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# The Common Law, Judges' Law

Land and Environment before the Kenyan Courts

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THE COMMON LAW, JUDGES' LAW

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*I dedicate this book to the memory of  
Hastings Wilfred O. Okoth-Ogendo,  
who served as Professor of Public Law  
in the University of Nairobi from 1989 to 2009:*

*in remembrance of  
his incomparable sense of academic service,  
and of his attribute as a scholar of exemplary commitment  
to intellectual inquiry on law and, in particular,  
on property law and constitutional development*

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## PREFACE

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Setting out from a background of scholarship evolved over a period of decades, I joined the High Court Bench in October 2003, with the enthusiasm to match the law as learnt, to the reality of dispute settlement. First assigned duty in the Civil Division at the principal station, and thereafter continually adjudicating civil disputes, I formed the impression, especially after serving for more than three years in the Criminal Division and after experiencing the entire range of justiciable causes, that *civil cases*, offered the widest scope for the development of the typical legal concept, and for the formulation of novel concepts of jurisprudence. The reason is that, unlike in criminal or cognate matters, which on constitutional or historical grounds were bounded by formal law, the civil domain rested on private grievance, and accorded the judge considerable liberty in the application of principle and in law-making.

At the same time I gained the perception, within the framework of civil litigation, that the law relating to *property* was by far the most tested sphere of dispute settlement. By no means surprising, in view of the constrained pace of growth of the national economy, attending upon a rapid pace of population growth, such as obtains in most African countries. The basic endowment of nature, in the form of land, and land-based resources and activities, lies at the core of social tensions, and the resultant urgency of dispute settlement; and these, thus, constitute the larger part of the incidence of civil litigation.

Such disputes do not, in most cases, find anything akin to solution-templates in the form of enacted law. And the *common law* tradition has come in handy - with its considerable scope for judicial law-making. This scenario conforms to reality in East Africa, which had the legacy of the common law, coming both formally through legislative prescription, and informally through the agency of judicial officers of Commonwealth origin, as well as through a system of legal education and training greatly influenced by the Commonwealth experience.

The classic depiction of the place of judicial creativity, even when the subject-matter is governed by enacted law, is that by Lord Denning:

“It would certainly save the judges trouble if Acts of Parliament were drafted with Divine prescience and perfect clarity. In the absence of it...a judge...must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute but also from a consideration of the social conditions which have given rise to it, and of the mischief which it was passed to remedy, and then he must implement the written word so as to give ‘forces of life’ to the intention of the legislature....”<sup>1</sup>

In the same way, there was an unlimited scope for the Kenyan judge to interpret the law, breathe life into it and, for all practical purposes, *make* law.

It is the clear significance of landed property in the incidence of litigation, that led to the choice of this sphere as the forum for examining evolving judicial practice. This work is a depiction of the judge’s law-creative role, in the common law tradition.

The judge’s context of work is, however, not exactly the same in East Africa as in England – the cradle of the common law tradition. In most countries of Africa, the fundamental principles of law are laid out in a written Constitution, that is binding on the courts and all public agencies. It is, thus, a matter of professional interest, how the superior courts have performed the common-law role, in the context of the Constitution as the basic norm.

In this work, it is the sphere of property law that has been adopted as the medium for examining the mode of discharge of the common law function, in the context of the principles elaborated in the Constitution.

## ACKNOWLEDGMENTS

The authorship of this book, which is inspired by the synergy of legal-research outcomes, on the one hand, and daily scenarios of dispute settlement on the other, was impelled by the constant intellectual engagement with its motions. A work thus conceived and executed, invariably relies on the special contributions of others who have the inclination and capacity to provide both substantive and operational support. Such persons in this instance, to whom I owe a special debt of gratitude, are: my law clerks, Rose Wachuka Macharia, and Emily Nyiva Kinama – for committed research support; and my diligent secretary, Annerita Murungi, for the accurate and elegant typescripts. My especial debt of gratitude is to Strathmore University Law School, and to its dean, Dr Luis Franceschi, for encouragement and for essential institutional support.

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