

ACCESSING JUSTICE IN KENYA: AN ANALYSIS OF CASE BACKLOG IN NAKURU
ENVIRONMENT AND LAND COURT.

A dissertation submitted in partial fulfillment of the requirements of the Bachelor of Laws
Degree

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DECLARATION

I, **Onserio Michelle Nyaboke**, declare that this proposal is my original work except where indicated by special reference in the text. This proposal has not been presented in any other institution for the award of an undergraduate degree or any other award in Kenya or abroad.

Signed

Date

Onserio Michelle Nyaboke

Supervisor's approval

Signed

Date

Dr. Antoinette Kankindi

LEGAL AND INTERNATIONAL INSTRUMENTS

Constitution of Kenya, 2010.

Constitution of India, 2015.

Judicial Service Act 2011

Law Society of Kenya Act 2012

Environment and Land Court Act of 2011

POLICY DOCUMENTS

The Judicial Transformation Framework 2012-2016

Sustaining Judiciary Transformation 2017-2021

The National Council on Administration of Justice, 'Court Users' Community Guidelines, 2019.

Abstract

In Kenya, various laws such as the Constitution and Judicial Service Commission Act of 2015, guarantee the right to access to justice as a human right. However, evidence shows that people are not accessing justice expeditiously due to case backlog. This problem arises from several factors ranging from problems in the judiciary's administrative system to the attitude of judicial officers. An attempt to solve the problem has been the transformation framework put in place by the Judiciary to increase judicial staff and the number of courts. Despite this measure, the problem persists in various jurisdictions. This study seeks to examine factors contributing to the persistence. The research focuses on the Environment and Land Court in Nakuru for the period between 2012- 2018 where the framework has not been implemented yet. The interest of study in the Environment and Land Court is determined by the fact that the Kenya National Bureau of Statistics has ranked it among the courts with the highest case backlog. Moreover, the research assesses how this phenomenon limits the right of access to justice. For the purpose of this analysis, the study uses the Human rights theory from the perspective of legal rights theory. In this regard, the research methodology adopted is the descriptive design approach which entails collecting information sought out from selected respondents by carrying out interviews and/or questionnaires. The study showed that the reforms suggested in the judiciary transformation framework have not been implemented in its entirety therefore creating a backlog problem.

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CHAPTER 1: INTRODUCTION

1.1 Background of the problem

Case backlog has been one of the main challenges facing the judiciary. In 2011, Kenya only had fifty three judges and three hundred and thirty magistrates for a population of forty one million four hundred thousand.¹ The pending and unresolved cases in the Magistrates Courts, High Courts and Kadhis Courts in 2010, 2011 and 2012 were 660,381; 650,010 and 627,370 respectively.² This phenomenon of case backlog covers all kinds of conflict including land and Environment cases. In fact, evidence shows that over sixty percent of the cases are land related and it became a source of unending conflict in the country.³ This led to the constitution giving mandate to the parliament to establish the Environment and Land Court making the judicial process expeditious.

After the 2010 constitution came into force, the Environment and Land Court Act, No. 19 of 2011 was established.⁴ The court has dual jurisdiction to hear and determine Environment and land cases.⁵ The new court allowed the president to appoint new judges.⁶

However, the problem of case backlog still persisted and the judiciary had to devise a reform mechanism to address the problem. It is in this context that the Judicial Transformation framework of 2012-2016 was launched. The main agenda of the framework was to transform the judiciary to become more efficient. The framework's transformation include: establishment of new courts in various Counties; decentralisation of the Court of Appeal; hiring of more judicial staff; improving court infrastructure as well as enhancement of management systems such as electronic tracking of cases.⁷

¹ Gainer, 'Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015,' Princeton University, 2015, 2.

² Kenya National Bureau of Statistics, *Economic Survey 2013*, 4th September 2019, 243.

³ Okong'o, 'Environment Adjudication in Kenya: A reflection on the jurisdiction of the Environment and Land Court,' (A presentation made at the Symposium on Environment Adjudication in the 21st Century held in Auckland New Zealand on 11th April 2017), _ (<https://Environment-adjudication.org>) on 4th September 2019.

⁴ Article 162 2 (b), *Constitution of Kenya* (2010); Section 4, *Environment and Land Court* (Act no 19 of 2011).

⁵ Section 13 (2), *Environment and Land Court Act* (Act no 19 of 2011).

⁶ Odote, 'The Role of the Environment and Land Court in Enforcing Environment Law: A Critical Analysis of the Environment Case Load,' unpublished LLM thesis, University of Nairobi, 2017, 1.

⁷ Mutunga, 'Judiciary Transformation Framework 2012-2016,' 12, _ (<http://kenyalaw.org>) on 28th August 2019.

Despite the framework put in place, the backlog of cases was still on the rise especially from 2015.⁸ The significant result of the implementation of Judicial Transformation Framework started to show in 2018 and 2019 according to the Chief Justice.⁹

In spite of these reforms, the performance of the Kenyan judiciary has not met the aspirations of the citizenry.¹⁰ Case backlog is still preventing people from accessing justice. The need to reduce case backlog is still acute. This is premised on the basis that its redress would assure Kenyans of their right in litigation matters. It is worth noting that where delays are experienced, the public tends to lose confidence in the Judiciary. This is more pronounced amongst individuals who are disadvantaged, as a result of socio-economic and political status, including those from marginalised, poor and vulnerable backgrounds.¹¹ The delay of court cases limits access to justice, a right guaranteed by law in virtue of the principle of equal justice.¹² In Kenya, access to justice is recognised by Article 48 of the constitution.¹³ Article 159 2(d) further states that justice shall be administered without undue regard to procedural technicalities.¹⁴ The delay of cases fall under procedural technicalities. The judiciary is vested with the responsibility of interpreting the law, and ensuring that every judicial process delivers justice expeditiously to all without discrimination.¹⁵

Therefore, the court needs to take a more active role in case management to ensure citizens can easily access justice.¹⁶

1.2 Statement of the problem

The background shows that the problem of backlog in Kenya still persists and the access to justice is not realized as a consequence of case backlog. The fact that the Constitution, Judicial Service Act and Transformation Framework provide for measures to solve the problem, the realization and enforceability in the Environment and Land Court is yet to be achieved.

⁸ Kenya National Bureau of Statistics, *Economic Survey 2019*, 4th September 2019, 275.

⁹ _ (<https://www.judiciary.go.ke/courts-record-a-significant-case-backlog-reduction-cj-maraga/>) on 28th August 2019.

¹⁰ Wangui, Factors Influencing Performance of the Judicial System in Kenya, the Case of Delayed Court Rulings, 66.

¹¹ Wangui, Factors Influencing Performance of the Judicial System in Kenya, the Case of Delayed Court Rulings, 66.

¹² Rhode, *Access to Justice*, 1 ed, Oxford University press, New York, 2004, 3.

¹³ Article 48, *Constitution of Kenya* (2010).

¹⁴ Article 159 2(d), *Constitution of Kenya* (2010).

¹⁵ Makau, 'Factors Influencing Management of Case Backlog in the Judiciary,' unpublished LLM thesis, University of Nairobi, 2014, 2.

¹⁶ Zuckerman, Cranston, *Reform of Civil Procedure: Essays on Access to Justice*, 2 ed, Oxford University Press, New York, 2007, 13.

This research has identified as a problem that people do not access justice as a result of case backlog in the Environment and Land Court.

1.3 Purpose of the Study

This study aims at identifying the situation of case backlog in the Environment and Land Court in Nakuru.

1.4 Statement of Objectives

This study seeks to:

1. Determine the factors that cause case backlog in the Environment and Land Court in Nakuru.
2. Analyse the current status of case backlog in the Environment and Land Court in Nakuru.
3. Establish to what extent case backlog limits access to justice in the Environment and Land Court in Nakuru.

1.5 Research Questions

1. What are the factors that cause case backlog in the Environment and Land Court in Nakuru?
2. What is the current status of case backlog in the Environment and Land Court in Nakuru?
3. To what extent does case backlog limit the right to access to justice in the Environment and Land Court in Nakuru?

1.6 Hypotheses

1. The Environment and Land Court is one of the courts recording the highest number of case backlogs in Kenya.
2. There is an inefficient administrative system in the judiciary limiting access to justice.

1.7 Justification of the study

According to the Kenya National Bureau of Statistics Economic Survey report of 2nd May 2019, the number of pending cases has been on an upward trend since 2015 and stood at 517,094 in

2018.¹⁷ The same report indicates that close to half of the cases filed in Kenyan Courts take more than three years to be resolved; with the Magistrate's Court the High Court and the Environment and Land Court registering the highest overall backlog.¹⁸

Since case backlog as a problem preventing people from accessing justice persists particularly in the Environment and Land Court in Nakuru, there is a need for the measures in the Judicial Transformation Framework to be implemented. This study seeks to shed light on the causes of this persistence in the Environment and Land Court for effective administration of justice.

1.7 Theoretical Framework

1.7.1 Legal rights theory within the general human rights theory

The human rights theory states that the said rights are universal, indivisible, inalienable, interdependent and interrelated.¹⁹ This theory encompasses the natural rights, economic rights, social rights, historical rights and the legal rights theories. The legal rights theory is concerned with rights created, protected and promoted by the state. For the analysis of the case backlog problem, which is an obstacle for people to access the right to justice, this paper will use the legal rights theory. In Kenya, legal rights including the right to access to justice are recognised by the Constitution and the Judicial service Act.

Before discussing the legal rights theory, it is important to understand what encompasses a legal right. According to Salmond, a legal right is an interest recognized and protected by a rule of legal justice.²⁰ He identifies five key aspects in a legal right as: the person entitled to the right, person who is to perform the act on the right holder; the content of the right; the subject-matter of the right and certain facts or events leading to the right being vested in its owner.²¹ Laski asserts that the central principle of the legal rights theory is that the rights completely depend upon the institutions and recognition of the state; meaning an individual cannot claim rights if they are not recognised by the state.²² Generally, it is understood that the state implements these rights through its own laws and institutions. Since the implementation of the legal rights are dependent upon the institutions put in place, the institutions play a key role in guaranteeing these rights such as the right to access to justice.

¹⁷ Kenya National Bureau of Statistics, *Economic Survey 2019*, 2nd May 2019, 275.

¹⁸ Kenya National Bureau of Statistics, *Economic Survey 2019*, 2nd May 2019, 275.

¹⁹ _ (<https://www.sfu.ca>) on 5th September 2019.

²⁰ Kocourek, 'Concepts of the Law,' *The Hohfeld System of Fundamental Legal Concepts*, 616.

²¹ Smith, 'Origin of Legal Rights- Legal Jurisprudence,' *Expert Legal Review*, 2017.

²² _ (<https://www.civilserviceindia.com>) on 8th September 2019.

This theory is relevant to this study because it helps in examining the second hypothesis i.e. there is an inefficient administrative system in the judiciary limiting the right to access to justice. Furthermore, the theory asserts that mere recognition is not enough. The laws have to be implemented by the institutions put in place by the law to guarantee the fulfillment of the legal rights.

1.8 Research design and methodology

This study uses a descriptive design approach including collecting information through carrying out interviews and/or questionnaires on selected respondents in the Environment and Land Court in Nakuru. The choice of this methodology is informed by the fact that not much is known yet about this problem. Therefore, interviews need to be carried out and questions needed to be asked to obtain the necessary information from the respondents for the purpose of this study. These respondents were identified using the snow ball method by relying on referrals from initially sampled respondents to other persons who would provide the needed information. The choice of interviews as a data collection tool is informed by the need to have first-hand evidence of the problem at a specific court that will be critical in the achievement of my research objectives. The interviews were carried out during agreed appointments with the respondents at places of work, in offices and other set venues. The focus of these interviews is to bring out the trend of case backlog and viewpoint and attitudes of selected respondents.

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In obtaining data, some of the ethical issues that arose were issues of confidentiality and a research permit to publish the information. These issues arose because the data collected involved private interviews with various individuals. Consent was given to publish data obtained solely for the purpose of the study. In addition, for confidentiality purposes no names are mentioned to protect their identity and privacy. As regards the research permit, most of the information obtained is in the public domain and therefore there was no breach of confidentiality.

The choice of India as the country the study compared with Kenya was informed by the fact that both countries have adopted similar reforms such as appointment of more judges and support staff, establishment of special courts and training of more judges; with the aim of reducing case backlog.

The respondents sampled for the study play an important role in obtaining the required information. They possess characteristics that would facilitate obtainment of desired data. They

are either staff in the judiciary or affiliated to the processes thereof such as plaintiff, defendant and their advocates.

1.9 Limitations to the study

In carrying out this study, the limitations this research faced include: insufficient time with the respondents affected by change of my case study from the Environment and Land Court in Machakos to Nakuru, as well as the distance between the University and Nakuru to obtain necessary information; and unavailability of respondents within the time frame available to me. Moreover, the choice of the Environment and Land Court will be limiting because it will not be a representative of the case backlog problem and therefore generalisation of findings may not be possible.

1.10 Definition of terms

Backlog - an accumulation of uncompleted tasks which are unperformed and need to be dealt with.²³

Case backlog - a court case which is pending before the court for a longer period than the time prescribed.²⁴

Court Backlog - a large number of pending cases awaiting trial or decision which exceeds court capacity.²⁵

1.11 Outline of the dissertation and its flow of argument

Chapter one presents the topic of my dissertation and deals with the background of the problem, statement of the problem, purpose of the study, statement of objectives, research questions, hypotheses, justification of the study, theoretical framework, research design and methodology, limitations of the study and definition of terms.

Chapter two of the study looks at the literature review with a focus on current legal framework in Kenya. The chapter also looks at the issue of whether case backlog limits the right of access to justice and whether the problem of case backlog lies in the legislation itself or in the administrative system in the judiciary.

²³ Merriam Webster Dictionary, 4 ed.

²⁴ Institute of Macroeconomic Analysis and Development, *Court Backlogs*, 2006, 1.

²⁵ Bridge H, 'Court Backlogs: Balancing Efficiency and Justice in Singapore,' 7, *Oñati Socio-legal Series*, 4, 2019, 881.

Chapter three provides a comparative study on the situation of case backlog with India in relation to this topic.

Chapter four presents the findings on the current status of case backlog at the Environment and Land Court in Nakuru from 2012-2018.

Chapter five of the study comprises the conclusion as well as provide possible recommendations.

CHAPTER 2: LITERATURE REVIEW

2.1 Introduction

This chapter includes literature review looking at the history of case backlog pre 2010 and the current legal framework in Kenya with a focus on whether case backlog limits the right of access to justice. This helps to gauge the extent to which the administrative system accords to the laws put in place and the sufficiency of the legislation already in place.

2.2 Literature Review

Case backlog is an issue that has unfortunately been a recurring problem for many years. Prior to the 2010 constitution, there were several factors that contributed to case backlog which limited the right to access to justice. Firstly, the courts were viewed as being politically biased that led to public confidence in the judiciary significantly going down.²⁶ This means individuals with a different political stand from that of the government of the day were limited in accessing justice, due to the fact that the cases presented in court were delayed for one reason or another causing backlog. Secondly, the head of state had absolute power to appoint both the Chief Justice of the Court of Appeal and all the members of the Judicial Service Commission, who were mandated to hire and discipline judges.²⁷ This did not guarantee a selection of judicial officers who would be impartial, professional and uphold the tenets of justice. It is important that any judicial system secures highly qualified individuals to administer justice impartially.²⁸

Often there were allegations that bribery of judges was rife in the court corridors leading to mismanagement of cases earning the judiciary a very bad reputation.²⁹ Another factor identified is one concerned with administrative inaction rather than administrative action. Inaction in this case refers to failure by key stakeholders in the judicial system to undertake the responsibilities vested upon them.³⁰ This means that the individuals who bribed the judges were accessing justice expeditiously to the detriment of those who could not pay the judges for their cases to

²⁶ Gainer, 'How Kenya cleaned up its Courts.' Foreign Policy, _ (<https://foreignpolicy.com>) on 29th August 2019.

²⁷ Article 61(1), *Independent Constitution of Kenya* (2008).

²⁸ Abraham, 'The Judicial Process,' 2ed, Oxford University press, New York, 1968, 4.

²⁹ Gainer, 'Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015,' Princeton University press, 2015, 3.

³⁰ Tarr, *Judicial Process and Judicial Policymaking*, 2ed, Clark Baxter, Canada, 2003, 288.

be heard. Furthermore, most judges lacked adequate capacity and requisite experience to deal with administrative matters. The judiciary itself lacked case tracking systems which would be used to monitor cases therefore making it easier for the court to expedite cases and account for delays. Other factors that contributed to the problem of case backlog are identified as insufficient IT system and poor relations among the key persons involved in the judicial process.³¹

The 2010 constitution provided a clear mandate for judicial reform, making justice more accessible to the people by restructuring the court system to include the Supreme Court.³² The Constitution created the Judicial Service Commission totally separated from the executive arm of government to guarantee judicial independence.³³ The constitution also gave parliament the mandate to establish a court with the status of the High Court to determine disputes relating to the environment and the use and occupation and title to land.³⁴ This provision gave birth to the Environment and Land Court established under section 4 of the Environment and Land Court Act. The assumption is that these new reforms will pave way for a more reputable way of administration of justice and hence a reduction in case backlog. In order to support the reformed system, parliament doubled the national budget of the judiciary in 2010.³⁵

Justice is not only the exclusive preserve of the courts. Other players including Parliament, independent institutions and the law society of Kenya to take on responsibilities for the achievement of reducing case backlog increasing the right to access to justice. The law Society of Kenya for example is mandated to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law.³⁶

In the logic of reforming the judiciary by making an effort to make justice more accessible to the people, the judiciary itself adopted a transformation framework to deal with persisting challenges including that of case backlog. The Judiciary Transformation Framework (JTF) sets out the agenda for judiciary transformation and the aim focuses on main principles and broad goals. These include: transforming the Judiciary, court procedures and management; restructuring the judiciary's administrative system; providing a conducive work environment;

³¹ Kurgat L, Ombui K, ' Factors Affecting Service Delivery in the Judicial System in Kenya: A Case of Makadara Law courts,' 2, *International Journal of Science and Research*, 10, 2013, 80.

³² Article 163, *Constitution of Kenya* (2010).

³³ Article 248, *Constitution of Kenya* (2010).

³⁴ Article 162 2 (b), *Constitution of Kenya* (2010).

³⁵ Gainer, 'How Kenya cleaned up its Courts.' Foreign Policy, _ (<https://foreignpolicy.com>) on 29th August 2019.

³⁶ Section 4 (c), *Law Society of Kenya Act* (2012).

transforming the Judiciary's relationship with other institutions of the justice chain among others.³⁷ These reforms aim at creating an independent judiciary, enhancing efficiency and better service delivery, hence greater access to justice for the citizens. The Framework is anchored on four main pillars. The first underscores the need to deliver justice focused on the people. This is supported by a paradigm shift in human resource right from the leadership, staff, organizational culture in the judiciary and a call for professionalism. As enablers, other critical variables include financial and infrastructural resources as well as the use of technology.³⁸

The Transformation Framework is focused on winning public confidence back in the Judiciary. This is achieved by the introduction of case tracking systems. The Case tracking systems are critical to the effectiveness and efficiency of the judiciary. They bring transparency and accountability to a court's operations, reducing case backlog and therefore ensuring access to justice. In addition, to further implement the Judiciary Transformation Framework, Chief Justice David Maraga came up with a service delivery agenda dubbed Sustaining Judiciary Transformation 2017-2021. This document provides for more recommendations to deal with the case backlog problem going forward. They include: establish High Courts in the 9 remaining counties which are Kwale, Lamu, Wajir, Mandera, Isiolo, Samburu, Elgeyo-Marakwet, Nandi and Vihiga; and magistrate courts in the 290 sub counties, carry out service weeks eradicate missing files by computerizing the court registries and strict monitoring of files, dismiss cases where the police fail to get the witnesses in time, stick to dates set for the hearing of civil cases among others.³⁹

As it can be clearly attested by the broad objectives of the framework, without significant changes in the administrative system of the judiciary, justice may be an illusion to many involved. A robust, inclusive and efficient system creates a sense of confidence and hope in the law, processes and the responsible institutions charged with dispensing justice.⁴⁰

2.3 Justification for the Establishment of the Specialized Courts (Environment and Land Court).

The Environment and Land Court handles disputes relating to both the environment and the occupation and title to land. In essence, the establishment of this court can be referred to as

³⁷ Mutunga, 'Judiciary Transformation Framework 2012-2016,' 11, _ (<http://kenyalaw.org>) on 28th August 2019

³⁸ Mutunga, 'Judiciary Transformation Framework 2012-2016,' 14, _ (<http://kenyalaw.org>) on 28th August 2019.

³⁹ Maraga, 'Sustaining Judiciary Transformation 2017-2021,' 22-23, _ (<http://kenyalaw.org/>) on 28th August 2019.

⁴⁰ Ekhubi, 'Change Management Practices in the Judiciary Transformation Framework in Kenya.' University of Nairobi, unpublished LLM thesis, 2012, 6.

court specialization. The aim of this specialization is to develop expertise among the generalist judges and enhance efficiency in the judicial system.⁴¹ The argument made for the establishment of this court and generally for specialized courts is to deal with case backlog. Owing to the number of cases a general court is required to handle, there is a likelihood that resolution of cases within reasonable time may be affected by delays in decision making, high costs of litigation, and lack of public information, trust as well as confidence from the public.⁴²

The specialized courts in general are expected to achieve certain objectives including but not limited to: enhance the efficiency of the judicial and legal system, uniformity, expertise, improve case management and increase system flexibility. Specialized courts on one hand achieve judicial system efficiency by reducing the number of cases in the general courts. Therefore, more cases can be resolved reducing case backlog and consequently enhancing access to justice. The legal system is also improved because the specialized court judges, typically do not require to be educated by advocates given the kind of expertise they possess. On the other hand, the advocate appearing before a generalist judge such as that of the High Court, Court of Appeal and Supreme Court, has to provide extensive background material and develop a comprehensive legal framework through numerous briefs and motions to ensure that the judge has access to as much information as possible that is favourable to their case. As a result, litigants will have to bear the heavy burden of costs arising from such a process. Additionally, the judicial system impacts negatively on duration within which a case would have been resolved, since delays are likely to occur thereby limiting to an extent access to justice within reasonable time.⁴³

In the specialized courts, there is also uniformity and consistency in the application of the law which leads to predictability. Since predictability reduces grounds for litigation, case resolution is likely to take a shorter period thereby reducing case backlog. This is because predictability builds the public confidence both of the legal profession and the court system, consequently reducing the likelihood of parties taking disputes to court for resolution.⁴⁴

Conclusion

⁴¹ Baum, *Specializing the Courts*, University of Chicago Press, Chicago, 2011, 4.

⁴² Angote, 'The Role of the Environment and Land Court in Enforcing Environment Law: A Critical Analysis of the Environment Caseload,' unpublished LLM Thesis, University of Nairobi, 2017, 23.

⁴³ Zimmer M, 'Overview of Specialized Courts,' *International Journal for Court Administration*, 2009, 1, _ (<https://pdfs.semanticscholar.org>) on 29th September 2019.

⁴⁴ Zimmer M, 'Overview of Specialized Courts,' *International Journal for Court Administration*, 2009, 2, _ (<https://pdfs.semanticscholar.org>) on 29th September 2019.

Despite the extensive literature provided above, there are still gaps as it has not yet addressed the backlog problem extensively. The number of cases instituted in courts is still on the rise against the number of finalised cases which creates backlog.

CHAPTER 3: COMPARISON BETWEEN KENYA AND INDIA ON CASE

BACKLOG

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3.1 Introduction

The justification of comparing is that both countries have adopted reforms with the aim of reducing case backlog. Since both countries have attempted similar reforms, this paper will examine the elements in those reforms such as appointment of more judges and support staff, establishment of special courts and training of more judges. This chapter provides an analytical comparative study on the workings of the Indian system of administration of justice towards curtailing the situation of case backlog in order to increase access to justice. This chapter shall further look at the court system in India, the statutory and administrative policies that have been put in place to ensure effective and smooth operations in the courts, and the reforms introduced by the Law Commission of India to address the persistence of backlogs in India.

3.2 The Court system in India

It is important to look at the court system in India to understand the workings of the judiciary. This will help in finding out whether case backlog is caused by an inefficient administrative system. The judicial System of India consists of Supreme Court, High Court and District/subordinate Court. This judicial system is similar to the Kenya system except it does not include the Court of Appeal. Under the constitution of India, the final court being the Supreme is made up of the chief justice of India and twenty-five other judges whose main role is advisory in nature.⁴⁵ Disputed cases from the lower courts and High Courts are taken to the Supreme Court to ensure justice. Decisions rendered by the Supreme Court are considered as binding to all other courts inferior to it.⁴⁶ The High Court is the second superior court consisting of 94 judges, of which 71 are permanent and 23 are additional judges.⁴⁷ These courts also have an additional set of legal professionals. District/Subordinate Courts are the lowest courts which are established according to the population distribution of the district and state.⁴⁸ The complexity of this court system creates problems including a high pendency of cases.

3.3 Background of the problem

⁴⁵ Article 127 (1), *Constitution of India* (2015); Charan, *Judiciary system in India*, 2018, 1.

⁴⁶ _ (<https://www.toppr.com/>) on 24th November 2019.

⁴⁷ _ (<https://www.toppr.com/>) on 24th November 2019.

⁴⁸ _ (<https://www.toppr.com/>) on 24th November 2019.

One of the most challenging problems facing the justice system in India is the delays resulting in the backlog of cases. These delays limit the access to justice of citizens and creates mistrust in the efficiency of the judicial system. Interested parties lose confidence in the Judicial system and some resort to acts of corruption and use of violence; a situation that leads to more litigations hence case backlog.⁴⁹ The National judicial data grid states that more than 16% of the cases are pending beyond five years, with 9.85 per cent of those cases having a pendency period beyond 10 years.⁵⁰ This is significant evidence on how the high pendency of cases causes delays when cases go beyond ten years. According to the Indian Government data, cases pending in the Supreme and High Courts were estimated at 3.93 million in 2015.⁵¹ In the period between 2015 and 2019, the problem of case backlog still persists as only 3.8 per cent reduction of cases was recorded.⁵² While the Supreme Court recorded a marginal reduction, the High Courts have instead increased their case pendency by 9.7%; that is, an increase of 375,402 cases during the same period.⁵³

Some of the factors contributing to the high rate of pendency of cases include:⁵⁴

1. The high number of cases that go through litigation which as from 2017, the pending cases over ten years were estimated to be 2,356,027
2. Population growth also contributes to backlog because the more the number of people, the greater the number cases that will be instituted in courts. According to the last census carried out in India which was 2011, population stood at 1,210,193,422.
3. Accumulation of appeals which ultimately results in accumulation of cases.
4. Inadequate support staff
5. Lack of priority to dispose of old cases
6. Unnecessary adjournments which leads to prolonged litigations

The factors above are similar to those causing case backlog in Kenya, the prominent ones being inadequate support staff, unnecessary adjournments and the high number of cases which go through litigation.

⁴⁹ Mahajan, 'Innovation Proposal to Reduce Monumental Backlog of Cases across Indian Court,' Pune University, 2016, 1 _ (<https://papers.ssrn.com/>) on 1st December 2019.

⁵⁰ Ghosh Y, 'Indian Judiciary: An Analysis of the Cyclic Syndrome of Delay, Arrears and Pendency,' 5, *Asian Journal of Legal Education*, 1, 2017, 23.

⁵¹ Policy Research Studies Legislative Research, Pendency of cases in the Judiciary, 25th July 2018, 1.

⁵² Policy Research Studies Legislative Research, Pendency of cases in the Judiciary, 25th July 2018, 2.

⁵³ Policy Research Studies Legislative Research, Pendency of cases in the Judiciary, 25th July 2018, 2.

⁵⁴ Ghosh Y, 'Indian Judiciary: An Analysis of the Cyclic Syndrome of Delay, Arrears and Pendency,' 24-25.

Due to this, substantive efforts have been made to deal with the problem such as employing and building capacity of more judges and judicial support staff, establishment of specialized courts, digitisation of court processes and reforming procedures.⁵⁵ Despite these reforms in both Kenya and India, there is still a high pendency of cases. Due to this, just like Kenya had the judiciary transformation framework, an Indian Law Commission was established to analyse the extent to which the reforms put in place were delivering the set-out objectives. However, the reforms in India are very specific in targeting the problem of case backlog. The fact that the survey targeted specific problems of individual courts, opportunities arise to deal with these issues.

The selection of reforms to be analysed in this paper was determined by the fact that they are similar to the ones in Kenya.

Some of the reforms analysed and emphasize upon were the following:

3.3.1 Appointment of judges on a priority basis

The commission suggested that instead of just hiring more judges and judiciary support staff, judges should be appointed based on priority. An example they provided as a rationale for this kind of thinking related to the Bihar High Court which required an additional 1624 judges to clear backlog in three years.⁵⁶ Given the big number of judges required to clear backlog of cases; and the time it would take to complete selection and training processes, the Law Commission recommended that the recruitment of new judges should be rationalised as a matter of priority, based on the number of judges required to dispense of the cases within three years.⁵⁷ The Judiciary Transformation Framework and the agenda in sustaining Judiciary Transformation did not recommend more support staff in the Environment and Land Court. They were not specific on the courts that require more support staff and the exact number needed depending on the extent of backlog in individual courts to expedite the problem.

3.3.2 Special Traffic Courts

The Law Commission of India suggested that traffic cases be dealt with by special courts because most cases in the Indian courts are traffic related offences. Therefore, suggesting that

⁵⁵ Mahajan, 'Innovation Proposal to Reduce Monumental Backlog of Cases across Indian Court,' Pune University, 2016, 1 _ (<https://papers.ssrn.com/>) on 1st December 2019.

⁵⁶ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 47.

⁵⁷ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 47.

these special courts function in morning and evening shifts.⁵⁸ On the basis that these kind of cases are likely to require short judicial processes, it was recommended that recent law graduates can be hired to handle matters in these special courts.⁵⁹ However, the special traffic courts should only deal with matters involving the payment of fines. If imprisonment is involved, then ordinary courts should take up the matter.⁶⁰ The Environment and Land Courts are similar to special traffic courts because of the huge number of cases in each.

3.3.3 Periodic assessment of needs for the judiciary

A study done between 2010 and 2012 proved that there was a high possibility of more cases being instituted by the general public in India. The variables identified for the expected trend include: changes in laws, robust public awareness on their rights, capacity building of judicial and support staff, use of technology for efficiency, changing social circumstances, and reduced delay of judicial processes.⁶¹ Therefore, the commission suggested that the trend of disposals and institutions should be monitored by the High Courts.⁶² This will assist in ensuring the problem does not recur. When the cases instituted increase over the disposal rates, then the necessary measures such as hiring more judges and support staff to ensure more cases are handled. In addition, the commission also recommended that the High Court should have regular data collection and management systems.⁶³

The Judiciary Transformation Framework provided for case tracking systems which was aimed at constant monitoring of the cases in the different courts. However, this was not implemented in many courts making it difficult to do so. The service agenda, Sustaining Judiciary Transformation recommends holding of mobile sessions monthly and computerizing the court registries to strictly monitor and audit files.

3.3.4 Efficient deployment of judicial resources

Apart from increasing the number of judges to handle the cases, there was need to deploy judges efficiently depending on various factors such as which courts urgently required judicial staff and the number of cases were being handled by that specific court. The commission

⁵⁸ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 47.

⁵⁹ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 47.

⁶⁰ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 47.

⁶¹ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 48.

⁶² Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 48.

⁶³ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 48.

recommended that once judges were appointed, appropriate allocation should be made based on the following:

1. Cases that were pending for more than one year were considered delayed, whereas those that had been instituted and were pending for the duration of less than a year were considered current. Courts with more, older pending cases were preferred to receive more resources as opposed to their counterparts with more but recent pending cases.
2. Not every case takes the same amount of time and requires the same judicial resources. For example, petty cases may be considered to be delayed if they take more than three months.⁶⁴ However, the recommendations made did not take into consideration this complexity. Therefore, High courts should avail more resources to courts with more delayed pending cases.⁶⁵
3. The fact that cases are being disposed at a high rate does not mean that there is no backlog of cases in that court. There may be old and complicated cases moving at a slow rate as compared to the bulky and simpler cases being disposed of.⁶⁶ The high rate of case disposal hides the fact that there may be cases stagnating over a long period of time. Therefore, even if courts show a high rate of disposal, judicial officers should not be reallocated to other courts before looking at the case load in that court.⁶⁷
4. As much as cases are being disposed at a high rate, the quality of decisions being made by the judges is not certain. The focus is more on the quantitative than the qualitative standard.⁶⁸ If a judge is compromising on the quality standard in order to dispose of more cases, then less number of judges will be recommended which would be detrimental compared to having more judges that would dispose the same number of cases in a qualitative standard.⁶⁹ Therefore, the commission recommended that in allocating judicial resources, the quality of decision making should be taken into account.⁷⁰

In Kenya, both the Judiciary Transformation Framework and Sustaining Judiciary Transformation recommended hiring of more judges and support staff. They however did not give direction as to how more staff will be hired. They did not consider the factors

⁶⁴ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 48.

⁶⁵ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 48.

⁶⁶ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 49.

⁶⁷ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 49.

⁶⁸ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 49.

⁶⁹ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 49.

⁷⁰ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 49.

which will prompt the hiring and deployment of judicial resources like the Indian Law Commission did.

3.3.5 Timely filling of vacancies: Increasing retirement age

Statistics show that there is a high vacancy rate in the courts, especially the subordinate courts which are created through retirement of the judges.⁷¹ Selecting and training of new judges to replace the ones who have retired takes time.⁷² The more time taken to select and train new judges, the more the backlog increases. To mitigate this, the commission recommended that the age retirement should increase from 60 years to 62 years to allow more time to recruit more judges.⁷³

As can be seen from the recommended reforms above, a deeper analysis was done in order to identify the root of the problem causing case backlog and trying to address it. In addition, apart from increasing the judge strength, other reforms need to happen such as improving infrastructure as the increase in number of judges alone will not be effective to deal with delays cases. Moreover, other approaches such as encouraging alternative dispute resolutions can mitigate the problem by leading the citizens to divert their cases from the courts to reduce case backlog. While this is valid for the case of special traffic courts, it is not possible

3.4 Lessons from the Kenyan and Indian Judicial Context

Both Kenya and India instituted reforms at around the same time. The reforms were informed by the need to mitigate the situation of high pendency of cases. Both countries decide to hiring of more judicial staff, digitisation of court processes and establishment of specialised courts. In spite of this, India has attempted to implement them more in detail. For instance, the Indian Commission realising that simply hiring more judicial staff is not enough, asserted that judges and other support staff need to be hired on a priority basis. This means that they should consider certain factors such as the number of cases being filed in that court, how many are being disposed of and the quality standard of the decisions made by the judges to dispense of the cases. Kenyan courts would achieve more efficiency if an analysis of each situation in different courts was done and hiring was based on such actual facts

⁷¹ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 50.

⁷² Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 50.

⁷³ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial manpower*, July 2014, 50.

Another lesson Kenya could borrow from the implementation of reforms instituted by India is filling of timely vacancies to give sufficient notice and time to recruit and train more judges. In the same way, judges in Kenya should also fill their vacancies on time before their retirement to enable the process of selection and training of new judges which takes time. The retirement age of judges in Kenya is seventy years.⁷⁴ They can however retire anytime from the age of sixty five years.

⁷⁴ Article 167, *Constitution of Kenya* (2010).

CHAPTER 4: THE CURRENT STATUS OF BACKLOG IN THE ENVIRONMENT AND LAND COURT IN NAKURU

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4.1 Introduction

This chapter presents the findings portraying the backlog situation in the Environment and Land Court in Nakuru. The data presented in this chapter are as a result of interviews and questionnaires administered to the personnel of the Environment and Land Court in Nakuru, that is: assistant presiding judge of the Environment and Land Court in Nakuru, deputy registrar of the Environment and Land court in Nakuru, 1 registrar, 2 advocates, 2 plaintiffs and 1 defendant. A number of factors led to the choice of the respondents who participated in this study.

Though the sitting judge ought to have been one of the respondents, his unavailability led to interviewing the only one present, that is, the assistant presiding judge. The judge plays an important role in this study because he gives useful and necessary information on the workings of the court. He is in a position to give the reasons why there is case backlog in the court, based on his experience working there. The choice of the deputy registrar was justified by her critical role in the workings of the registry at the court, more specifically, overseeing the work of the registrars. She is also responsible to the presiding judge in the discharge of his functions and she is the person who receives complaints concerning delay of cases. Therefore, she was a key respondent in providing information, especially on the complaints they receive and the reason for delays in the court. The registrars are conversant with the cases since they work on them on a day to day basis. They are responsible for setting up and maintenance of the registers of the court. They are in a position to give records on the number of cases that have delayed over a period of time, which is essential to determine the current status of case backlog in the court of study. The Advocates interviewed were selected because they are conversant with the workings of the court. They are therefore in a position to speak on the number of cases they have handled, which ones have delayed, the reasons for their delay and how this delay affects their client's right to access justice. The plaintiffs and defendant selected for the study are essential because they provide key information on how the delays in their cases, if any, have limited their right to access justice. Therefore, it was necessary to triangulate the information from various respondents for validity and reliability purposes.

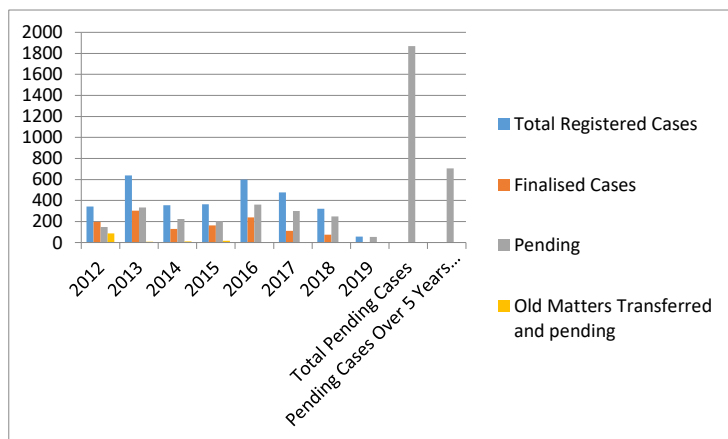
This chapter will start from the current status of case backlog in the Environment and Land Court in Nakuru and factors causing it, based upon the data provided by the judicial officers.

Further it will analyse the impact of case backlog on the advocates, plaintiffs and defendant. Lastly, it will look at the reforms targeting the reduction of backlog and examine to what extent they have been implemented.

4.2 Status of Case backlog

Since the establishment of the Environment and Land Court in Nakuru in 2012, the study found a backlog spanning from 2012-2018 according to data records of May 2019. The number of cases filed in relation to the number of cases resolved provides the difference of the cases pending in each year. The following graph captures the situation in the given period.

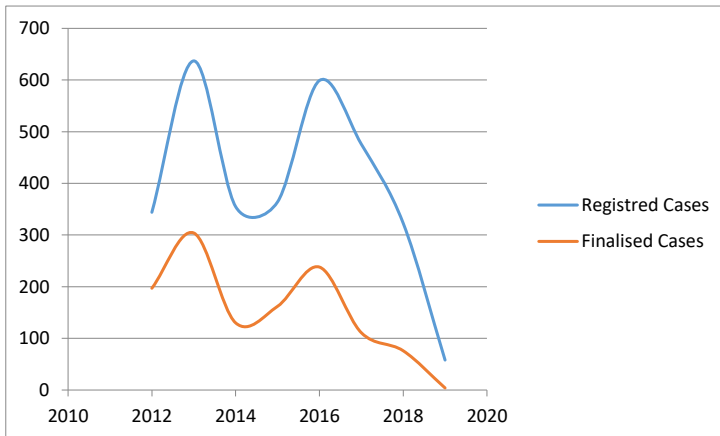
Figure 4.2.1



The total number of cases registered between 2012 and 2018 is 3098. In the same period, 1218 cases were resolved. 122 old and pending matters were transferred to the ELC court. The total number of pending cases in 2018 stood at 1815 in 2018. Of these, 705 had lasted 5 years and above and some of them are still pending.

Figure. 4.2.2 shows the number of finalised cases against the registered cases.

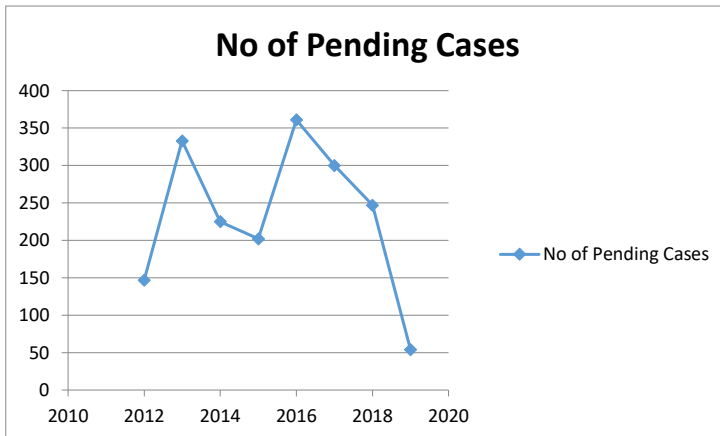
Fig. 4.2.2



As can be seen from the data, the number of finalised cases is less than the registered ones. In 2012 of the 344 total registered cases, 197 were finalised. In addition to the registered cases, 86 old matters had been transferred to the court and were still pending. This led to 430 cases for resolution in that year. In 2013, the number of registered cases rose to 637. About half of the cases were resolved with an additional 7 from old matters. The total number of pending cases came to 340. In both 2014 and 2015 the registered cases were slightly over 350 each year with an average of less than half unresolved cases in each year. 2016 saw a rise of registered cases to 599 with a resolution of 238 cases, while 2017 saw only 111 cases resolved against a total number of 476 registered cases. In 2018 only 76 cases were expended against 323.

Figure 4.2.3 shows the number of unresolved cases since 2012

Fig. 4.2.3



As can be deduced from the data, the trend is that the number of new pending cases has been fluctuating each year. There is a noticeable rise in 2013 to 333 and a drop in 2014 and 2015 to 225 and 202, respectively. 2016 saw a rise in case pendency of 316. The subsequent years saw a drop of case pendency to 300 and 247 in 2017 and 2018, respectively. Despite the seeming reduction in the number of pending cases, there is still backlog because the total number of cases pending was at 1815 in 2018.

4.3 Reforms implemented in the Environment and Land Court in Nakuru

As noted in the introduction of this research, the judiciary has realised this problem of case backlog and as a result, they introduced reforms to deal with the problem of case backlog in the judiciary transformation framework. Because of the period of the study, that is, 2012-2018; and the time the judiciary transformation framework was introduced, that is, 2012-2016, the reforms are important to analyse the situation of case backlog in the Nakuru Environment and Land Court.

The interviewed judicial officers answered questions about key reforms implemented such as hiring of more judicial staff, conducive work environment, case tracking systems among others.

The following table shows the judicial officers' responses

From the point of view of reforms undertaken by the Environment and Land Court in Nakuru, the judicial officer responded to a likert scale ranging from 1 to 5 on a number of reforms. The table shows the responses given.

Figure 4.3.1

| TYPE OF REFORM | EXTENT TO WHICH REFORMS HAVE BEEN IMPLEMENTED | | | | |
|--|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 |
| Hiring of more judicial staff | ✓ | | | | |
| Providing case tracking systems | | | ✓ | | |
| Restructuring the judiciary's administrative system | | | ✓ | | |
| Conducive working environment | | ✓ | | | |
| Transforming the Judiciary's relationship with other institutions of the justice chain | | | | ✓ | |

In response to the extent to which the Environment and Land Court in Nakuru has implemented some of the judicial reforms, ranking poorly were hiring of more judicial staff and a conducive working environment. The judicial officer indicated that there is still inadequate staff, especially court registrars in view of the number of cases that are registered annually. Improvement of the working environment is still wanting with regards to court rooms, judge's chambers and digital devices such as computers. Providing case tracking systems has been provided which has led to improvement compared to the period prior to 2012. However, equipment such as computers are still insufficient. The reform that has received considerable attention is transforming the judiciary's relationship with other institutions of the justice chain as provided for in the Court User Committee (CUC) Guidelines of 2019. Using these guidelines, the Environment and Land Court in Nakuru has been able to improve relations with the stakeholders and to avoid unnecessary hiccups. These guidelines shall hopefully reduce case backlog in the future. However, for the period of this study, the impact of these guidelines does not apply.

CUC is established under Section 35 of the Judicial Service Act with the mandate of providing for the establishment of the National Council on the Administration of Justice (NCAJ).⁷⁵ This council ensures proper coordination, efficiency and effectiveness as well as collaborative approaches in the administration of justice and the transformation of the justice system.⁷⁶ This is achieved through bringing together concerned stakeholders in the justice sector together with

⁷⁵ Section 35, *Judicial Service Act* (No 1 of 2011).

⁷⁶ The National Council on Administration of Justice, 'Court Users' Community Guidelines,' 1, 2019 _ (<https://www.unodc.org/>) on 5th January 2020.

a view to promote public participation, engagement of various actors, awareness on court operations and enhancement of sector partnerships.⁷⁷

4.4 Factors Causing Case Backlog according to the Judicial Officers

The respondents cited varied factors causing backlog according to their own context and experience. The judicial staff encompassing the assistant presiding judge, the deputy registrar and the registrar identified the following factors as contributing to case backlog:

1. The matters filed every year surpass the capacity of the court to dispense them in good time;
2. The parties file too many applications therefore dragging the parties cases;
3. Inadequate judicial staff to dispense of the matters in good time;
4. Environment and Land Court judges not being given the same status as High Court judges, which acts as a demotivator;
5. Lack of sufficient funds to implement reforms;
6. Lack of a conducive working environment caused by inadequate infrastructure such as lack of computers and inadequate space in the judge's chambers and other working spaces;
7. A party presents too many witnesses who consume time thereby prolonging the set aside time for hearing a case.

4.5 Background of the Plaintiffs' and Defendant cases

The first plaintiff's case involves a piece of land which he bought in 2011 from the parents in law at an agreed price. The land appreciated after sometime and the parents in law demanded for more money which he was not ready to pay, as it was contrary to the agreement made two years prior to this new demand. The wife sided with her parents and is intending to sell to another party. When the plaintiff discovered what was going on, he brought the matter to court towards the end of 2014. The case has been in court since then and until now, it has not been resolved.

The second plaintiff's case involves a lady whose deceased husband bought a piece of land in Nakuru in 2008. They bought this land for future investment therefore the land has not been

⁷⁷ The National Council on Administration of Justice, 'Court Users' Community Guidelines,' 1, 2019 _ (<https://www.unodc.org/>) on 5th January 2020.

put to substantive use except for the trees planted there. A limited company lays a claim to the same land. Both parties are in possession of title deeds bearing the same land registration number but indicating different purchase periods; hers is earlier, the other party is later. The plaintiff took the case to court after learning that the limited company has set camp at the property with the intention of putting up a structure. The case has been in court since 2015 and is yet to be resolved.

The defendant's case involves a commercial plot which he bought and put it in the brother's name. They had a written agreement indicating that he was the owner of the plot. This was also due to the fact that he had bought several plots and he gifted his brother one plot. Unfortunately, the brother passed away and his children are laying a claim to the piece of land. However, the title deed is in the hands of the defendant and the children have taken him to court demanding that he surrenders the title deed because it is in their father's name.

4.6 Factors causing case backlog according to the Advocates Plaintiffs and Defendant

The advocates identified the main cause of case backlog as courts approved adjournments made by the opposing counsel. In most instances, it is due to a witness being unavailable or lack of proper preparation for the hearing. Another factor which was specific to one advocate was that the judge died which caused a delay in their case as a new judge was posted almost a year later. Furthermore, the advocates stated that the Environment and Land Court does not prioritise the movement of cases. It appears that the judges do not prioritise the pending cases, instead they take on new ones causing accumulation. At times the court does not sit and no reason is provided for. Therefore, the cases that were in the cause list on that day are automatically pushed to another day causing more accumulated delays. Moreover, in other instances the court does not streamline its schedule making it difficult to expedite the cases. Another respondent stated as a factor that the plaintiff and judge died and this caused a delay in their case. These are exceptional circumstances that nonetheless contributed to case backlog in the Environment and Land Court in Nakuru.

According to another respondent, the main reason for his case being delayed was because a directive was given by the Environment and Land Court in Nakuru that any land case in that court should be transferred to the High Court and allocated to one particular judge. This directive meant that a case pending in court since 2014 was being moved to the High Court in 2017, and the move implied that it was going to be pending for almost a year. This shows how a case can easily be delayed that was given in 2017 which affected a case that was instituted in

2014. This shows a pendency of a case since 2014 to 2018. Responses also included that delays in their cases were due to too many adjournments due to many reasons such as an instance when one witness would be heard for a whole day thus dragging the case further.

A few of the factors mentioned such as the death of the judge and plaintiff is beyond the Court's control. However, most of the factors mentioned cause unnecessary delays which ultimately limits their access to justice.

4.7 Impact of Case Backlog on the Plaintiffs and Defendant

Based on the factors stated above, the delays in their cases impact the parties negatively. Some of the challenges mentioned by the respondents include the fact that first, more costs are incurred as the longer the case is in court, the more money is spent. This was especially stressed by the first plaintiff who stated that initially, there was an amount agreed upon between his advocate and himself. However, since the case has taken too long, every time the advocate makes an appearance in court, he asks for more money. Secondly, the non-profitability regarding the land cases by which the property is put under the custody of the court until the case is resolved. This means that the parties in the case cannot make productive use of the land. Thirdly, Psychological challenge is imposed on the parties by delays causing anxiety, uncertainty and unnecessary stress. Finally, the change of advocates for the defendant when they become too expensive or they do not discharge their duties in a proper manner which essentially meant starting again with new terms, costs and uncertainties

Impact of case backlog on members of the public and the government

An impact on the parties involved in a case that delays in court over a long period of time affects the other members of the public as well as the **government** in terms of both resources and time. When cases in the judicial system are expedited quickly, it contributes to economic growth because the government will use less money in clearing backlog. Instead, it can divert that money to other areas that will boost the economic growth of the country. When cases delay, it means more money has to be allocated to expedite the cases by hiring of more judicial staff, efficient deployment of resources and improvement of infrastructure such as buying more computers to ensure backlog is cleared. In addition, when there is case backlog, public trust and confidence in the judicial system goes down which affects their right to access justice. Moreover, in land matters, whenever there is a dispute concerning the owner of a piece of land, the title deed is in custody of the court. This affects other parties in the event that title deed was used as collateral. For example, if an individual borrowed money from a bank and the title deed

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was collateral in the event one defaults in payment, since it will be in the custody of the court, it will affect both the bank and the borrower negatively.

CHAPTER 5: RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

The conclusions and recommendations made in this chapter are based on the literature review and the findings indicated in the previous chapter. Bearing in mind that the study focused on one Environment and Land Court, the recommendations may not be generalized for every other Environment and Land Court, rather they give an indication of the issues that need attention.

5.2 Conclusion

It is evident that case backlog is a persistent challenge plaguing the Environment and Land Court in Nakuru, and most likely other courts in the country. It is on this basis that the Kenyan judiciary put in place a transformation framework between 2012 and 2016 to expedite cases in order to address this perennial problem. No doubt, the measures taken have had a minimal positive impact. Hence, the number of cases pending annually suggests the need to find other mechanisms of expediting cases so as not to limit access to justice to the plaintiff and defendant.

As evidenced by the findings that point to wanting infrastructure, inadequate staff, a wanting conducive environment and a partially restructured administrative system are the major factors contributing to case backlogs, which in turn limits access to justice.

The recommendations this study makes are in view of the situation in the Environment and Land Court in Nakuru.

5.3 Recommendations

It appears that the judiciary would need to deploy resources, support staff and equipment that would help to prioritize the pending cases instead of accumulating them. That would mean the need to analyse the situation in each and every individual courts to determine how to effectively deploy them. For example, for tracking systems, more computers should be allocated

To reduce delays, time frame should be set to determine the length of judicial proceedings at both the general level and at the actual proceedings. The timings set should be measurable, realistic and revised from time to time depending on the dynamics of the case.

Standards for example in terms of witness statements and reason to adjourn should be set so that they can be met by the parties so that cases can be expedited instead of delaying them. The court can read through witnesses' statements to ensure that the witnesses do not contradict what they said when called to the stand to testify. A big problem that occurs in the Environment and

Land Court is that witnesses say one thing in the witness statement and when called to the stand to testify, they may give more information that was not in the witness statement; or omit information that was initially in the witness statement. Since you cannot compel a witness to adopt a witness statement, they have to be amended before the case proceeds.

One of the reforms introduced by the Judiciary Transformation Framework and Sustaining Judiciary Transformation is hiring more judges and support staff. Since this problem persists, the paper suggests that they should train more judges to fill in the vacancies and provide personnel for the courts facilitated by circuit judges instead of permanent presiding judges.

The courts should use evaluation feedback reports from plaintiffs, defendant, advocates and judicial officers themselves concerning the timeliness of proceedings so that they can make readjustments and expedite the cases accordingly.

Previously, Magistrates did not have jurisdiction to listen to land matters. However, they now have jurisdiction to determine land matters. Therefore, the last recommendation suggests that more cases should be taken to the lower courts to reduce the high pendency of cases in the Environment and Land Court.

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APPENDICES

Appendix 1



INTERVIEW SCHEDULE FOR THE JUDGE: THE ENVIRONMENT AND LAND COURT IN NAKURU

ACCESSING JUSTICE IN KENYA: AN ANALYSIS OF CASE BACKLOG IN NAKURU ENVIRONMENT AND LAND COURT

Dear Respondent,

The interview schedule is designed to solicit information on case backlog in the Environment and Land Court in Nakuru. The information provided will be used for the sole purpose of this study.

General Information

Title:

Role:

1. How long have you presided over Environment and land courts and what is your experience in dealing with Environment and Land matters?
2. Which of the judiciary's reforms have you implemented in the ELC to mitigate case backlog?
3. In your view, is case backlog still persistent despite implementing the reforms and why?
4. In your view is case backlog limiting citizens' rights to access to justice in Environment and land matters?
5. Have some of the reforms not worked, and why do you think they have not worked?
6. From your experience, what recommendations would you give to best address the challenges?

Appendix 2



Strathmore University

Law School

QUESTIONNAIRE FOR THE REGISTRAR

**ACCESSING JUSTICE IN KENYA: AN ANALYSIS OF CASE BACKLOG IN
NAKURU ENVIRONMENT AND LAND COURT**

Dear Respondent,

This questionnaire is designed to acquire information on case backlog in the Environment and Land Court in Nakuru. The information provided will be used for the sole purpose of this study.

1. General Information

Title of Respondent:

Role:

Duration of working in the ELC:

Below 2 years 2-5 years 6-10 years over 10 years

2. Provide Information on the number of cases for the specified period as given by the table below:

| YEAR | NUMBER OF CASES BROUGHT BEFORE THE ELC | NUMBER OF CASES RESOLVED | NUMBER OF CASES PENDING |
|-------------|---|---------------------------------|--------------------------------|
| 2012 | | | |
| 2013 | | | |
| 2014 | | | |
| 2015 | | | |
| 2016 | | | |

| | | | |
|------|--|--|--|
| 2017 | | | |
| 2018 | | | |

3 Would you say there is a backlog in this court?

Yes No

If yes, what are the causes for the delay in resolving the cases?

4. Have you received complaints concerning the delay of Environment and land cases?

Yes No

If yes, kindly list any grievances made in the space provided

5. In your view, how does delay in resolving cases affect citizens' rights to access justice?

6. Which judiciary’s reform targeting case backlog worked on your experience?

7. To what extent have the following reforms been implemented in your court? Please provide an assessment of the following reforms being implemented in your court by ticking one of the options provided in the table below.

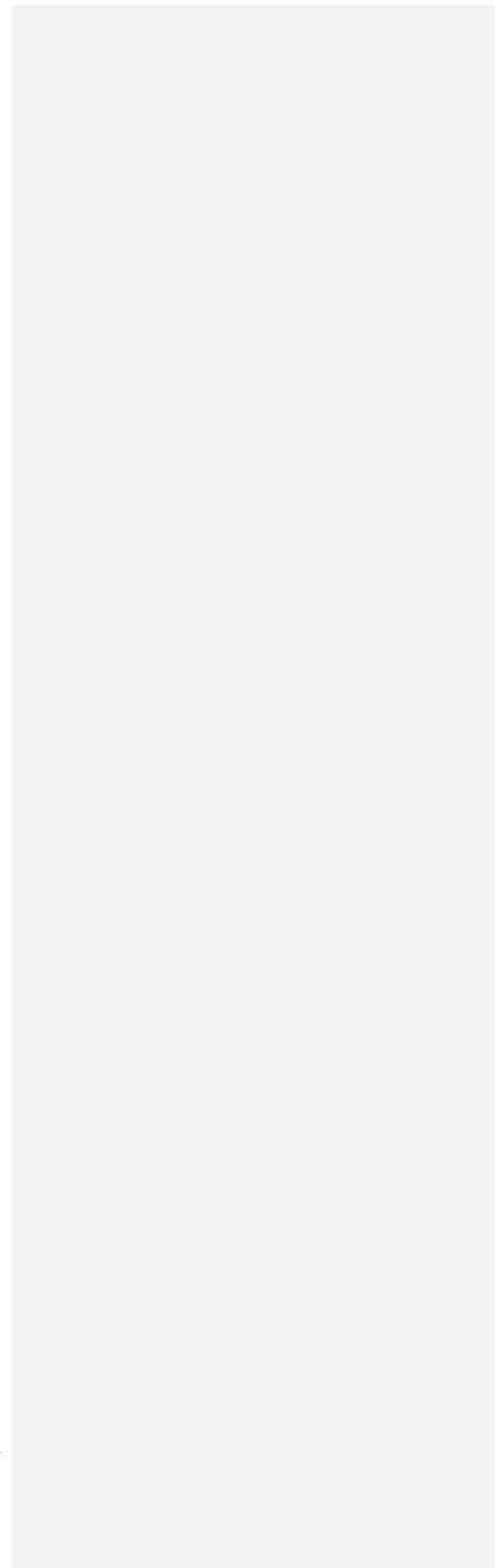
1- not at all 2- little extent 3- some extent 4- great extent 5- beyond expectations

| TYPE OF REFORM | EXTENT TO WHICH HAVE BEEN IMPLEMENTED | | | | |
|--|---------------------------------------|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 |
| Hiring of more judicial staff | | | | | |
| Providing case tracking systems | | | | | |
| Restructuring the judiciary’s administrative system | | | | | |
| Conducive work environment | | | | | |
| Transforming the Judiciary’s relationship with other institutions of the justice chain | | | | | |

8. Indicate challenges specific to the ELC in Nakuru that contribute to the persistence of case backlog.

9. In your view, how can the challenges you have cited above be addressed?

Appendix 3





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INTERVIEW SCHEDULE FOR THE DEFENCE ADVOCATE

**ACCESSING JUSTICE IN KENYA: AN ANALYSIS OF CASE BACKLOG IN
NAKURU ENVIRONMENT AND LAND COURT**

Dear Respondent,

The interview schedule is designed to solicit information on case backlog in the Environment and Land Court in Nakuru. The information provided will be used for the sole purpose of this study.

1. How long have you been representing clients on land and Environment matters in this court?
2. How many cases have you handled on land and environment matters since 2012-2018?
(Probe for cases between 2012-2018)
3. In your view, how many of these cases have been delayed and for how long?
4. Would you say that there is a case backlog in this Land and Environment Court?
5. According to you, what are the reasons for delay in these cases?
6. What challenges have you personally faced due to case backlog in this court?
7. How have you addressed the challenges?
8. In your view, what reforms have been introduced in the court to deal with this problem?
9. In your view, have the reforms which were implemented by the judiciary worked?
10. In your view, to what extent has case backlog affected the defendant and generally citizen's rights of access to justice?

Appendix 4



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INTERVIEW SCHEDULE FOR THE PLAINTIFF ADVOCATE

**ACCESSING JUSTICE IN KENYA: AN ANALYSIS OF CASE BACKLOG IN
NAKURU ENVIRONMENT AND LAND COURT**

Dear Respondent,

The interview schedule is designed to solicit information on case backlog in the Environment and Land Court in Nakuru. The information provided will be used for the sole purpose of this study.

1. How long have you been representing clients on land and Environment matters in this court?
2. How many cases have you handled on land and environment matters since 2012-2018?
(Probe for cases between 2012-2018)
3. In your view, how many of these cases have been delayed and for how long?
4. Would you say that there is a case backlog in this Land and Environment Court?
5. According to you, what are the reasons for delay in these cases?
6. What challenges have you personally faced due to case backlog in this court?
7. How have you addressed the challenges?
8. In your view, what reforms have been introduced in the court to deal with this problem?
9. In your view, have the reforms which were implemented by the judiciary worked?
10. In your view, to what extent has case backlog affected the plaintiff and generally citizen's rights of access to justice?

Appendix 5



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INTERVIEW SCHEDULE FOR THE PLAINTIFF AND DEFENDANT

**ACCESSING JUSTICE IN KENYA: AN ANALYSIS OF CASE BACKLOG IN
NAKURU ENVIRONMENT AND LAND COURT**

Dear Respondent,

The interview schedule is designed to solicit information on case backlog in the Environment and Land Court in Nakuru. The information provided will be used for the sole purpose of this study.

1. When did you take the case to court for the first time?
2. Why did you bring the case to court? (Probe for facts of the case)
3. How long has your case been in court?
4. Why has it stayed this long?
5. What are the challenges you have faced? (Probe for delays and reasons for delays)
6. How have you addressed those challenges? (Probe for any measures taken by the plaintiff depending on the challenges)
7. In your view, what can the court do to resolve your case?
8. In your view, how have the challenges affected you?
9. How has the delay limited your right to access justice?

Appendix 5

**DATA AS PER REGISTER OF THE ENVIRONMENT AND LAND COURT NAKURU
AS AT MAY 2019**

2012

| | |
|-------------------------------------|-----|
| Total registered cases | 344 |
| Finalised cases | 197 |
| Pending | 147 |
| Old matters transferred and pending | 86 |

2013

| | |
|-------------------------------------|-----|
| Total registered cases | 637 |
| Finalised cases | 304 |
| Pending | 333 |
| Old matters transferred and pending | 7 |

2014

| | |
|-------------------------------------|-----|
| Total registered cases | 355 |
| Finalised cases | 130 |
| Pending | 225 |
| Old matters transferred and pending | 11 |

2015

| | |
|-------------------------------------|-----|
| Total registered cases | 364 |
| Finalised cases | 162 |
| Pending | 202 |
| Old matters transferred and pending | 18 |

2016

| | |
|------------------------|-----|
| Total registered cases | 599 |
| Finalised cases | 238 |

| | |
|--------------------------------------|-------------|
| Pending | 361 |
| 2017 | |
| Total registered cases | 476 |
| Finalised cases | 111 |
| Pending | 300 |
| 2018 | |
| Total registered cases | 323 |
| Finalised cases | 76 |
| Pending | 247 |
| 2019 | |
| Total registered cases | 58 |
| Finalised cases | 4 |
| Pending | 54 |
| | |
| 5 YEARS AND ABOVE (2012-2014) | 705 |
| ALL PENDING CASES | 1869 |