

PUBLIC PARTICIPATION IN JUDICIAL PROCESSES:

MAINSTREAMING COURT USERS COMMITTEES (CUCs)

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YOUR Lordship the Chief Justice of the Republic of Kenya, Your Lordship the Chief Justices present, My Lady the Deputy Chief Justice of the Republic of Kenya, Your Lordships, Honourable Judicial officers, friends, ladies and gentlemen.

- His Lordship Justice Beverly Mc Lachlin(1) once said,

“...the courts, if they are to be relevant and responsible, must...operate in the real world... in a manner which furthers democratic principles and promotes perceptions and reality of the rule of law.”

- A country’s justice system is a key indicator of its level of democracy, rule of law and respect for human rights. It must as a matter of necessity rely heavily on involvement of all stake holders. The public is the key stakeholder in that regard and therefore the importance of its participation in any judicial process can never be over emphasized. The other stakeholders, including the offices of the Attorney-General, the Director of Public

Prosecutions, the Inspector General of Police, the Commissioner of Prisons, the Law Society of Kenya, the Public Service, officers responsible for Gender, Women and Children's Affairs, those responsible for matters of Labour, Environment and Land, organizations or associations dealing in legal aid, human rights or governance issues, Non Governmental Organizations, the private sector; and the office of the Director of Probation and After-Care Department, among others, also generally represent the wider public in judicial processes.

- The international community including the diplomatic corps is another important stake holder and that role is demonstrated by the role played by international law generally and jurisprudence..... a good topic for discussion on another day.
- Lack of or limited communication or communication break down within these key actors, especially in the criminal justice system, to a great extent limits the ability of the justice agencies in fulfilling their constitutional obligations.
- Traditionally ***“the court is not supposed to speak except through its judgments”*** and while this is a sound policy that needs to be followed, in a

democracy, information is the key to good governance, especially with reference to judicial administration(2).

- Access to justice for all, irrespective of socio-economic status, race or gender is a major hallmark for any society that is democratic. Access to justice creates an environment that allows for the rule of law to blossom.
- Connie Ngondi - Houghton(3), in her paper titled ***'Access to Justice and the Rule of law in Kenya(4)'*** argues in reference to legal empowerment;

“...when one is recognized by law, have authority of the law, is permitted by the law, and acts within the law, they can expect, and should be able to access the benefits anticipated by that law. When the majority of the population is in this position, and the law is enforced efficiently and fairly, then there is order, predictability, and justice in the society”.

- The question is therefore whether order, predictability and justice in the society can be achieved, as quoted, in the absence of public

participation in enacting, interpreting and enforcing the law.

- The Constitution in its preamble recognizes the aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law. In **Article 159(1)** of the Constitution, judicial authority is derived from the people to wit; **“judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution”**
- Justice for all has been an illusion for years; justifying to a great extent, the public’s frustration over the shroud of mystery that has continued to surround the Judiciary and judicial processes. Limited public participation in judicial processes has contributed greatly to the increasing frustration within and without: Judicial officers are (equally) frustrated not only by economic and psychological factors but also by
 - (i) the perceived lack of understanding and, therefore, appreciation by the public of judicial processes, and

- (ii)** by the information barriers existing between judicial officers and the public, resulting in the poor image a judicial officer, and the judiciary, portrays.
- It is wholly due to this frustration and perception that the public has demanded a number of changes including public recruitment of Judges of the Supreme Court including His Lordship the Chief Justice and her Ladyship the Deputy Chief Justice, Judges of the Court of Appeal and the High Court, Magistrates and Judiciary staff, and that the serving Judges and Magistrates be taken through the vetting process to determine their suitability to continue to serve in their honorable capacities, among other changes, as required by the Constitution, the Vetting of Judges and Magistrates Act, 2011 and the Judicial Service Act, 2011.
 - In 2006, KMJA(5) came up with the idea of having Court Users Committees (CUCs) to try and address this frustration within and without the Judiciary. In that year, the Governance, Justice, Law and Order Sector (GJLOS) reported in their Household Baseline Survey that only 4 % of the population submits legal disputes to Law Courts while the rest, about 96% all prefer extra judicial means of settling disputes; mainly due to the lack of faith in the judiciary by the public based on the lengthy and complicated judicial

processes, the perceived compromised dignity of judicial officers and generally the mysterious administration of justice.

- In the year 2008, infamous for the PEV, the leadership of the Orange Democratic Movement (ODM) put the last nail on the

Judiciary's credibility by declaring that they did not trust the Judiciary with any election petition in the ensuing political struggle that later became responsible for large scale bloodletting; loss of lives; loss of livelihoods and homes by Kenyan mostly because the judiciary it was argued had cultivated a culture mystery and limited public participation in its processes. Whether in fact the judiciary was wholly to blame for the post-election chaos is a contested question.

- KMJA in any event believed that involving the public in the judicial processes through meetings with the various stakeholders would foster mutual understanding, open up the judiciary to public scrutiny and participation in decision making and therefore help to cure the public perception of the judiciary and judicial officers from being perceived as endemically corrupt and unsuitable to serve, to a capable, effective and responsive institution of justices.

- The Constitution and the Judiciary Service Act, 2011 have now given credibility to Court users Committees, institutionalizing them and even expanding them to the County and National level. Through the Council on Administration of Justice and the institutionalized Court Users Committees(6), the Judiciary has acknowledged the need to coordinate responses to criminal and other justice issues, as well as its own critical role in implementing these initiatives and reforms in a collaborative fashion and without risking its independence.
- It has done this through the Judicial Service Act, 2011 by reconstituting and incorporating the Judicial Service Commission, modernizing and expanding its functions including clearly articulating the procedure for appointment and removal of judges, and discipline of other judicial officers and staff as well as enhancing the Commission's as well as the Judiciary's operational and financial autonomy. To promote co-ordination, efficiency, effectiveness and consultation in the administration of justice and reform of the justice system, the Act inter alia establishes the National Council on Administration of Justice(7) whose function include a coordinated, efficient, effective and consultative

approach in the administration of justice and reform of the justice system.

- The Court Users Committees which are forums for different agencies to meet, brainstorm, pool and direct synergy towards facilitating and improving the courts' administration of justice, have been found to be extremely useful in terms of improving co-ordination among the different departments and agencies within the system of the administration of justice. Results ranging from improving and reorganizing the filing system in the criminal registry, improving communication and interpersonal relationships among judicial officers and other stakeholders and acting as platforms for inter-disciplinary learning among, others are just some of the benefits the CUCs have demonstrated.
- The participation of the legal profession in CUCs can and should be enhanced through dialogue and agreement with the Law Society of Kenya (LSK)(8) as at present, lawyers are participating in CUCs through ad hoc and at times personal initiatives.
- In order to provide common information for learning purposes the CUCs across the board should have some common agenda items and common templates or curriculum for their capacity building

initiatives in a collaborative manner. Joint thematic sessions for the CUCs, say on brief trainings on case tracking, GBV(9), social justice and ADR(10) would work well when the CUCs are used as the training forum to simultaneously target all stakeholders who would then easily be brought up to date on the contemporary challenges in each thematic area. This would form another good avenue for promoting uniform Continuous Legal Education for all stakeholders. By seeking stakeholder input and commitment through the CUCs, courts would provide responsible leadership in developing a responsive and effective court system that anticipates and meets all these challenges.

Conclusion

- By inviting and embracing public participation, the Judiciary would not only be representing the public, in whom the Judicial authority vests, but would be able to share the successes and failures of the institution with the public, and develop processes that would track and take care of the changing demands of our society.
- In the long run, public participation will reenergize the justice system by enabling all actors to easily engage in dialogue, find lasting practicable solutions to their immediate challenges and improve their

professional relationships. It will make the justice chain more transparent, efficient and effective.

- Public participation is therefore indispensable in judicial processes if courts are to be relevant and responsible by showing that they operate in the real world and in a manner that furthers democratic principles and promotes perceptions of the reality of the rule of law.
- Currently, the Court users Committees are the best vehicle for improving public participation in judicial processes and should not only be encouraged but be seen as a good platform to implement a number of changes craved by the judiciary including capacity building of its members and tracking the changing demands of the society to help the judiciary to always remain real to the society.
- Judiciary open days and entrenchment of peer review mechanism are some of the processes that court users committee can use to recreate confidence in the Judiciary and improve access to Justice generally.

THANK YOU FOR LISTENING TO ME

Endnotes

1. Justice B. Mc lachlin, “The Charter of Rights and Freedoms: a Judicial Perspective” (1989)23 U.B.C.L. Rev.579 at 584 and 590
2. Mrs. L.A Achode, Registrar of the High Court in her statement during the Judiciary Open Day (Daily Nation 19TH March 2009
3. Ngondi C Houghton has also written another article titled ‘*The state of Human rights in Kenya*. ‘A publication of the Ministry of Justice and Constitutional affairs in 2005.
4. A paper developed for the Commission for the Empowerment of the Poor, 2006.
5. Kenya Magistrates and Judges Association
6. The idea is the brain child of KMJA that found adoption in the judiciary through the JSC Act, part VI, section 40-44
7. Para 1 the memorandum of objects and reasons, the Judicial Service Act
8. Law society of Kenya
9. Gender Based Violence
10. Alternative Dispute Resolutions