to commit a breach of peace, the magistrate examines the informant on oath and may as require the person to explain why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period when the magistrate deems fit.

## 6.6 Orders for furnishing Security

### Sections 55 to 60

This involves the power to give and reject sureties, the procedure on the failure of an individual to give security.

#### What happens when one fails to furnish security ordered by the court?

In such a situation, when a person who is ordered to give security does not give security on or before the date on which the period for which security is to be given commences, he will be committed to prison.

If the person is already in prison, he will be detained in prison until that period expires or until within that period, he gives the security to the court or magistrate who made the order requiring it.

However, the court also has the power to cancel the bond when the court considers it fair to do so.

#### What does the security for good conduct involve?

Security for good behavior is a requirement from habitual offenders in which case the magistrate may require the suspect to explain why he should not be ordered to execute a bond, with sureties, for his good behavior for such period.

In this regard, section 49 highlights the issue of summons or warrant in case of person not so present. Section 53 deals with orders to give security.

### 6.6.1 Where an Inquiry is made

When an inquiry is made and it becomes important to maintain order and peace, the person in respect to the inquiry might be subjected to a restriction order, or should execute a bond, with or without sureties; the only exception being a minor.

### 6.6.2 Failure to provide Security

#### What are the consequences for failing to provide security?

When a person fails to provide security within the specified timeline:



- (i) he or she will be committed to prison;
- (ii) where one was in prison, he or she going be detained in prison until that period expires or until within that period, he gives the security to the court or magistrate who made the order requiring it.
- (iii) High court has the power to cancel bond pursuant to section 60.

## 6.7 Powers of the Police

A police officer has a number of powers including the power to:

- (i) Prevent crime or offence;
- (ii) Arrest without warrant to prevent the commission of cognizable offences;
- (iii) to prevent injury or damage to public property.

## 6.8 Criminal Investigation and Place of Trial

### Sections 66 to 193

#### 6.8.1 General Authority of Courts

Every court has the authority to determine any case brought before it if:

- the offence is within the court's local limits;
- the offender is charged with an offence committed within Kenya; or
- which according to law may be dealt with as if it had been committed within Kenya.

This is why trials normally take place at places where offences were undertaken.

#### What happens when the place where the offence was committed is uncertain?

These uncertain offences include situations when an offence is a continuing one, and continues to be committed in more than one local area.

Such offences are tried within the local limits of the court where the offender is found.

#### Criminal trial is open to the public

The place in which a criminal court is held for the purpose of trying an offence is considered as an open court and that means the public generally may have access except in certain circumstances when such access may be denied.

#### 6.8.2 Transfer of Cases

#### For what reasons might a criminal case be transferred?

There are situations where cases may be transferred from one jurisdiction to another:

- (i) A court may after hearing of a criminal complaint determine that the offence arose outside the limits of the jurisdiction of the court direct the case to be transferred to the court with jurisdiction;
- (ii) There are instances when cases may be transferred between magistrates in which a magistrate may transfer a case if satisfied that the matter should be tried by a subordinate court empowered to try that case within the local limits of the first-class subordinate courts' jurisdiction;



- (iii) Magistrates are also empowered to stay proceedings and submit the case with a brief report thereon to a magistrate holding a subordinate court of the first class empowered to direct the transfer of the case.

## 6.9 Public control of Criminal Proceedings

### Sections 82 to 88

The Republic or the government has significant control in criminal proceedings and generally, the Republic is a party to criminal proceedings.

#### How does the state control criminal proceedings?

The Director of Public Prosecutions (DPP) has power to terminate or stop criminal proceedings; also known as *nolle prosequi*.

“*Nolle prosequi is a formal notice usually served on a court by the Director of Public Prosecution to stop criminal proceedings against an accused person.*”

#### What are reasons for terminating criminal proceedings?

The primary reasons why *nolle prosequi* may be entered including:

- (i) where the evidence is insufficient and inadmissible;
- (ii) in the event of plea bargaining
- (iii) where the defendants have proved innocence;
- (iv) To weed out small or trivial cases.

### Appointment of Public Prosecutors

Section 85 safeguards the appointment of public prosecutors.

They are appointed by the DPP their primary role is to prosecute.

## 6.10 Lodging Complaint

### Section 89

#### What is the procedure for lodging a complaint?

- (i) The procedure of making a complaint is set out in section 89 of the Code.
- (ii) Generally, proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.
- (iii) A complaint may be made orally or in writing, but, if made orally, it shall be reduced to writing by the magistrate, and, in either case, be signed by the complainant and the magistrate.

## 6.11 Issuance of Summons

### Sections 90 to 91

#### Who has the power to issue summons?

A magistrate may issue either summons or a warrant to compel the attendance of the accused



person before a subordinate court having jurisdiction to try the alleged offence.

Pursuant to Section 91, every summons issued by a court must be in writing and sealed.

Summons are generally served by a police officer, an officer of the court issuing it or by such other person as the court may direct.

### **Who is responsible for serving summons and on whom are summons served?**

Basically, every summons shall be served either by a police officer, an officer of the court issuing it or by such other person as the court may direct that the summons be served personally on the person summoned by delivering or tendering to him one of the duplicates of the summons. In company law, a company is commonly viewed as an individual.

Therefore, summons shall be served to a company represented by the secretary, local manager or other principal officer of the corporation or by registered letter addressed to the principal officer of the corporation in Kenya at the registered office.

## **6.12 Issuance of Warrants**

Warrants be it warrant of arrest or search warrants are significant part of the Criminal Procedure Code.

### **What is procedure for issuing warrants of arrest?**

- (i) Irrespective of the issue of a summons, a warrant may be issued at any time before or after the time appointed in the summons for the appearance of the accused.
- (ii) Warrants are also issued when the accused fails to obey summons.
- (iii) Warrants are issued by a judge or magistrate issuing it and shall bear the seal of the court.
- (iv) Courts have the power to direct a warrant of arrest to one or more police officers, or to one police officer and to all other police officers of the area within which the court has jurisdiction, or generally to all police officers of the area.
- (v) The police officer or other person executing a warrant of arrest shall ensure that the person arrested is taken to court without delay.
- (vi) Most importantly, a warrant of arrest may be executed at any place in Kenya.
- (vii) However, there are provisions of arresting a person outside the jurisdiction where the judge or magistrate issued the warrant.
- (viii) Where a warrant of arrest directed to a police officer is to be executed outside the local limits, the officer shall take it for endorsement to a magistrate within the local limits of whose jurisdiction it is to be executed.
- (ix) Where there is an irregularity of a warrant, it shall not affect the validity of the proceedings on the part of the prosecution at a trial.
- (x) A person who has breached bond will have warrant issued for him to be arrested and produced to court.

### **What is procedure for search warrants?**

Search warrants are highlighted in Section 118 of the Code and may be issued in the following circumstances:

- (i) Where there is an activity with respect to the offence that has been committed, the court or a magistrate may issue a search warrant to authorize a police officer or a person



- named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle.
- (ii) Anything found shall be seized and taken to court.
- (iii) Search warrants can be executed at any day.
- (iv) A property may be detained and brought before a court and the property is detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

## 6.13 Bail and bond

### Section 123

Provisions as to bail is also part of the Code.

#### What is difference between bail and bond?

Bail is the cash payment paid by the defendant or by someone on his behalf i.e. it is the money that is put up as security, to assure that the defendant will appear for trial.

A bond, on the other hand, is the pledge to make good on the bail if the defendant doesn't appear before the court.

#### What is procedure for bail?

- (i) When one is arrested or detained without warrant and is ready to commit to bail, such an individual may be admitted to bail;
- (ii) However, there are additional bail requirements for a person accused of murder, treason, robbery with violence, attempted robbery with violence and any drug related offence;
- (iii) Before a person is released on bail, a bond for such sum directed by the court or police officer shall be executed by that person;
- (iv) The person is released on bail on the understanding that he or she will attend the court at the time and place specified in the bond.
- (v) A person shall be released as soon as the bond has been executed.

## 6.14 Information on Charges

### Section 134 to 137

A charge or charge sheet refers to a formal accusation against a person for committing an offence.

#### What must a charge contain?

The Criminal Procedure Code provides that every charge or information must contain:

- (i) a statement of the specific offence or offences for which the accused person is charged;
- (ii) Any other particulars that may be relevant for giving reasonable information on the nature of the offence charged.
- (iii) Where more than one offence is preferred in the charged sheet, a description of each offence is to be set out in a separate paragraph of the charge or information called a count.



## How do you frame a charge?

Section 137 prescribes the rules pertaining to the framing of charges.

- (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of offence.
- (ii) The statement of offence describes the nature of the crime in ordinary language.
- (iii) After the statement of the offence, particulars of the offence shall be set out in ordinary language.

### 6.15 Plea Agreement

#### *Sections 137 A-O*

A prosecutor and an accused person may negotiate and enter into an agreement for:

- (i) reduction of a charge of offence to a lesser one; or
- (ii) withdrawal of the charge; or
- (iii) a stay of other charges; or
- (iv) the promise not to proceed with other possible charges.
- (v) A plea agreement on behalf of the Republic shall be entered into by the DPP.
- (vi) A plea can only be entered after the court has been notified, consultation with the police officer investigating the case and after consideration of the nature of crime.

### 6.16 Rule against Double Jeopardy

Section 138 of the Code provides that persons convicted or acquitted not to be tried again for same offence.

However, a person convicted or acquitted of an offence may afterwards be tried for another offence with which he might have been charged on the former trial.

### 6.17 Offences by Foreigners within Territorial Waters

One must seek the leave of DPP in order to commence the trial of a person who is not a Kenyan citizen for an offence committed within exclusive economic zone and the territorial waters.

### 6.18 Compelling Witness Attendance

A court may issue summons to a person requiring him or her to attend as a witness to give evidence.

#### 6.18.1 Consequences for disobeying Court's Summons

In situations when witnesses disobey summons:

- (i) The court may issue warrant of arrest against the person.
- (ii) There is a penalty for such a person.
- (iii) The witness shall be liable to a fine not exceeding five thousand shillings.



### 6.18.2 Examination of Witnesses

The Criminal Procedure Code provides that the defendant or his advocate shall have the right to cross-examine any such person.

Every witness shall be sworn under oath.

### 6.19 Dealing with cases of Unsound Mind

In such a situation, the court shall postpone the hearing until a time when the hearing can be tenable.

If the person with unsound mind can make a defence, then the medical officer shall forward a certificate to that effect to the Director of Public Prosecutions.

### 6.20 Judgement

The judgments must be pronounced in an open court and notice given to the parties and their advocates.

In the case of a conviction, the judgment must specify the offence, law under which the accused person is convicted and the punishment.

The parties are entitled to a copy of the judgment; given without delay.

The court has the power to order costs against the accused or a private prosecutor.

### 6.21 Restitution of Property

Where a person is apprehended and charged, and property is taken away from him, a court may order that:

- (i) the property be restored to the person; or
- (ii) the property be applied to the payment of any fine or
- (iii) the property be used to pay any costs or compensation directed to be paid by the person charged.

### 6.22 Convicted for an Offence not Charged

An individual may be convicted for offences other than those charged.

For instance, a person may be convicted for an offence under the Sexual Offences Act although he was not charged with it.

### 6.23 Recording of Evidence

This part outlines rules for taking and recording evidence in trials generally such as:

- (i) Evidence should be taken in presence of the accused
- (ii) the evidence of the witnesses must be recorded.



## 6.24 Withdrawal of Complaint

If a complainant may before a final order is passed in a case convince a court to be allowed to withdraw the complaint and there upon the accused will be acquitted.

## 6.25 Adjournment of Hearing

The court may adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the parties.

Where the accused fails to appear before the court following an adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing.

If the complainant does not appear the court may dismiss the charge with or without costs.

However, if the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence.

If the accused person does not have an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.

## 6.26 Appeals from Subordinate Courts

A person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court.

### 6.26.1 Procedure for Appeal

An appeal must be entered within 14 days of the date of the order or sentence appealed against. There are also instances when the court may admit an appeal after the lapse of the fourteen days subject to leave of court.

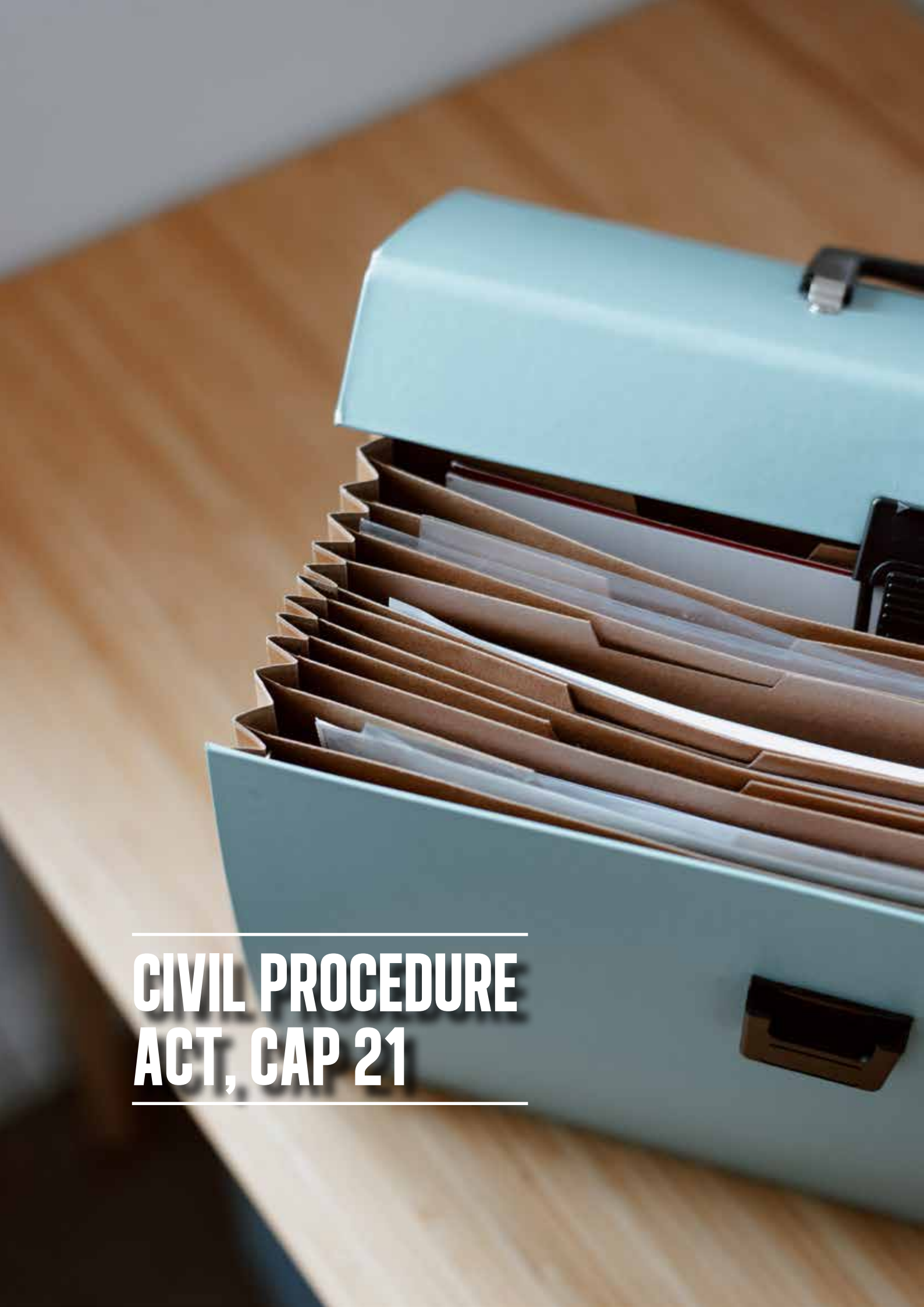
Where a person entitled to appeal has taken the necessary steps, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties.

Generally, appeals from subordinate courts shall be heard by two judges of the High Court. There are also appeals from the High Court to the Court of Appeal.

### 6.26.2 Revision by High Court

Section 362 prescribes the revision of criminal proceedings in which the High Court may call for the record of any criminal proceedings before any subordinate court to ensure that such record are correct, legal and proper.





# **CIVIL PROCEDURE ACT, CAP 21**



## 7.1 Introduction

The Civil Procedure Act is the law that establishes the procedures for resolving civil disputes by courts.

This Act is divided into eleven parts and it aims to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

## 7.2 Definition of Key Terms

### **Section 2**

“court” means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction;

“decree” means the formal expression of a court adjudicating a matter including an order made a judgment is rendered or delivered.

“decree holder” means any person in whose favour a decree has been passed or an order capable of execution has been made, and includes the assignee of such decree or order;

“foreign court” means a court situate outside Kenya which has no authority in Kenya;

“foreign judgment” means the judgment of a foreign court;

“impartial” in relation to a dispute means being and being seen to be unbiased towards parties to a dispute, their interests and the options they present for settlement;

“judge” means the presiding officer of a court;

“judgment-debtor” means any person against whom a decree has been passed or an order capable of execution has been made;

“legal representative” means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

“mediation” means an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto;

“mediator” means an impartial third party selected to carry out a mediation;

“profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;



“movable property” includes growing crops;

“order” means the formal expression of any decision of a court which is not a decree, and includes a rule nisi;

“pleading” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant;

“suit” means all civil proceedings commenced in any manner prescribed.

## 7.3 Suits in General

### 7.3.1 Jurisdiction

#### **What is the jurisdiction of courts in civil cases?**

According to section 5, any court shall have jurisdiction to try all suits of a civil nature except for suits the court is barred from trying.

Section 7 of the Act is on the competence of a court and requires such competence to be determined irrespective of any provision as to right of appeal from the decision of that court.

Where a plaintiff or the complainant is prevented by rules from instituting a further suit in respect of any cause of action, he shall not be entitled to institute a suit in respect of that cause of action. This is the provision of barring a suit.

### 7.3.2 Place of Suing

#### **What are the factors that one must consider when intending to file a case?**

The Civil Procedure Act sets out a number of factors to take into account when deciding the place to file a case and they include:

- (i) Every suit shall be instituted in the court of the lowest grade competent to try it.
- (ii) Further, suits shall be filed in locations where the subject matter is located. This will aid in ease of recovery, ease of determination of any other right to or interest in immovable property, and compensation for wrong to immovable property.
- (iii) In instances where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts.
- (iv) Again, where a person has a permanent dwelling at one place and a temporary residence at another place, he shall be considered to reside at both places in respect of any cause of action arising at the place where he has such temporary residence. Companies and organizations shall be viewed as primary operators within the country.
- (v) In respect of any cause of action arising, they shall be deemed as Kenya. In respect to contracts, a cause of action shall put into consideration the place the contract was made, the place where the contract was performed, and where the money was transacted.



### 7.3.3 Objections to Jurisdiction

Section 16 spells out the objections to jurisdiction. No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice.

### 7.3.4 Transfer of Suits

#### **Can a case be transferred from one court to another?**

Yes! It is possible and this is set out in section 17 of the Act, which deals with the power to transfer suits.

The High court also has the power to transfer a case instituted in a subordinate court. It may transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it.

It may also withdraw any suit or other proceeding pending in any court subordinate to it. Altogether, every suit shall be instituted in such manner as may be prescribed by rules. The procedures of a suit are described in Section 20. After a suit has been duly filed, the defendant shall be served in manner prescribed to enter an appearance and answer the claim. The court has the power to order the discovery of documents that may be produced as evidence.

### 7.3.5 Summons to Witnesses

Summons to witnesses shall also be given as provided for in Section 23. After the case has been heard, the court shall determine the judgment. On such a judgment, there shall be a decree. There are also salient provisions like interests and costs.

Where the decree is for the payment of money, the court may order an interest rate in a way that the court deems fit. Depending on the conditions of the case, the court has the full power of determining who and what extents that the costs shall be paid.

## 7.4 Execution

### 7.4.1 Courts Executing Decrees

A decree may be executed either by the court which passed it or by the court to which it is sent for execution. The court which passed a decree may of its own motion send it for execution to any court of inferior but competent jurisdiction.

### 7.4.2 Questions Arising from Execution of Decrees

A court executing a decree shall seek to answer any questions arising between the parties to the suit or those that are representing them. To put this in context, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

### 7.4.3 Transferees and Legal Representatives

There are also transferees and legal representatives. They hold the same subject to the equities.



#### 7.4.4 Procedure in Execution

##### **What is the procedure for executing or enforcing a court order?**

The Court has the power of enforcing an execution. Some of the orders provided for in Section 38 include:

- (i) by delivery of any property specifically decreed;
- (ii) by attachment and sale, or by sale without attachment, of any property;
- (iii) by attachment of debts;
- (iv) by arrest and detention in prison of any person;
- (v) by appointing a receiver

Most importantly, civil matters do not warrant a prison sentence when the decree is payment of money.

However, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison.

Some factors that may warrant this are that the judgment-debtor is likely to abscond the local limits of the court and has concealed his property in bad faith after the judgment.

A decree may also be effected on a legal representative. It may be executed by the attachment and sale of any such property.

#### 7.4.5 Arrest and Detention

Can one be arrested and detained in the process of enforcing a court order or decree?

Yes! A person can be arrested and detained as provided in section 40 of the Act.

A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the court.

Such a person may be detained in prison where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period not exceeding six months and for any other instance, a period not exceeding six weeks.

He can be released at any period provided that the decree is satisfied.

#### 7.4.6 Attachment of Property

##### **How is the attachment of property done in order to fulfil the requirements of a court's order?**

This is dealt with in section 44 of the Act and it is outlined as follows:

- (i) All property belonging to a judgment debtor is be liable to attachment and sale in execution of a decree.
- (ii) There are some properties that cannot be attached like the necessary clothes, equipment used for his trade or profession, books of accounts, and stipends.
- (iii) A person executing the decree shall not break into any dwelling-house after sunset and before sunrise.
- (iv) Also, the executor cannot force access to a dwelling where the judgment-debtor is willing to allow entry.
- (v) There are instances where property attached in execution of decrees of several courts in which the court shall sit and determine all claims and the decree which the first



- property was attached shall come first.
- (vi) The sale of property is normally a volatile issue; as provided for in Section 48, where immovable property is sold in execution of a decree and the sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.
  - (vii) A suit cannot be maintained on a purchaser who was certified by the court. Put simply, you cannot bring a cause of action against the purchaser of the property which was sold.

## 7.5 Incidental Proceedings

### What is incidental proceedings?

Incidental proceedings refer to those proceedings which relate to the main proceedings.

According to the Civil Procedure Act, a court may issue a commission to make an investigation and examine any person.

The High Court may also commission for the examination of a person by a subordinate court.

Through a letter of request, the High Court or a subordinate court with the sanction of the High

Court may issue a letter of request to examine a witness residing at any place outside Kenya.

The same can be issued by foreign courts to a Kenyan citizen and it shall be executed as expected.

## 7.6 Suits in Particular Cases

As provided by Section 56, alien enemies residing in Kenya with the permission of the President, and alien friends, may sue in the courts of Kenya. Every person residing in a foreign country which is at war with Kenya and doing business in that country without a licence by the President shall be considered to be an alien enemy residing in foreign country.

Also, a foreign state may sue in any court of Kenya, provided that state has been recognized by Kenya and the object of the suit is to enforce a private right vested in the head of that state or in any officer of that state in his public capacity.

## 7.7 Special Proceedings

Arbitration is an alternative form of solving disputes. This is provided for in Section 59.

The court may direct that any dispute presented before it be referred to mediation. This is after the court has considered the request of the parties concerned, it is appropriate, and where the law requires so.

Mediation in this context shall be in accordance with the mediation rules. Most importantly, all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court.



## 7.8 Supplementary Proceedings

In terms of supplemental proceedings, the court, in some instances issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance.

Again, as provided for in Section 63, a defendant has recourse when it appears that that the arrest, attachment or injunction was applied for on insufficient grounds. The defendant may apply for an award against the plaintiff for a reasonable compensation.

## 7.9 Appeals to High Court and Court of Appeal

### 7.9.1 Appeals from Original Decrees

An appeal shall be forwarded to the high court from any original decree or part of a decree of a subordinate court, on a question of law or fact. The same hierarchy extends to the high court. Appeals from the high court shall lie at the court of appeal.

### 7.9.2 Appeals from Orders

Section 75 provides orders from which appeal lies. An appeal shall lie because of the following orders. They include an order modifying or correcting an award, an order staying or refusing to stay a suit where there is an agreement to refer to arbitration, an order on an award stated in the form of a special case.

### 7.9.3 General Provisions Relating to Appeals

Section 78 of the Act gives the appellate court the powers to determine a case finally, order a new trial, remand a case and take additional evidence. Generally, appeals from subordinate courts shall be heard by one judge of the High Court except when in any case the Chief Justice shall direct that the appeal be heard by two or more judges of the High Court.

## 7.10 Review

Any person who considers himself aggrieved may apply for a review of judgment to the court which passed the decree or made the order if the judgment or the decree has not been appealed against.

## 7.11 Miscellaneous Provisions

### 7.11.1 Exemption of Certain Women

Those women who are precluded by the customs of their community from appearing in public will be exempted from appearing in court.



### **7.11.2 Exemption from Arrest under Civil Process**

A judge or a magistrate who is returning from work or an advocate or a witness acting in obedience to a summons shall be exempt from arrest under civil process.

### **7.11.3 Arrest and attachment**

In instances where a court makes an order for arrest or attachment of property outside the local limits of jurisdiction and the person or property is found outside the local limits, the magistrate of the subordinate court may write to the other magistrate and request a warrant or a decree to be made.

### **7.11.4 Language of Court**

The official language used in courts is English and Swahili.





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