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THE NATIONAL ASSEMBLY

Hon. W. Cheptund
Chairman
Subongo

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FOURTH SESSION – 2020

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT

ON THE CONSIDERATION OF THE SMALL CLAIMS COURT
(AMENDMENT) BILL, 2020 (NATIONAL ASSEMBLY BILL NO. 4)

CLERK'S CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

APRIL, 2020

Approved for Tabling
29/4/20
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DINA

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CHAIRPERSON FOREWORD

The Small Claims Court (Amendment) (No. 4) Bill, 2020 underwent First Reading on 14th April, 2020 and was immediately committed to the Departmental Committee on Justice and Legal Affairs for review and report to the House pursuant to the provisions of Standing Order 127(1).

Pursuant to the provisions of Article 118 of the Constitution of Kenya and Standing Order 127 (3) the Committee through an advertisement in the local daily newspapers of 17th April, 2020 invited the public to make representations on the Bill. The Committee received submission from the Judiciary, the Law Society of Kenya, Professor Tom Ojienda, Senior Counsel, Mr. Wilberforce Akello, Advocate of the High Court of Kenya, Mr. Kennedy Ogutu, Ministry of East African Community and Regional Development and Mr. Nguyo Wachira Patrick

While considering the Bill the Committee held two (2) sittings in which the Bill was considered clause by clause, considered all the submissions from the stakeholder and unanimously adopted its report.

May I take this opportunity to express gratitude to Committee Members for their resilience and devotion to duty which made the consideration of the Bill successful. May I also appreciate the Speaker and Clerk of National Assembly for always providing guidance and direction to Committees in the discharge of their mandate. Finally, I commend the secretariat for exemplary performance in providing technical and logistical support to the Committee.

Hon. Speaker, on behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order 199 (6), it's my pleasant privilege and duty to present to the House a report of the Committee on the Small Claims Court (Amendment) (No. 4) Bill, 2020.

Hon. William Cheptumo, M.P.

CHAPTER 1

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-
 - (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
 - (b) study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
 - (c) study and review all legislation referred to it;
 - (d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
 - (e) investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;
 - (f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)
 - (g) examine treaties, agreements and conventions;
 - (h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
 - (i) consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and
 - (j) Examine any questions raised by Members on a matter within its mandate.
2. The Second Schedule of the Standing Orders on Departmental Committees further outlines the Subjects of the Committee, as follows-
 - (a) Constitutional affairs;
 - (b) The administration of law and Justice;

- (c) The Judiciary;
- (d) Public prosecutions;
- (e) Elections;
- (f) Ethics, integrity and anti-corruption; and,
- (g) Human rights.

1.2 Committee Membership

3. The Committee was constituted on Thursday, 14th December, 2017. The current membership is as follows-

Chairperson

Hon. William Cheptumbo, M.P.
Baringo North Constituency
Jubilee Party

Vice Chairperson

Hon. Alice Muthoni Wahome, M.P.
Kandara Constituency
Jubilee Party

Hon. John Olago Aluoch, M.P.
Kisumu West Constituency
FORD-Kenya

Hon. George Peter Kaluma, M.P.
Homa Bay Town Constituency
ODM-Party

Hon. Roselinda SoipanTuya, M.P.
Narok County
Jubilee Party

Hon. Charles Gimose, M.P.
Hamisi Constituency
FORD-Kenya

Hon. Johana Ng'cno, M.P.
Emurua Dikirr Constituency
KANU-Party

Hon. W. Kamoti Mwamkule, M.P.
Rabai Constituency
ODM-Party

Hon. Ben Orori Momanyi, M.P.
Borabu Constituency
WIPER-Party

Hon. Zuleikha Hassan, M.P.
Kwale County
ODM-Party

Hon. Jennifer Shamalla, M.P.
Nominated MP
Jubilee Party

Hon. Beatrice Adagala, M.P.
Vihiga County
ANC-Party

Hon. Gladys Boss Shollei, CBS, M.P.
Uasin Gishu County
Jubilee-Party

Hon. John Munene Wambugu, M.P.
Kirinyaga Central
Jubilee -Party

Hon. George Gitonga Murugara, M.P.
Tharaka Constituency
Democratic Party (DP)

Hon. Anthony Githiaka Kiai, M.P.
Mukurueni Constituency
Jubilee-Party

Hon. John Kiarie Waweru, M.P.
Dagoretti South Constituency
Jubilee-Party

Hon. Japheth Mutai, M.P.
Burcti Constituency
Jubilee-Party

Hon. Adan Haji Yussuf, M.P.
Mandera West Constituency
Economic Freedom Party

1.3 Committee Secretariat

4. The Committee secretariat is as follows—

Mr. Abenayo Wasike
Senior Clerk Assistant
Lead Clerk

Mr. Denis Abisai
Principal Legal Counsel I

Ms. Halima Hussein
Clerk Assistant II

Mr. Ahmed Hassan Odhwa
Principal Research Officer

Mr. Omar Abdirahim
Fiscal Analyst III

Ms. Rosclyne Ndegi
Serjeant-at-Arms I

Mr. Joseph Okongo
Media Liaison Officer

5. Minutes of sittings of the Committee on the consideration of the Bill are attached to this report as **annexure I**.

CHAPTER 2

2.0 INTRODUCTION AND BACKGROUND

2.1 Memorandum of objects and reasons of the Bill

6. The principal object of the Bill is amend to amend the Small Claims Court Act, No. 2 of 2016 in order to promote the effective disposal and management of small claims which affect the small and medium enterprises. The Bill also seeks to align the Small Claims Court Act with Article 48 of the Constitution (Right of Access to Justice) and Article 50 of the Constitution (Right to a Fair Hearing).
7. The Bill does not concern County Governments in terms of Article 110 (1) (a) of the Constitution and its does not affect the functions and powers of County Governments as set out in the Fourth Schedule to the Constitution.
8. The Bill does not delegate legislative powers nor does it limit fundamental rights and freedoms.
9. The enactment of this Bill will not occasion additional expenditure of public funds.
10. Clause 2 of the Bill seeks to amend section 12(3) of the Small Claims Court Act in order to increase the pecuniary jurisdiction of the Small Claims Court from the current Ksh 200, 000 to Ksh 1 Million:
11. Clause 3 of the Bill proposes to-
 - (a) Delete section 20(2) of the Act in order to remove the current prohibition on legal practitioners from representing parties appearing before the Small Claims Court;
 - (b) Amend section 20(3) of the Act in order to allow legal practitioners, alongside other authorized persons, to represent parties before the Small Claims Court.
12. **Clause 4** of the Bill proposes to delete and substitute section 34(3) of the Act in order to introduce a new provision which empowers the Small Claims Court to allow a maximum of three adjournments of a hearing on reasonable grounds, and to grant any further adjournments only under exceptional circumstances. The current provision provides that 'The Court may only adjourn the hearing of any matter under exceptional circumstances which shall be recorded'.

CHAPTER 3

3.0 OVERVIEW OF THE RELEVANT PROVISIONS OF THE SMALL CLAIMS COURTS ACT, NO. 2 OF 2016

13. The Small Claims Court was established in April 2016 when the Small Claims Court Bill 2015 was enacted into law. The Court was established as a forum which shall resolve disputes informally, inexpensively and expeditiously in accordance with the principles of law and natural justice.
14. Section 4(1) of the Small Claims Court Act, No. 2 of 2016, establishes the Court as a subordinate Court pursuant to Article 169 (1)(d) of the Constitution, which Article empowers Parliament to establish other Courts and Local Tribunals. Section 4(2) of the Act empowers the Chief Justice to designate any Court station as a Small Claims Court with such geographical jurisdiction as may be specified in the notice.
15. Section 5 of the Act provides that the Small Claims Court shall be presided over by an Adjudicator, who is required to be an Advocate of the High Court of Kenya with at least three years' experience in the legal field.
16. Section 6(1) of the Act requires the Judicial Service Commission to appoint such number of Adjudicators, registrars and other officers of Small Claims Courts as may be necessary for the effective discharge of the functions of the Court.
17. Section 11 of the Act empowers the Chief Justice to determine the local limits of the jurisdiction of the Court and further requires the Chief Justice to ensure that such Courts are accessible in every sub-county and progressively in other decentralized units of judicial service delivery.
18. Section 34 of the Act provides that all proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination.
19. Section 38 of the Act provides that a person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law and the decision of the High Court on that matter shall be final.
20. **Sections of the Small Claims Court Act, 2016 No. 2 of 2016 which the Bill proposes to amend;**

Section 12 on Nature of claims and pecuniary jurisdiction

Section 12(1)- Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to –

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

- (b) a contract relating to money held and received;*
- (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;*
- (d) Compensation for personal injuries; and*
- (e) Set-off and counterclaim under any contract.*

Section 12 (2)- Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.

Section 12(3)- The pecuniary jurisdiction of the Court shall be limited to two hundred thousand shillings.

Section 12(4)- Without prejudice to subsection (3), the Chief Justice may determine by notice, in the Gazette, such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit.

Section 20 on Representation before the Court

Section 20 (1)- A party to the proceedings shall appear in person or where he or she is unable to appear in person, be presented by a duly authorized representative.

Section 20 (2)- The representative referred to in subsection (1) shall not be a legal practitioner.

Section 20 (3)- A Court shall, before permitting a person to act as a representative under subsection (1), satisfy itself that the person has sufficient knowledge of the of the case and sufficient authority to bind the party being represented.

Section 34 on Expeditious disposal of cases

Section 34 (1)-All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination.

Section 34 (2)- Judgment given in determination of any claim shall be delivered on the same day and any event, not later than three (3) days from the date of the hearing.

Section 34 (3)- The Court may only adjourn the hearing of any matter under exceptional circumstances which shall be recorded.

CHAPTER 4

4.0 PUBLIC PARTICIPATION IN THE REVIEW OF THE BILL

21. Through an advertisement on 17th April, 2020 the Committee pursuant to the provisions of Article 118 (1) (b) of the Constitution as read together with Standing Order 127 (3) invited the public to make submissions regarding the proposed amendments in the Bill. A copy of the newspaper advertisement is attached as **annexure 3**:
22. Following the newspaper adverts on the dailies the Committee received submissions from the following offices and persons. Copies of the submissions are attached as **annexure 4**.
 - (a) The Judiciary
 - (b) The Law Society of Kenya
 - (c) Professor Tom Ojienda, Senior Counsel
 - (d) Mr. Wilberforce Akello, Advocate of the High Court of Kenya
 - (e) Mr. Kennedy Ogutu
 - (f) Ministry of East African Community and Regional Development
 - (g) Mr. Nguyo Wachira Patrick
23. The Committee extensively considered the contents of the submissions and details of the deliberations. The Committee's observations and resolutions are contained in Chapter 4 of the report.

4.1 Submission from the Judiciary

24. The Judiciary via an email confirmed that they participated in the drafting of the Bill prior to the publication and gave its views at that stage, save that they remain of the opinion that the threshold of the court should be Ksh. 500,000.

Committee observations

The Committee observed that the Judiciary's submissions were through an email. The Committee was of the view that the Judiciary should have submitted a written memorandum indicating the justification for the proposed pecuniary jurisdiction of Ksh 500,000.00. The Committee also observed that the Chief Justice has powers under section 12(4) of the Small Claims Act, 2016, to determine the pecuniary jurisdiction of the Court and that power may be used to increase the jurisdiction should the Chief Justice deem it fit to do so.

4.2 Submissions from the Law Society of Kenya

Mr. Nelson Andayi Havi, the President of Law Society of Kenya via a letter dated 23rd April, 2020 submitted as follows; THAT;

25. The legislative intention of the Act and the Court was to decongest the Magistrate's Court and expedite the disposal of small civil claims. In the absence of the Court, civil claims with a subject matter of Kenya shillings two hundred thousand (Kshs 200,000.00) fell within the pecuniary jurisdiction of the Resident Magistrate's Court, being Kenya Shillings five million (Kshs 5,000,000.00).
26. Such claims would be determined in accordance with the Magistrate's Court Act, No. 26 of 2015, the Civil Procedure Act, CAP 21 of the Laws of Kenya and the Civil Procedure Rules, 2010 and there is no time limit for determination of claims under these Acts. The Act attempts to actualize the overriding objective in the Civil Procure Act, for the expeditious disposal of disputes before the Court at a reasonable cost.
27. The time and cost of disposal of civil claims by the Court is achieved in the following ways.
 - (a) The confinement of the Court's jurisdiction to five causes of action in contract and tort with a subject matter not exceeding Kenya shillings two hundred (Kshs 200,000.00).
 - (b) The exclusion of strict rules of evidence in proceedings before the Court.
 - (c) The waivers of costs save for claims determined to be vexatious, frivolous or an abuse of the process of the Court.
 - (d) The requirement for a day to day hearing and delivery of judgment within three days of conclusion of hearing.
28. There is nothing in the Act to suggest that the Court is any less a Court as known in the civil justice system.
29. The proposed increase of the pecuniary jurisdiction of the Court to Kenya shillings one million (Kshs 1,000,000.00) is in order but only if appearance before the Court is limited to the party or Advocate as elaborated further herein below.
30. Section 5 of the Act requires that the Adjudicator appointed to preside over the Court be an Advocate of the High Court with at least three years legal experience. The Adjudicator will be of equal competence as a Magistrate adjudicating over a claim with a subject matter of Kenya shillings one million (Kshs 1,000,000.00) before the Resident Magistrate's Court. The amendment on Section 12 (3) of the Act is therefore welcome with the rider on representation and appearance.

31. The introduction of the right of a party to representation before the Court by a legal practitioner is a reaction to the pending cases before the High Court on the constitutionality of the limitation of that right under Section 20 (2) of the Act and of the constitutionality of the entire Act. The limitation does not meet the threshold set out in Article 24 of the Constitution for limitation of a fundamental right. The right to a fair trial cannot be limited, a position entrenched in Article 25 of the Constitution. A party before the Court is entitled to legal representation just as it is before any other Court. There should be equality and nondiscrimination on the right to legal representation in tandem with Article 27 of the Constitution. Further, Article 48 of the Constitution implores the State to ensure access to justice for all. Further Article 50 of the Constitution states that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court. The proposed deletion of Section 20 (2) of the Act is timely.
32. There is legitimate concern by the Society on the propriety of an authorized representative other than a legal practitioner appearing before the Court. The role of an Advocate in the institution of civil claims is recognized by the Section 11 of the Civil Procedure Act, which provides as follows:
- "Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts: Provided that-*
- (i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court "*
33. Order 9 of the Civil Procedure Rules categorizes recognized agents of a party and Advocates. This dichotomy does not however, empower an unqualified person to act on behalf of a party in Court in the same manner as would an Advocate.
34. Section 20 (1) and (3) of the Act as it is now and may be, upon deletion of subsection (2) and amendment of subsection (3) permit anyone with "sufficient knowledge of the case and sufficient authority to bind the party being represented" to appear before the Court as would an Advocate. The Act does not stipulate what amounts to sufficient knowledge of a case or authority to bind the party represented. This will open a Pandora's box and create a breeding ground for fraudsters and corruption. There is need to guard against the real likelihood of the Court being taken over by quacks and unqualified persons competing for legal work with

35. Advocates. It is prudent that a party either appears in person before the Court or be represented by an Advocate.
36. The practice of Advocates is regulated to ensure high standards of legal representation with disciplinary and penal consequences for offenders. There will be no mechanism of holding unqualified persons appearing before the Court accountable and permitting unqualified persons to appear before the Court will defeat the very essence of educational and legal training for Advocates.
37. The minimum instruction fees for claims before the Court as per the Advocates (Remuneration) (Amendment) Order, 2014 is Kenya shillings twenty two thousand five hundred (Kshs 22,500.00) and the maximum is Kenya shillings one hundred and thirty five thousand (Kshs 135,000.00). A balance can be struck between the need to reduce legal costs whilst maintaining the quality of legal representation before the Court to ensure that there is work for youthful Advocates and for most Advocates who otherwise appear before the Resident Magistrate's Court for matters that fall within the jurisdiction proposed to be given to the Court.
38. It is the responsibility of Law Society of Kenya under Section 4 of the Law Society of Kenya Act No 21 of 2014 to guarantee several safeguards in the practice of law to:
- (a) ensure that all persons who practice law in Kenya or provide legal services in Kenya meet the standard of learning, professional competence and professional conduct that are appropriate for the legal services they provide.
 - (b) Protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law.
 - (c) Represent, protect and assist members of the legal profession in Kenya in matters relating to the conditions of practice and welfare.
 - (d) Establish mechanisms necessary for the provision of equal opportunities for all legal practitioners in Kenya. The Court is the best forum for creating employment for youthful Advocates, a matter that resonates with the Government's agenda of youth empowerment under Article 55 of the Constitution.
39. The Law Society proposes that section 20 of the Act be amended to read as follows:

"Subsection (1): A party to the proceedings shall appear in person or by an Advocate.

Subsection (2): The remuneration of an Advocate appearing before the Court shall be not more than three quarters and not less than half the amount set out in the Advocates Remuneration Order"

40. There is need for an expedited hearing before the Court is discernible in the intended substitution of Section 34 (3) of the Act. However, that goal will not be achieved unless there a set time frames for determination of claims and therefore suggest that the claims be determined within 60 days of the date of filing and that Section 34 of the Act be amended to provide for the time limit instead of the intended substitution.

Committee observations

41. The Committee agreed with the LSK submissions that section 20(2) of the Act should be amended to allow legal practitioners to represent parties in the Small Claims Court. The Committee was of the view that the proposed enhanced pecuniary jurisdiction of the Court is likely to attract cases with complicated issues of facts and the law and thus it was important to allow advocates to represent parties in the Court. The Committee was also of the view that the right to a fair hearing as set out in Article 50(1) of the Constitution inherently entailed the right of parties to a civil dispute to either appear in person or be represented by an advocate of their choice.

4.3 Submission by Prof. Tom Ojienda, Senior Counsel

Professor Tom Ojienda, Senior Counsel via a memorandum dated 20th April 2020 submitted that;

42. The idea behind the establishment of the Small Claims Court is to allow for access to justice to the masses through a quick, inexpensive and expeditious informal process, in order to guarantee the right of access to justice under Article 48 of the Constitution.
43. The Small Claims Court Act, No. 2 of 2016, is yet to be operationalized and the proposed changes in the Bill are problematic and need to be reviewed, keeping in mind the realities and challenges currently faced by the courts in dealing with the backlog of cases and the esteem of the legal profession as far as legal representation is concerned and called for the amendment or rejection of the Bill, on the following grounds:

(i) Against increasing the pecuniary jurisdiction of the Small Claims Court

44. Professor Ojienda stated that the proposed increase of the pecuniary jurisdiction of the Court from the current Ksh 200,000.00 to Ksh 1,000,000.0 will inevitably amount to substantial injustice. The pecuniary jurisdiction of Small Claims Courts is generally relatively low. The Professor submitted that the idea behind the establishment of the Small Claims Court is to enable judicial institutions to provide easy access to an informal, inexpensive and speedy resolution of simple debt recovery disputes. Increasing this amount from the current KES 200,000 to KES 1 Million will amount to substantial injustice because the current state of the Kenyan economy is such that KES 1 Million is a lot of money, and not small money. That being the case, a dispute involving KES 1 Million should not be subjected to the extremely simplified proceedings of the Small Claims Court.
45. Prof. Ojienda further submitted that a comparative analysis of the pecuniary jurisdictions of Small Claims Courts in other jurisdictions indicated a trend where the courts handle

relatively low value claims. That the pecuniary jurisdiction of Small Claims Courts in other comparable jurisdictions was as follows-

- (a) Western Australia - Australia Dollars \$ 10,000.00 (Ksh 600,000.00)
- (b) South Australia - Australia Dollars \$ 12,000.00 (Ksh 800,000.00)
- (c) South Africa - Rand 20,000.00 (Ksh 100,000.00)
- (d) Kentucky (USA) - United States Dollars \$ 2500.00 (Ksh 250,000)

46. Professor stated that the increasing the pecuniary jurisdiction of the Small Claims Court will result in an increase in case backlog in the Court, thus being counterproductive and defeating the very purpose for the establishment of the Court. Besides, the establishment of too many judicial institutions creates new problems of court bureaucracy and more expenses for the Judiciary to take care of.
47. Professor Ojienda further submitted that rather than increasing the pecuniary jurisdiction of the Small Claims Court, the factors that delay access to justice should be considered and addressed. This may require amending the necessary legislations, such as the Civil Procedure Rules, in order to make civil litigation simple and less protracted. This may also involve merging the Resident Magistrates' Courts with the Small Claims Court and assigning entry level magistrates to the small claims, thus rendering the Small Claims Court useless. The result would be lesser costs of putting up Court premises, in terms of facility and salary expenses for the adjudicators, clerks and other Small Claims Courts' staff.
48. Professor Ojienda stated that in order to prevent concurrent jurisdiction between the Resident Magistrate's Court and the Small Claims Court, there is need to amend Section 7(1)(c) of the Magistrates' Courts Act, 2015 to restrict the pecuniary jurisdiction of the Resident Magistrate's Court to any claim where the value of the subject matter is above KES 200,000 but not in excess of KES 5 Million.

(ii) Against representation of persons by laypersons

49. Professor Ojienda noted and appreciated the proposal in the Bill removing the current ban on legal practitioners from representing parties before the Small Claims Court. He submitted that bringing legal practitioners on board is imperative because even in their simplified nature, legal practitioners should still have the legal right to appear in these courts should a party to a claim prefer to be represented by an advocate; quick justice must equally be just if the right to access justice is truly going to be upheld.
50. Professor Ojienda submitted that the Bill, just like the Principal Act, provides a scenario whereby it is legal for laypersons (non-advocates and non-professionals) to appear before the Small Claims Court to legally represent parties to a claim. He submitted that the provision is inconsistent with the Advocates Act, which restricts the practice of law to legal professionals, advocates and certain officers who can act as advocates, especially in disputes that are purely civil claims.

51. Professor Ojienda further submitted that allowing laypersons to practice law in judicial institutions, including the Small Claims Courts is tantamount to opening a Pandora's box, as both the Bill and the Principal Act will defeat the very objective of the Advocates Act by introducing quacks into the justice system to attempt to offer legal advice and representation to parties without the requisite legal training, professionalism, regulation and discipline. He submitted that there is no mechanism in place for regulating quacks and allowing laypersons to 'practice law' will convert the Small Claims Courts into a playfield for conmen, crooks and swindlers.
52. Professor Ojienda stated that the Small Claims Courts, if operationalized, should operate within the acceptable standards of legal professionalism, despite their simplified procedures. This means that parties to a dispute before the Courts should either appear before Court in person or be represented by duly authorized legal practitioners.

(iii) Against interference with the discretion of Adjudicators to grant adjournments

53. Professor Ojienda noted that Clause 4 of the Bill proposes an amendment to Section 34(3) of the Principal Act, in order to allow for up to three adjournments of the hearing of any matter on reasonable grounds and any other adjournments only on exceptional circumstances. He observes that the effect of the amendment is to rein in on the adjudicator's discretion to allow or not allow adjournment of hearings of small claims, in the spirit of the informal but expeditious adjudication of cases in the Small Claims Court.
54. Professor Ojienda submitted that the proposed amendment contradicts section 17 of the Small Claims Court Act, 2016, which empowers the Court to have control of its own procedure in the determination of claims before it. He further submitted that the proposed amendment is contrary to the letter and spirit of Order 17 of the Civil Procedure Rules, 2010, which leaves the grant or denial of requests for adjournments to the discretion of the Court.
55. Professor Ojienda further submitted that the proposed stringent rules on the adjournment of cases in the Small Claims Court offend Article 48 of the Constitution which provides that the State shall ensure access to justice for all persons. He submitted that the grant or denial of requests to adjourn matters before the Small Claims Court should be left to the discretion of the adjudicator of the Court as and when he or she deems it just to do so.

Committee observations

56. On Clause 2 of the Bill the Committee observed that Professor Ojienda had opposed the proposed amendment to section 12(3) of the Act in order to increase of the pecuniary jurisdiction of the Court from the current Ksh 200,000.00 to Ksh 1,000,000.00 on the ground that the amendment inevitably amounts to substantial injustice. Prof Ojienda was of the view that the pecuniary jurisdiction of Small Claims Courts in comparative jurisdictions is generally relatively low and that Ksh 1 Million is not small money in the current state of Kenya's economy-it is a lot of money.

57. The Committee did not agree with Prof. Ojienda's submissions in this respect and was of the view that Ksh 1,000,000.00 was not much in present day Kenya and there was thus need to amend section 12(3) of the Act in order to increase of the pecuniary jurisdiction of the Court.

On Clause 3 of the Bill

58. The Committee observed that the Professor Ojienda had noted and appreciated the proposal in the Bill to amend section 20(2) of the Act and thus remove the current ban on legal practitioners from representing parties before the Small Claims Court. Professor Ojienda submitted that bringing legal practitioners on board is imperative because even in their simplified nature, legal practitioners should still have the legal right to appear in these courts should a party to a claim prefer to be represented by an advocate.

59. The Committee further observed that Professor Ojienda submitted that the Bill, just like the Principal Act, provides a scenario whereby it is legal for laypersons (non-advocates and non-professionals) to appear before the Small Claims Court to legally represent parties to a claim. He submitted that section 20(3) of the Act is inconsistent with the Advocates Act, which restricts the practice of law to legal professionals, advocates and certain officers who can act as advocates, especially in disputes that are purely civil claims.

60. The Committee also observed that Professor Ojienda had submitted that allowing laypersons to practice law in judicial institutions, including the Small Claims Courts is tantamount to opening a Pandora's box, and defeats the objective of the Advocates Act by introducing quacks into the justice system to attempt to offer legal advice and representation to parties without the requisite legal training, professionalism, regulation and discipline.

61. The Committee agreed with Professor Ojienda's submission that section 20(2) of the Act should indeed be amended to allow legal practitioners to represent parties in the Small Claims Court. The Committee was of the view that the proposed enhanced pecuniary jurisdiction of the Court is likely to attract cases with complicated issues of facts and the law and thus it was important to allow advocates to represent parties in the Court. The Committee was also of the view that the right to a fair hearing as set out in Article 50(1) of the Constitution inherently entailed the right of parties to a civil dispute to either appear in person or be represented by an advocate of their choice.

62. The Committee disagreed with Professor Ojienda's submissions that persons who are not legal practitioners should not represent parties to proceedings in the Small Claim Court. The Committee was of the view that the Small Claims Court was established to provide an informal, inexpensive and expeditious mechanism for the resolution of disputes. The Committee observed that the issue of lay persons representing other persons in the Court was not a creation of the Bill but was integral part of the Small Claims Act as enacted in 2016. The Committee was of the view that there is merit in allowing any person conversant

with the facts of the case to represent other persons in the Court for the purposes of ensuring the expedient delivery of justice in an inexpensive way.

On Clause 4 of the Bill

63. The Committee observed that Professor Ojienda had opposed the proposed amendment section 34(3) of the Act on the ground that the effect of the amendment is to interfere with the adjudicator's discretion to allow or not allow adjournment of hearings of small claims, in the spirit of the informal but expeditious adjudication of cases in the Small Claims Court. Professor Ojienda had also submitted that the proposed amendment is contrary to the letter and spirit of Order 17 of the Civil Procedure Rules, 2010, which leaves the grant or denial of requests for adjournments to the discretion of the Court. Professor Ojienda had further submitted that the proposed stringent rules on the adjournment of cases in the Small Claims Court offend Article 48 of the Constitution which provides that the State shall ensure access to justice for all persons.
64. The Committee agreed with Professor Ojienda's submissions regarding the proposed amendment to section 34(3) of the Act. The Committee was also of the view that the proposal claws back the letter and spirit in the current section 34 of the Act which bars adjournment of matters, unless under exceptional circumstances which must be recorded. The Committee was of the view that the proposed amendment gives the parties a sense of entitlement to at least three adjournments on reasonable grounds and several other adjournments in exceptional circumstances. The proposal thus defeats the very purpose for which the Small Claims Courts are established and the Committee resolved that the amendment be rejected.

4.4 Submissions from Mr. Wilberforce Akello, Advocate of the High Court of Kenya

Mr. Wilberforce Akello Advocate of the High Court of Kenya via a letter dated 24th April, 2020 proposed the following amendments-

65. That Section 20(2) of the Small Claims Court Act should be amended to allow representation by legal practitioner of choice in tandem of constitutional principles. Section 20 as present will create possible conflicts with articles 49 and 50 of the Constitution of Kenya 2010 as it purports to exclude Advocates from practicing in the Small Claims Court is patently unconstitutional. Legal representation by qualified legal practitioners is one of the facets of access to justice.
66. Section 20 of the Act should therefore be amended to provide that "A party to the proceedings shall appear in person or by an Advocate.
67. That Section 20(3) of the Small Claims Court Act should be deleted. This is to ensure that a party can act in person or by appointed legal practitioner. This is to ensure that there is no possible conflict with the Advocates Act and Order 9 of the Civil Procedure Rules. This is also to ensure that all the practitioners in that court are regulated as well as guarantee the claimant's right to file their cases therein and act in person without hindrance.

68. That the pecuniary jurisdiction of Kshs. 200,000 should be retained, Section 12(3) of the Small Claims Court Act should remain without amendments. Accordingly, clause 2 of the proposed Amendments Bill should be abandoned for following rationale;

- (a) The Chief Justice may determine by notice in the Gazette and review the pecuniary jurisdiction once the infrastructure of these courts have been provided and tested as underscored in section 12(4). This is tandem with the provisions under the Magistrate Act.
- (b) This is an informal court where a Claimant may present his or her claim orally, in his or her ethnic language, sign language and strict rules of evidence are not applied and increase to 1 Million will create substantial justice since 1 Million Claim is a big claim that cannot be judiciously determined in the informal set up of the Small Claims Court.
- (c) The proposed increase will create enormous injustice as the Small Claims Court will be overburdened by numerous cases thereby defeating the very intention of the Act provision of quick access to an inexpensive and speedy resolution of simple civil debt recovery claims. This is an informal court with informal infrastructure and by allowing a big claim of 1M to be determined in an informal set up would cause substantial injustice and the same will invoke strict procedure rules which will defeat the very intention of the Small Claims Act.
- (d) The proposed pecuniary jurisdiction lies with the Magistrate Court. It will create parallel jurisdiction which will create confusion within the justice system. Increasing the jurisdiction to 1 Million will basically transfer backlog to the informal Small Claims Court.
- (e) In Countries like South Africa, United States of America the Small Claims Court has pecuniary jurisdiction of equivalent of Kshs. 100,000 and Kshs. 250,000/ respectively and an increase in this amount to Kshs. 1 million will occasion substantial injustice.

69. That Section 34 of the Small Claims Act should be further amended to provide for discretion of the Small Claims Court Magistrate to adjourn a matter in exceptional circumstances but the six months period be inserted as the maximum period(cap) within which a suit should be heard and determined. This is well within the objectives of the Act of providing quick, inexpensive access to justice devoid of strict rules of formality.

70. That the proposed that Small Claims Court Act provides for a Schedule which provides for a cap on reduced/smaller court filing fees without alterations this will assist the ordinary and poor wananchi in accessing justice without financial hindrances.

Committee observations

71. The Committee agreed with the Mr. Akello's submissions that section 20(2) of the Act should be amended to allow legal practitioners to represent parties in the Small Claims Court. The Committee was of the view that the proposed enhanced pecuniary jurisdiction of the Court is likely to attract cases with complicated issues of facts and the law and thus it was important to allow advocates to represent parties in the Court. The Committee was also of the view that the right to a fair hearing as set out in Article 50(1) of the Constitution inherently entailed the right of parties to a civil dispute to either appear in person or be represented by an advocate of their choice.

4.5 Submission from Mr. Kennedy Ogutu

Mr. Kennedy Ogutu via a letter dated 4th April, 2020 opposed the proposed amendments in Clause 2 and 3 on the following grounds; THAT;

Clause 2 of the Bill on increasing pecuniary jurisdiction

72. The objective of this amendment is to allow claims by SMEs to be handled by the Small Claims Court whose jurisdiction is presently capped at Ksh. 200,000. However, there is nothing in the amendment that suggests that the enhanced jurisdiction is for SMEs only and the proposed amendment will also open Small Claims Courts to claims by individuals of up to 1million Shillings.
73. Whereas the current limit would exclude most claims by SMEs, this amendment will expand the jurisdiction of the courts for all claimants and not just SMEs. A vast majority of cases that are filed before Magistrates Courts are currently within this range. Rather than reduce the timelines for the resolution of small claims, this amendment will flood these courts with cases, resulting unwittingly in the very same delays the court was intended to address in the first place
74. The limit at Ksh. 200,000 will lock out many SMEs and therefore Parliament should set two different pecuniary limits for small claims courts one for individuals (Ksh. 200,000) and another for SMEs corporations, partnerships, unincorporated associations, government bodies and other legal entities (Ksh. 1 million)
75. Parliament should further initiate broad reforms in the justice sector to reduce delays in the administration of justice. SMEs and others whose claims fall outside the jurisdiction of the Small Claims Court will then benefit from the expeditious and inexpensive resolution of their cases in the mainstream courts.

Clause 3 of the Bill

Permitting Advocates before the Small Claims Court

76. The Small Claims Court is meant for simple and straight-forward claims that can be resolved in a day or two without the input of advocates. Permitting advocates will be counterproductive as it will likely introduce sharp practice that will result in delays and eventually defeat the very essence of Small Claims Courts.

77. Persons who wish to retain Advocates in their cases have the liberty to approach the Magistrates Courts with their claims.
78. Prohibiting advocates from Small Claims Courts is against the constitution. Quite pointedly, the Bill states expressly that it seeks to align the principal statute with Article 48 and Article 50 of the Constitution. However, there is nothing in the Constitution that would make it unconstitutional to prohibit advocates from representing parties before the Small Claims Court
79. Article 48 of the Constitution on Access to Justice provides that "The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice." Although representation by counsel is often cited among the ingredients of the right to access to justice, it should be noted that there is no express mention of representation by an Advocate under the same Article instead, Advocates are only mentioned under Article 50.
80. Whereas Article 50 of the Constitution talks about fair hearing, the Article is more concerned with rights of accused persons in criminal proceedings. Article 50(1) states that "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body." In Article 50(2), the Constitution breaks down the right to fair trial in criminal proceedings, which includes the right of an accused person to choose to be represented by an advocate.
81. Article 25 of the Constitution elevates the right to fair trial by listing it among only 4 rights that cannot be limited under any circumstances. However, the right to fair trial arises only in criminal proceedings and it is only in criminal proceedings that the right to choose to be represented by an advocate cannot be limited.
82. The right to have an advocate in civil proceedings if at all such a right exists is not listed under Article 25 among the four sacrosanct rights that may not be limited. As such, the Constitution allows any such right to be limited, provided the limitation be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
83. Prohibition of advocates from Small Claims Courts is both reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The overall objective of such limitation is to pave way for the expeditious and inexpensive resolution of disputes. Where a party is not happy with the outcome of a case at the Small Claims Court, s/he will be at liberty to appeal to the High Court where legal representation will be permitted.

Permitting Representation by Non-Advocates

84. The intention of permitting non-advocates is to allow claimants and respondents to be assisted - rather than represented - in the proceedings by their friends, family or other close associates who are familiar with their cases. This provision will also allow owners, managers or other officials of SMEs to represent them in court without forcing small enterprises to hire lawyers whose fees can be prohibitive.
85. Despite these noble intentions, this provision will expose litigants to all manner of cons. There is already a vast number of quacks masquerading as advocates or court staff who line court corridors preying on litigants who need guidance with their cases. These individuals are unregulated and this means there is no limit on how they conduct themselves. With no regulatory limits on what they charge persons they 'assist', there is a real danger that they can exploit litigants who come before Small Claims Courts thereby making litigation before these courts overly expensive.
86. Lack of regulation also means there is no regulatory body that is responsible for their conduct, and where complaints about their conduct can be filed. This exposes litigants who may be conned, and who will then be forced to initiate complaints with the police, thereby frustrating their quest for justice even further.
87. The principal Act already contains numerous provisions aimed at addressing the challenges that unrepresented litigants would face. These include simplified procedures, standard forms and the exclusion of the strict rules of evidence. The prohibition of advocates also helps level the playing field between the lay parties.
88. Lawyers are usually invaluable in court proceedings due to the overly technical nature of litigation. Proceedings before mainstream courts are characterized by numerous technical rules, complex documents that require expertise to draft, and a technical language not spoken by many outside the legal profession. The aura within mainstream courts is also quite intimidating, and many individuals who would otherwise ably speak for themselves will lose the courage within formal courts.
89. By doing away with these technicalities, litigants can easily navigate their way around the Small Claims Court without needing the assistance of lawyers or other representatives, and Parliament should not be guilt-tripped into permitting lawyers to practice before these courts.
90. It is standard practice in many jurisdictions to prohibit advocates in proceedings before small claims courts. These include countries whose constitutions contain provisions similar to those in our constitution that guarantee the right to fair hearing and access to justice.

Clause 4 of the Bill

91. Mr Kennedy Ogutu supported the proposed amendment in clause 4 of the Bill on the following grounds; THAT;
92. This amendment fits well with the overall objective of the Small Claims Court Act, which is to ensure that small claims are resolved informally and inexpensively but in accordance with established principles of law and natural justice.
93. By saying that "The Court may only adjourn the hearing of any matter under exceptional circumstances ..." the Act currently permits an unlimited number of adjournments which is antithetical to the objects of the Act. As such, the limit on the number of adjournments will go a long way in ensuring the expeditious resolution of small claims.
94. In addition to limiting the number of adjournments, a further amendment should be introduced to impose a time limit on the resolution of small claims. A limit of 30 days from the date of filing seems reasonable.

Committee observations

95. The Committee agreed with the submissions by Mr. Kennedy Ogutu that the amendment will allow claims by SMEs to be handled by the Small Claims Court whose jurisdiction is presently capped at Ksh. 200,000 and the enhanced jurisdiction makes it easier to do business in Kenya.

4.6 Submission from the Ministry of East African Community and Regional Development

The Ministry of East African Community and Regional Development via a letter dated 23rd April, 2020 submitted as follows; THAT;

96. Section 20 of the Small Claims Court Act be amended to allow for any legal representation in the addition to self-representation which is already allowed in the Act. This will allow young Advocates joining legal practices to be able to support the operations of this Court.
97. The fees the Advocates charge in the Small Claims Court be reduced to ensure small businesses benefits from the reduced costs.
98. New amendment be introduced to the Bill by inserting a new sub-section (5) under section 34 to prescribe a sixty (60) days' time frame for determination of claims before the Small Claims Court.
99. The proposed text for the subsection 5 under section 34 of the Act is as follows;

"All proceedings before the Court shall be heard and determined within sixty days from the date of lodging the claim before the Court"

Committee observations

100. The Committee did not agree with the submissions by the Ministry that it is only advocates who can represent parties in the Small Claims Court. The Committee was of the view that the simplified procedures adapted by the Courts allow persons who are not advocates to represent parties in those proceedings.
101. The Committee was of the view that the issue of unqualified persons taking advantage of the Act to purport to represent litigants before the Court was addressed by the proposed definition of “authorized persons” which limited those persons to the next of kin or a close relative approved by the Court.
102. The Committee also did not agree with the submissions by the Ministry that a time limit of sixty days be inserted in the Act because statutory time limits have proved to impractical and ineffective.

4.7 Submission from Mr. Nguyo Wachira Patrick

Mr. Nguyo via a letter dated 24th April submitted as follows; THAT

103. The main purpose of the Small Claims Court is to enhance access to justice. The Magistrate Court has clogged justice by providing high costs of accessing the court and too much legalese in its proceedings. Globally this has led to the emergence of the small claims court.
104. The development of commerce and entrepreneurship has forced the justice and legislation arms of governments to adopt an expedited means of dispute settlement to also encourage investment.
105. The main reason for the creation of such a litigation court/Small Claims Court should be an expedited trial that is cost effective. The expedited trial should be conducted within the framework that enhances access to justice for all irrespective of resources or jurisdiction. Success of such a court will also lead to wide global acceptance of our jurisdiction as an investment friendly nation

(i) Section 20 on legal representation

106. This is a contentious issue. No straight answer can be acceptable to all parties appearing in that court and proposes the following three categories of representation and appearances.
- (a) The claimant can appear and articulate his claim in person.
 - (b) Counsel has a right to appear once appointed by the principal claimant. However counsel fees should be limited to encourage the disadvantaged poor access justice. Counsel should charge not more than half of any applicable item of fee provided for in the Remuneration Order.

107. A manager or director of the claimant company with a sufficient letter of appointment. A director of a small claimant company may be locked out of representation for his organization despite being aware of the transactions leading to claim in court.
108. A widow(er) should be allowed to step in the shoes of the departed spouse before the completion of the probate process but the proceeds of the claim will be in the name/in favour of the estate. A son/daughter should be allowed to represent the parent who is out of the jurisdiction of the court
109. The court should be allowed to review genuine case by case of the person representing the principal claimant. Let the court limit the person representing the principal claimant. The court will rarely allow a masquerader or any other person without the knowledge of the claim appear before it. Unqualified persons representing the claimant should be kept out of that court. The Small Claims Court should encourage the filing of small claims. Representation does not affect the process of proving the authenticity of the claim. Furthermore only the legitimate claimant will receive the amount awarded by the court and not his representative.
110. If the person representing the claimant lacks sufficient cause, basis, does not understand the issues in court, the court may revoke the representation forthwith. It will thereafter cause the claimant to appear in person thereafter.
111. The person representing the claimant should not be entitled to any fee or payment for representation and the Court should guard the unscrupulous representatives representing multiple claimants. The court should only on very rare occasions allow non advocates to represent parties in court. Once the court is allowed to approve the representation, the court should guard the legal profession sufficiently but also ensure no unauthorized self-profiteering persons practice law in small claims court at the expense of advocates.
112. In Canada and Australia the small claims court allows other representatives to appear only with leave of the court. They are not entitled to any fees.

(ii) Enhanced value of claims from Kshs 200,000 to Kshs 1,000,000.00

113. Supports the enhancement of the amount to kshs 1,000,000 based on the following international standards.
114. The latest international developments in the practice of civil procedure are the commonness in which jurisdictions have adopted the Small Claims Court. These are unique courts specialized in small trade and commercial disputes. The cases will usually only be of pecuniary claims.
115. The jurisdictions with the largest pecuniary amounts are; Australia (state of Queensland) which allows up to \$ 25,000 dollars, England and Wales and America (State of California)

jurisdictions both which are approximately 10,000 USD or 10,000 pounds (about kshs 1,000,000.00)

116. However due to different state federal systems every state has a different small claim procedure and monetary limits in these countries. The underlying common factor is that they hear small claims. The situation in Australia is that some states have donated jurisdiction of a minimum of 10,000.00 Australian dollars. The Queensland Small Claims court deals with minor civil disputes, which involve amounts up to \$25,000.

Committee observations

117. The Committee agreed with the submissions from Mr. Nguyo that the Court should be allowed to review and approve all cases where persons who are not advocates are seeking to represent claimants. The Committee noted that the court will not allow a masquerader or any other unqualified persons to purport to represent others in the Court without indicating his or her relations with the litigant.

CHAPTER 5

5.0 COMMITTEE RECOMMENDATIONS

118. The Committee having considered the Small Claims Court (Amendment) Bill, 2020 recommends that the House approves the Bill with the following amendments-

Clause 2

THAT the Bill be amended by inserting the following new Clause immediately before Clause 2-

Amendment of section 2 of No.2 of 2016 **1A.** *Section 2 of the Small Claims Court Act, 2016, hereinafter referred to as the "principal Act", is amended-*

(a) by inserting the following new definition in proper alphabetical sequence-

"authorized representative" means the next of kin or a close relative of a party to the proceedings appointed in writing and approved by the Adjudicator to represent that party in court proceedings;

(b) in the definition of the expression "prescribed limit" by deleting the words "one hundred thousand" and substituting therefor the words "five hundred thousand".

Justification

119. The proposed amendment under paragraph (a) seeks to insert a definition for the term "authorized representative" which is used in the Act but is not defined in the current form of the Act. The Committee noted that section 20(1) of the Small Claims Court Act allows parties to be represented in the Court by duly authorized representatives and the definition clarifies that that representative should only be the next of kin or a close relative of a party to the proceedings and the Adjudicator of the Court must approve the appointment before it takes effect.

120. The amendment also seeks to allay widespread fear in the legal profession that the Small Claims Courts Act, 2016 had opened the door for all manner of unqualified persons to "practice law" in those Courts. Nothing could further from the truth since Act enables parties to the proceedings to either appear in person or appoint a relative conversant with the facts to represent them as way of saving on the high cost of hiring advocates.

121. The proposed amendment under paragraph (b) seeks to harmonize the definition therein with the proposed new pecuniary jurisdiction of the court.

Clause 2

THAT Clause 2 of the Bill be amended by deleting the words “one million shillings” appearing at the end of the Clause and substituting therefor the words “five hundred thousand shillings”.

Justification

122. The Committee noted and accepted submissions from the Judiciary that the pecuniary jurisdiction of the Small Claims Court should be capped at Ksh 500,000.00. The Committee also noted that the courts are yet to be operationalized and their initial jurisdiction should not be too high before their performance is monitored and evaluated.

123. The Committee further noted that the Chief Justice has powers under section 12(4) of the Small Claims Act, 2016, to determine the pecuniary jurisdiction of the Courts and the Chief Justice may thus use those powers to increase the pecuniary jurisdiction of the Courts should he or she deem it proper to do so.

Clause 3

THAT the Bill be amended by inserting the following new Clauses immediately after Clause 3-

3A. The principal Act is amended by inserting the following new section immediately after section 20-

*Remuneration of
advocates*

No. 21 of 2014

20A. The Chief Justice shall, in consultation with the Council of the Law Society of Kenya established under the Law Society of Kenya Act, make orders prescribing and regulating the remuneration of advocates who appear before the Court.

Justification

124. The amendment seeks to explicitly empower the Chief Justice to make orders prescribing and regulating the remuneration of advocates who appear before the Small Claims Court. The Committee noted that the Advocates Remuneration Order 2014 made under the Advocates Act may not be applicable in light of the fact the Small Claims Courts are supposed to adjudicate matters in a manner that is informal, inexpensive and expeditious.

3B. Section 33 of the Principal Act is amended in sub-section (1) by deleting the words “where it is satisfied that the claim to which such costs relate is vexatious, frivolous or an abuse of the due process of the Court” appearing after the word “proceedings”.

Justification

125. The amendment seeks to remove the current restrictions on the circumstances under which the Small Claims Court may award costs to a successful party in the proceedings.

The amendment thus seeks to restore the inherent discretionary powers of the Court to award costs whenever it deems it proper to do so.


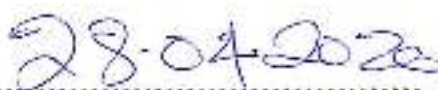
Clause 4

THAT the Bill be amended by deleting Clause 4.

Justification

126. The Committee noted that the proposed amendment in the Bill seeks to allow for up to three adjournments of the hearing of any matter on reasonable grounds and any other adjournments only on exceptional circumstances. The Committee was of the view this proposal claws back the letter and spirit in section 34 of the Act which bars adjournment of matters, unless under exceptional circumstances which must be recorded.

127. The Committee was also of the view that the proposed amendment gives the parties a sense of entitlement to at least three adjournments on reasonable grounds and several other adjournments in exceptional circumstances. The proposal thus defeats the very purpose for which the Small Claims Courts are established and the Committee resolved that the amendment be rejected.

Signed..........Date..........


Hon. William Cheptumo, M.P.

Chairperson, Departmental Committee on Justice and Legal Affairs

ANNEXURE 1

**Minutes of committee sittings
on consideration of the bill
and adoption of report.**

MINUTES OF THE 16TH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY 28TH APRIL, 2020 AT 12:20PM IN COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS.

PRESENT-

- | | | |
|------------------------------------|---|-------------------------|
| 1. Hon. William Cheptumo, M.P. | - | Chairperson |
| 2. Hon. Alice Muthoni Wahome, M.P. | - | Vice Chairperson |
| 3. Hon. John Olago Aluoch, M.P. | | |
| 4. Hon. Peter Opondo Kaluma, M.P. | | |
| 5. Hon. Zuleikha Hassan, M.P. | | |
| 6. Hon. Japheth Mutai, M.P. | | |
| 7. Hon. Anthony G. Kiai, M.P. | | |
| 8. Hon. George G. Murugara, M.P. | | |
| 9. Hon. Jennifer Shamalla, M.P. | | |
| 10. Hon. Beatrice Adagala, M.P. | | |
| 11. Hon. Adan Haji Yussuf, M.P. | | |
| 12. Hon. John M. Wambugu, M.P. | | |

ABSENT WITH APOLOGIES-

1. Hon. Roselinda Soipan Tuya, M.P.
2. Hon. Ben Momanyi, M.P.
3. Hon. Charles Gimose, M.P.
4. Hon. William K. Mwamkale, M.P.
5. Hon. Johana Ng'eno, M.P.
6. Hon. Gladys Boss Shollei, CBS, M.P.
7. Hon. John Kiarie Waweru, M.P.

IN ATTENDANCE-

- | | | |
|-----------------------|---|-------------------------|
| 1. Ms. Halima Hussein | - | Second Clerk Assistant |
| 2. Mr. Denis Abisai | - | Principal Legal Counsel |

COMMITTEE SECRETARIAT-

MIN No. 01/2020:-

PRELIMINARIES

The meeting commenced at 12:20pm with a word of prayer from Chairperson.

MIN No. 02/2020:-

CONSIDERATION AND ADOPTION OF THE REPORT ON THE SMALL CLAIMS COURT (AMENDMENT) BILL, 2020

The Committee considered and adopted its report on the Small Claims Courts (Amendment) Bill, 2020 unanimously. The adoption was proposed by Hon Beatrice Adagala, MP and seconded by Hon Anthony Kiai, MP.

MIN No. 03/2020:-

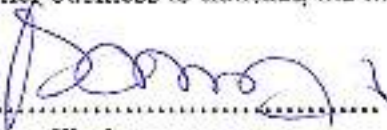
ANY OTHER BUSINESS

No matter arose.

MIN No. 04/2020:

ADJOURNMENT

There being no other business to transact, the meeting was adjourned at 1:33pm.

Signed.....
Chairperson

Date.....28.04.2020.....

MINUTES OF THE 15TH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON THURSDAY 23RD APRIL, 2020 AT 11:00AM IN COMMITTEE ROOM 9, MAIN PARLIAMENT BUILDINGS.

PRESENT-

- | | | |
|------------------------------------|---|-------------------------|
| 1. Hon. Alice Muthoni Wahome, M.P. | - | Vice Chairperson |
| 2. Hon. John Olago Aluoch, M.P. | | |
| 3. Hon. Peter Opondo Kaluma, M.P. | | |
| 4. Hon. Japheth Mutai, M.P. | | |
| 5. Hon. Anthony G. Kiai, M.P. | | |
| 6. Hon. George C. Murugara, M.P. | | |
| 7. Hon. Jennifer Shamalla, M.P. | | |
| 8. Hon. Beatrice Adagala, M.P. | | |
| 9. Hon. Adan Haji Yussuf, M.P. | | |

ABSENT WITH APOLOGIES-

- | | | |
|----------------------------------------|---|--------------------|
| 1. Hon. William Cheptumo, M.P. | - | Chairperson |
| 2. Hon. Rosclinda Soipan Tuya, M.P. | | |
| 3. Hon. Ben Momanyi, M.P. | | |
| 4. Hon. Charles Gimose, M.P. | | |
| 5. Hon. Zuleikha Hassan, M.P. | | |
| 6. Hon. William K. Mwamkale, M.P. | | |
| 7. Hon. Johana Ng'eno, M.P. | | |
| 8. Hon. Gladys Boss Shollei, CBS, M.P. | | |
| 9. Hon. John Kiarie Waweru, M.P. | | |
| 10. Hon. John M. Wambugu, M.P. | | |

IN ATTENDANCE-

- | | | |
|-----------------------|---|-------------------------|
| 1. Ms. Halima Hussein | - | Second Clerk Assistant |
| 2. Mr. Denis Abisai | - | Principal Legal Counsel |

COMMITTEE SECRETARIAT-

MIN No. 01/2020:-

PRELIMINARIES

The meeting commenced at 11:00am with a word of prayer from Chairperson.

MIN No. 02/2020:-

CONSIDERATION OF THE SMALL CLAIMS COURT (AMENDMENT) BILL, 2020

The Committee considered the Small Claims Courts (Amendment) Bill, 2020 clause by clause and made the following observations and recommendations:

- (i) The Committee observed that section 20(1) of the Small Claims Court Act allowed parties to be represented in the Court by duly "authorized representative" which is not defined in the current form of the Act.
- (ii) The Committee further observed that the proposed amendment in clause 4 of the Bill seeks to allow for up to three adjournments of the hearing of any matter on reasonable grounds and any other adjournments only on exceptional circumstances.
- (iii) The Committee noted that the proposed amendments in clause 4 claws back the letter and spirit in section 34 of the Small Claims Court Act which bars adjournment of matters, unless under exceptional circumstances which must be recorded.

The Committee made the following recommendations; THAT;

- (i) **Clause 2 of the Bill** be amended by inserting the following new Clause immediately before Clause 2 to define the words "authorized representative" to correct the error in the current provision and harmonize the definition therein with the proposed new pecuniary jurisdiction of the court.
- (ii) Clause 2 of the Bill be amended by deleting the words "one million shillings" appearing at the end of the Clause and substituting therefor the words "five hundred thousand shillings."
- (iii) Clause 3 of the Bill be amended by inserting the following new Clause immediately after Clause 3 to explicitly empower the Chief Justice to make orders prescribing and regulating the remuneration of advocates who appear before the Small Claims Court.
- (iv) Clause 4 of the Bill be deleted as the same is provided for in section 34 of the Small Claims Court Act, 2016.

MIN No. 03/2020:-

ANY OTHER BUSINESS

No matter arose.

MIN No. 04/2020:

ADJOURNMENT

There being no other business to transact, the meeting was adjourned at 11:37am.

Signed.....

Chairperson

Date.....

ANNEXURE 2


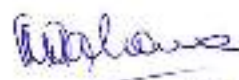





Adoption list








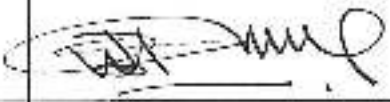

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

ADOPTION LIST FOR THE REPORT ON THE CONSIDERATION
OF THE SMALL CLAIMS COURT (AMENDMENT) BILL, 2020
(NATIONAL ASSEMBLY BILL NO. 4)

DATE: TUESDAY 28TH APRIL, 2020

VENUE: COMMITTEE ROOM 9,

NO.	NAME	SIGNATURE
1.	Hon. William Cheptumo, M.P. - Chairperson	
2.	Hon. Alice Wahome, MP. - Vice Chairperson	
3.	Hon. John Olago Aluoch, MP.	Attended via Zoom
4.	Hon. Roselinda Soipan Tuyu, MP.	
5.	Hon. Ben Momanyi, MP.	
6.	Hon. William Kamoti, MP.	
7.	Hon. Peter Opondo Kaluma, MP.	
8.	Hon. Zuleikha Hassan, MP.	me Attended via Zoom
9.	Hon. Johana Ngeno Kipyegon, MP.	
10.	Hon. Charles Gimose, MP.	

11.	Hon. John Kiarie Waweru, MP.	
12.	Hon. George Gitonga Murugara, MP.	
13.	Hon. Adan Haji Yussuf, MP.	
14.	Hon. Japheth Kiplangat Mutai, MP.	
15.	Hon. Anthony Githiaka Kiai, MP.	
16.	Hon. Jennifer Shamalla, MP.	
17.	Hon. Beatrice Adagala, MP.	
18.	Hon. John Munene Wambugu, MP.	
19.	Hon. Boss Shollei, CBS, MP.	

ANNEXURE 3

Copy of the Newspaper advertisement inviting the public to present written submissions on the Bill.

Munge
Munya

Food security? Kenyans told to ignore reports on food shortages

State will send money to poor families directly, Munya says

Minister says almost half of the donations were being diverted into people's pockets

BY LEOPOLD OBI
lobi@kenyanation.com

The government has suspended the distribution of food to vulnerable households, saying donors have taken advantage of the programme to enrich themselves. Agriculture Cabinet Secretary Peter Munya said many of the intended households have not been getting the aid.

Mr Munya added that the government has instead come up with a strategy to better the people by directly sending money to the needy families electronically.

"The households can then make a decision on what to do with the money," the minister said.

The minister added that the group entrusted to distribute the food by State agencies diverted up to 50 per cent of the aid into their pockets.



Agriculture Cabinet Secretary Peter Munya addresses the media at the Kikuyu House in Nairobi yesterday.

"In the process, the government ended up losing a lot of money as the poor families continued suffering," Mr Munya told journalists at the Kikuyu House in Nairobi when he held the news conference yesterday.

"The government has decided that individuals will be given money to buy food rather than provisions they need."

The CS did not, however, give details on the amount every family or individual would receive.

Following the outbreak of the Covid-19 pandemic, which has crippled the health systems and economies worldwide, hundreds of thousands of Kenyans are increasingly facing themselves jobless and without money.

There are fears that many

In his words

WHAT THE CS SAID YESTERDAY

Government has lost money on food donations.

The National Council of Producers and the State Food Reserve will be merged.

It is not possible to make decisions on what to do with the money received from the government.

families could be facing hunger after their breadwinners lost their jobs, were forced to take unpaid leave or were pay cut.

Mr Munya said the government has information on its members' families and individuals and would use it to identify those to receive the money. He, however, urged Kenyans not to panic following reports of impending food shortages.

Mr Munya said the country has enough food. He said the government is moving away from starting food.

Oil firm gives NYS Sh55m to make masks

BY SARAH NANIILA AND ALBERT NIWAZIGHE

Kenya Pipeline Company (KPC) has given the National Youth Service (NYS) Sh55 million to make a million masks that will be given to Kenyans for free.

NYS personnel got down to business at the Nairobi and Kisumu plants yesterday and are expected to make at least 20,000 masks daily.

KPC has in the past weeks made and distributed containers to poor Kenyans.

In late March, the personnel and its partners began producing and distributing two million litres of sanitiser estimated to cost

Sh1 billion. More than 370,000 litres of the liquid have been distributed across the county.

"The government asked to support boda boda as other groups who cannot buy quality masks in the market," KPC board chairman Ju Ngugi said.

"I urge other parastatals to join us in helping the country fight the Covid-19 pandemic."

NYS Director-General M Mwaikwa said producing 5 million masks is part of the agency's contribution to the battle against the coronavirus that has killed 254 Kenyans and infected 11,000 yesterday.



Work goes on at the National Youth Service plant in Ruwaka, Nairobi yesterday. The agency has begun producing masks.


THE KENYA PLANT HEALTH INSPECTORATE SERVICE

VACANCY ANNOUNCEMENT - POSITION OF MANAGING DIRECTOR
(1 POSITION) REF: VAM/5/2020

The Kenya Plant Health Inspectorate Service (KEPHIS) is a State Corporation under the KEPHIS Act No. 54 of 2012. The Service is a regulatory agency under the Ministry of Agriculture, Livestock, Fisheries and Cooperatives, mandated to assure the quality of agricultural inputs and produce.


KEPHIS is seeking to recruit a competent and visionary individual who together with the Board of Directors will provide leadership and steer the Service towards attaining its vision and objectives. The Managing Director serves as the Chief Executive Officer and reports to the Board of Directors.

Details of duties and responsibilities, key qualifications, key competencies and mode of application are contained on our website at www.kephis.org or at the Information Centre.

The deadline for application is Thursday, 30th April 2020 at 5pm.

Chairman
Kenya Plant Health Inspectorate Service (KEPHIS)

REPUBLIC OF KENYA


NATIONAL ASSEMBLY
TWELFTH PARLIAMENT - FOURTH SESSION

In the matter of consideration by the National Assembly:
The Small Claims Court (Amendment) Bill (National Assembly Bill No. 4 of 2020)

SUBMISSION OF MEMORANDA

Article 163(6) of the Constitution provides that, "Each House shall receive, consider and forward to the other House and after discussion of the Committee and its Committee, the National Assembly Standing Order (2010) provides that, "The Departmental Committee shall advise on the merits of the Bill, and shall also advise the House and recommend to the House whether the Committee matter be referred to the House."

The Small Claims Court (Amendment) Bill (National Assembly Bill No. 4 of 2020) seeks to amend the Small Claims Court Act, 2010 to enhance the capacity jurisdiction of the Small Claims Court from the current two hundred thousand shillings to one million shillings and to allow a party appearing before the court, to either appear in person or be represented by a duly authorised representative or an advocate. Further, the Bill seeks to amend the Act to allow the Court to limit parties to a maximum of three adjournments on reasonable grounds, and only allow any further adjournments in exceptional circumstances.

The Small Claims Court (Amendment) Bill (National Assembly Bill No. 4 of 2020) is to be discussed at the next meeting of the Departmental Committee on Justice and Legal Affairs for consideration and thereafter report to the House.

Pursuant to the provisions of Article 163(6) of the Constitution and Standing Order (2010), the Committee invites interested members of the public to submit any representations they may have on the Bill. The submissions may be forwarded to the Clerk of the National Assembly, P.O. Box 41045-00100, Nairobi; hand-delivered to the Office of the Clerk, Parliament Building, Nairobi; or via email to clerk@parliament.go.ke; to be received not later than Friday, 24th April, 2020 at 5:00 pm.

Copy of the Bill can be accessed from the parliamentary website:
www.parliament.go.ke/the-national-assembly/bills-and-committees

MICHAEL R. SIALAI, FRS
CLERK OF THE NATIONAL ASSEMBLY

ANNEXURE 4

**Written submission received
from stakeholders**

SMALL CLAIMS (AMENDMENT) BILL, 2020.

2 messages

Joseph Were <jmwere2015@gmail.com>

Mon, Apr 27, 2020 at 2:08
PM

To: halimabsiye@gmail.com

Cc: Isaac Wamaasa <wamaasaisaac@gmail.com>, Conrad Bosire
<conrad.bosire@gmail.com>

Good afternoon Halima,

As discussed earlier, the Judiciary participated in the Bill prior to the publication and gave it's views. Save that we remain of the opinion that the threshold of the court should be Ksh. 500,000.

Thank you.

Joseph Were
Office of the Chief Registrar Judiciary.



Law Society of Kenya

Mr. Michael Slalal CBS
 The Clerk of the National Assembly
 Parliament of Kenya
 P.O Box 41842-00100
 NAIROBI.

Lavington, opp Valley Arcade, Gitanga Road
 P.O Box 72219-00200 Nairobi, Kenya
 Dropping Zone -149 Embassy House
 Basement
 Tel: +254 709 087000/720 904983
 Website: www.lsk.or.ke
 Email: lsk@lsk.or.ke

Our Ref: DoL/2020/1

Your Ref: TBA

Date: 23rd April, 2020

Dear Mr Michael Slalal,

Re: The Small Claims Court (Amendment) Bill, 2020

The notice published in the Daily Nation of 17th April, 2020, calling for representations on The Small Claims Court (Amendment) Bill, 2020 (Bill) refers.

The Bill seeks to amend Section 12 (3) of the Small Claims Court, Act No 2 of 2016 (Act) by increasing the pecuniary jurisdiction of the Small Claims Court (Court) from Kenya Shillings two hundred (Kshs 200,000.00) to Kenya shillings one million (Kshs 1,000,000.00). The Bill further seeks to amend Section 20 (2) of the Act by removing the restriction against a legal practitioner appearing before the Court. Additionally, Section 20 (3) of the Act is sought to be amended by limiting the requirement for the Court's satisfaction of an authorised representative of a party on the sufficiency of knowledge of a case to a representative who is not a legal practitioner. Lastly, an amendment is intended on Section 34 (3) of the Act to limit adjournments before the Court to three. The views of the Law Society of Kenya (Society) on the Bill are as set out herein below.

The legislative intention of the Act and the Court was to decongest the Magistrate's Court and expedite the disposal of small civil claims. In the absence of the Court, civil claims with a subject matter of Kenya shillings two hundred thousand (Kshs 200,000.00) fell within the pecuniary

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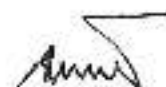
jurisdiction of the Resident Magistrate's Court, being Kenya Shillings five million (Kshs 5,000,000.00). Such claims would be determined in accordance with the Magistrate's Court Act No 26 of 2015 (Magistrate's Court), the Civil Procedure Act, Cap 21 of the Laws of Kenya (Civil Procedure Act) and The Civil Procedure Rules, 2010 (Civil Procedure Rules). There is no time limit for determination of claims under the Magistrate's Court Act, the Civil Procedure Act and the Civil Procedure Rules. The Act attempts to actualize the overriding objective in the Civil Procure Act, for the expeditious disposal of disputes before the Court at a reasonable cost.

The time and cost of disposal of civil claims by the Court is achieved in several ways. First, is the confinement of the Court's jurisdiction to five causes of action in contract and tort with a subject matter not exceeding Kenya shillings two hundred (Kshs 200,000.00). Second, is the exclusion of strict rules of evidence in proceedings before the Court. Third, is the waiver of costs save for claims determined to be vexatious, frivolous or an abuse of the process of the Court. Fourth, is the requirement for a day to day hearing and delivery of judgment within three days of conclusion of hearing. There is nothing in the Act to suggest that the Court is any less a Court as known in the civil justice system.

The proposed increase of the pecuniary jurisdiction of the Court to Kenya shillings one million (Kshs 1,000,000.00) is in order but only if appearance before the Court is limited to the party or Advocate as elaborated further hereinbelow. Section 5 of the Act requires that the Adjudicator appointed to preside over the Court be an Advocate of the High Court of at least three years legal experience. The Adjudicator will be of equal competence as a Magistrate adjudicating over a claim with a subject matter of Kenya shillings one million (Kshs 1,000,000.00) before the Resident Magistrate's Court. The amendment on Section 12 (3) of the Act is therefore welcome with the rider on representation and appearance.

The introduction of the right of a party to representation before the Court by a legal practitioner is a reaction to the pending cases before the High Court on the constitutionality of the limitation of that right under Section 20 (2) of the Act and of the constitutionality of the entire Act. The limitation does not meet the threshold set out in Article 24 of The Constitution of Kenya (Constitution) for limitation of a fundamental right. The right to a fair trial cannot be limited, a position entrenched in Article 25 of the Constitution. A party before the Court is entitled to legal representation just as it is before any other Court. There should be equality and nondiscrimination on the right to legal representation in tandem with Article 27 of the Constitution. Further, Article 48 of the Constitution implores the State to ensure access to justice for all. Lastly, under Article 50 of the Constitution every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court. The proposed deletion of Section 20 (2) of the Act is timely.

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 Riziki Emukule (Coast Representative)



There is legitimate concern by the Society on the propriety of an authorized representative other than a legal practitioner appearing before the Court. The role of an Advocate in the institution of civil claims is recognized by the Section 11 of The Civil Procedure Act in following words:

"Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts: Provided that— (1) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court;..."

Order 9 of The Civil Procedure Rules categorizes recognized agents of a party and Advocates. This dichotomy does not however, empower an unqualified person to act on behalf of a party in Court in the same manner as would an Advocate. Section 20 (1) and (3) of the Act as it is now and may be, upon deletion of subsection (2) and amendment of subsection (3) permit anyone with "sufficient knowledge of the case and sufficient authority to bind the party being represented" to appear before the Court as would an Advocate. The Act does not stipulate what amounts to sufficient knowledge of a case or authority to bind the party represented. This will open a Pandora's box and create a breeding ground for fraudsters and corruption. There is need to guard against the real likelihood of the Court being taken over by quacks and unqualified persons competing for legal work with Advocates. It is prudent that a party either appears in person before the Court or be represented by an Advocate.

An Advocate is defined in Section 2 of The Advocates Act, Cap 16 of the Laws of Kenya (The Advocates Act) as any person whose name is duly entered upon the Roll of Advocates. On the other hand, an unqualified person is defined in Section 2 as one not qualified under Section 9 of The Advocates Act. Substantial resources are incurred in training one to be an Advocate, in an elaborate education programme regulated by the Government of the Republic of Kenya and the Society. Over one thousand Advocates are admitted every year, a substantial number setting up law firms upon admission. The practice of Advocates is regulated to ensure high standards of legal representation with disciplinary and penal consequences for offenders. There will be no mechanism of holding unqualified persons appearing before the Court, accountable. What is more, permitting unqualified persons to appear before the Court will defeat the very essence of educational and legal training for Advocates.

We are mindful of the need to reduce costs of matters before the Court, an idea which the Society fully embraces. The minimum instruction fees for claims before the Court as per The Advocates (Remuneration) (Amendment) Order, 2014 is Kenya shillings twenty two thousand five hundred

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(Kshs 22,500.00). The maximum is Kenya shillings one hundred and thirty five thousand (Kshs 135,000.00). A balance can be struck between the need to reduce legal costs whilst maintaining the quality of legal representation before the Court. We will also, have met our statutory obligation to ensure that there is work for youthful Advocates and for most Advocates who otherwise appear before the Resident Magistrate's Court for matters that fall within the jurisdiction proposed to be given to the Court.

It is our responsibility under Section 4 of the Law Society of Kenya Act No 21 of 2014 (Law Society of Kenya Act) to guarantee several safeguards in the practice of law. Relevant to the matter at hand are four. One, ensure that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide. Two, protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law. Three, represent, protect and assist members of the legal profession in Kenya in matters relating to the conditions of practice and welfare. Four, establish mechanisms necessary for the provision of equal opportunities for all legal practitioners in Kenya. The Court is the best forum for creating employment for youthful Advocates, a matter that resonates with the Government's agenda of youth empowerment under Article 55 of the Constitution.

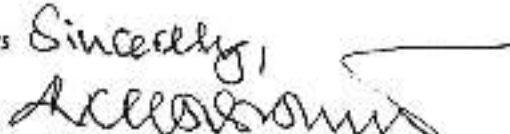
Accordingly, we propose that that Section 20 of the Act be amended as follows:

Subsection (1): A party to the proceedings shall appear in person or by an Advocate.

Subsection (2): The remuneration of an Advocate appearing before the Court shall be not more than three quarters and not less than half the amount set out in the Advocates Remuneration Order.

The need for an expedited hearing before the Court is discernible in the intended substitution of Section 34 (3) of the Act. However, that goal will not be achieved unless there a set time frame for determination of claims. We therefore, suggest that the claims be determined within 60 days of the date of filing and that Section 34 of the Act be amended to provide for the time limit instead of the intended substitution.

We are available to appear before the National Assembly to expound further on the propriety of the view expressed hereinabove in so far as the Bill is concerned.

Yours Sincerely,


Nelson Andayi Havi,
 President, Law Society of Kenya

Nelson Havi (President), Carolyn Kamende (Vice-President)
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 Riziki Emukaie (Coast Representative)

WILBERFORCE AKELLO
ADVOCATE OF THE HIGH COURT OF KENYA
(PRACTICE NO. LSK/2020/01100)
TRANSNATIONAL BANK PLAZA, 9TH FLOOR,
P.O BOX 67845-00200
NAIROBI.

DATE: 24TH APRIL 2020

TO :
THE CLERK
THE NATIONAL ASSEMBLY
NAIROBI.

NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE OF JUSTICE AND LEGAL AFFAIRS
NAIROBI.

Dear Sir,

RE: SUBMISSIONS OF A MEMORANDUM ON THE SMALL CLAIMS COURT
(AMENDMENT) BILL, 2020

Reference is made to the above noted matter.

To facilitate the objectives of the Small Claims Court Act and ensure access to justice, quick, inexpensive expedited resolution of small claims devoid of strict of formality, I propose the following:

1. Section 20(2) of the Small Claims Court Act should be amended. This is to allow representation by legal practitioner of choice in tandem of constitutional principles. Section 20 as present will create possible conflicts with articles 49 and 50 of the Constitution of Kenya 2010 as it purports to exclude Advocates from practicing in the Small Claims Court is patently unconstitutional. Legal representation by qualified legal practitioners is one of the facets of access to justice. Section 20 should therefore be amended to provide that "*A party to the proceeding shall appear in person or by an Advocate*".
2. Section 20(3) of the Small Claims Court Act should be deleted. This is to ensure that a party can act in person or by appointed legal practitioner. This is to ensure that there is no possible conflict with the Advocates Act and Order 9 of the Civil Procedure Rules. This is also to ensure that all the practitioners in that court are regulated as well as guarantee the claimant's right to file their cases therein and act in person without hindrance.

3. Pecuniary jurisdiction of Kshs. 200,000 should be retained. Section 12(3) of the Small Claims Court Act should remain without amendments. Accordingly, clause 2 of the proposed Amendments Bill should be abandoned. The rationale for this as follows:
- a. The Chief Justice may determine by notice in the Gazette and review the pecuniary jurisdiction once the infrastructure of these courts have been provided and tested as underscored in section 12(4). This is tandem with the provisions under the Magistrate Act.
 - b. Please note that this is an informal court where a Claimant may present his or her claim orally, in his or her ethnic language, sign language and strict rules of evidence are not applied. Can such informal court deal with a contractual claim of 1 Million? An increase to 1 Million will create substantial justice. 1 Million claim is a big claim that cannot be judiciously determined in the informal set up of the Small Claims Court.
 - c. I submit that such proposed increase will create enormous injustice as the Small Claims Court will be overburdened by numerous cases thereby defeating the very intention of the Act provision of quick access to an inexpensive and speedy resolution of simple civil debt recovery claims. This is an informal court with informal infrastructure and by allowing a big claim of 1M to be determined in an informal set up would cause substantial injustice. The same will invoke strict procedure rules which will defeat the very intention of the Small Claims Act.
 - d. Kindly also note that the proposed pecuniary jurisdiction lies with the Magistrate Court. It will create parallel jurisdiction which will create confusion within the justice system. Increasing the jurisdiction to 1 Million will basically transfer backlog to the informal Small Claims Court.
 - e. Further note, in South Africa, the Small Claims Court has pecuniary jurisdiction of equivalent of Kshs. 100,000. The United States of America and particularly in the States of Kentucky and Kansas, the Small Claims Court have pecuniary jurisdiction of equivalent of Kshs. 250,000/-. Accordingly, an increase in this amount to Kshs. 1 M will occasion substantial injustice.
4. Delete section 8(b) of the Small Claims Act. This court requires competent and qualified Registrar to ensure efficient administration. The rationale is, to allow a paralegal or clerk as Registrar of the Small Claims Court may diminish the efficiency of the courts to ensure quick, inexpensive disposal of debt recovery claims. Section 8(a) should be retained. The proposed amendments on this heading is consistent with the qualifications and competency of other Registrars as provided in the Judicial Service Act.

5. Section 33 of the Small Claims Court should be further amended to allow costs to follow events and further allow the Small Claims Court Magistrate discretion over costs as consistent with the provisions of the Civil Procedure Act.

6. Section 11 of the Small Claims Court Act to be amended to include give the Small Claims Court jurisdiction over works injuries arising from the foundation of Work Injuries Benefits Act. This is in addition to the jurisdiction over personal injuries. The rationale is that the ordinary wanjiku can get quick access to workers justice at the Small Claims Court (up to a pecuniary of Kshs.200,000) instead of the option of the more bureaucratic Director of Occupational Liability/Director of Labour Office.

7. Section 34 of the Small Claims Act should be further amended to provide for discretion of the Small Claims Court Magistrate to adjourn a matter in exceptional circumstances but the six months period be inserted as the maximum period(cap) within which a suit should be heard and determined. This is well within the objectives of the Act of providing quick, inexpensive access to justice devoid of strict rules of formality.

8. Finally, noting that this is informal court that aims to facilitate access to justice and quick determination of small claims, I propose that Small Claims Court Act provides for Schedule in the Act which provides for a cap on reduced/smaller court filing fees without alterations. This will assist the ordinary and poor wananchi in accessing justice without financial hindrances.

9. I hope the National Assembly Departmental Committee of Justice and Legal Affairs will consider the foregoing to ensure quick, inexpensive access to justice within the framework of the Constitution of Kenya 2010.

Kind regards,

WILBERFORCE AKELLO

Prof. Tom Ojienda, SC

Golf View Office Suites,
4th Flr, Suite No. A4 (i), Muthaiga
P.O. Box 14246-00400, Nairobi
+254 20 271 2743 / 44
info@proftomojiendaandassociates.com

**TO: NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE
ON JUSTICE AND LEGAL AFFAIRS**

FROM: PROF. TOM OJIENDA, SC

DATE: 20TH APRIL 2020

**RE: SUBMISSION OF A MEMORANDUM FOR THE REVIEW
OF THE SMALL CLAIMS COURT (AMENDMENT) BILL,
2020**

1. INTRODUCTION

The Small Claims Court (hereinafter “**the SCC**”) though established by the **Small Claims Court Act, 2016**¹ (hereinafter “**the SCC Act, 2016**” or “**the Principal Act**”) is yet to be operationalised. The SCC draws its mandate from **Article 169 (1)(d) of the Constitution of Kenya, 2010** (hereinafter “**the Constitution**”), which creates subordinate courts.² Per **Section 4 of the SCC Act, 2016**, and pursuant to **Article 6(3) of the Constitution**,³ the Chief Justice is empowered to designate any Court station as a SCC and specify the geographical jurisdiction of any such Court, through a Gazette notice to that effect. The idea behind the SCC is to allow for access to justice to the masses through a quick, inexpensive

¹ **Section 4(1) of the Small Claims Court Act, No. 2 of 2016** (hereinafter “**the SCC Act, 2016**”) <http://kenyalaw.org/8181/exist/kenyalex/actview.xq?actid=No%202%20of%202016#part_I_V>.

² **Article 169(1) of the Constitution** also creates other subordinate courts, which include: (a) the Magistrates courts; (b) the Kadhis’ courts; (c) the Courts Martial; and (d) local tribunals established by an Act of Parliament.

³ **Article 6(3) of the Constitution** states that; “A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.”

and expeditious informal process, in order to guarantee the right of access to justice under **Article 48 of the Constitution**.⁴

The Small Claims Court (Amendment) Bill, 2020⁵ (hereinafter “**the SCC (Amendment) Bill, 2020**” or “**the Bill**”) seeks to amend the SCC Act, 2016 in order to introduce changes to the current workings of the SCC, as concerns the pecuniary jurisdiction of the Court, representation of parties before the Court, and the rule on adjournment of matters before the Court. The proposed changes in the Bill are nothing but problematic and need to be reviewed, keeping in mind the realities and challenges currently faced by our courts in dealing with the backlog of cases and the esteem of the legal profession as far as legal representation is concerned. Hence, the call for the amendment, or rejection thereof, of the Bill.

2. THE CURRENT LEGAL FRAMEWORK ON THE SMALL CLAIMS COURT IN KENYA

The SCC is presided over by an adjudicator who must be an advocate of the High Court of Kenya, with at least three years' experience in the legal field.⁶ As indicated above, the Chief Justice is empowered to determine the local limits jurisdiction of the SCCs. In doing so, the Chief Justice must ensure that the said courts are accessible in every sub-county and progressively in other decentralized units of judicial service delivery.⁷

The SCC has jurisdiction to determine any civil claim relating to: (a) a contract for sale and supply of goods or services; (b) a contract relating to money held and received; (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property; (d) compensation for personal injuries; and (e) set-off and counterclaim under any contract.⁸ **Under Section 12(3) of the SCC Act, 2016, the pecuniary jurisdiction of the SCC is currently limited to KES 200, 000.** Nonetheless, the Chief Justice is

⁴ **Article 48 of the Constitution** provides that; “*The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.*”
⁵ Kenya Gazette Supplement No. 22, National Assembly Bill No. 4 of 2020, dated 19th March 2020 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2020/SmallClaimsCourt_Amendment_Bill_2020.PDF>.

⁶ Section 5 of the SCC Act, 2016.

⁷ Section 11 of the SCC Act, 2016.

⁸ Section 12(1) of the SCC Act, 2016.

empowered to determine any other pecuniary jurisdiction for the SCC as he thinks fit, via a Gazette notice to that effect.⁹

Besides, there are **express exclusions on the jurisdiction of the SCC**. **First**, owing to the *sub judice* and *res judicata* rules, if a claim has been lodged with the SCC, no proceedings relating to the same course of action are to be brought before any other Court, except where the proceedings before that other Court were commenced before the claim was lodged with the SCC or the claim before the other Court has been withdrawn.¹⁰ On the same note, a claim cannot be brought before the SCC if proceedings relating to that claim are pending in or have been heard and determined by any other Court.¹¹ In any case, a higher Court may transfer a claim to the SCC.¹² **Second**, the SCC is prohibited from adjudicating on a claim where the cause of action is founded upon defamation, libel, slander, malicious prosecution, or upon a dispute over a title to or possession of land, or a matter concerning employment and labour relations.¹³

The procedure for the SCC is provided for under Part IV of the SCC Act, 2016 and the Small Claims Courts Rules, 2019 [hereinafter "**the SCC Rules, 2019**"].¹⁴ On matters procedure, the rules are a bit relaxed as concerns the SCC. First, **the rules on filing of claims before the Court are rather flexible** and are provided for under **Section 23 of the SCC Act, 2016**, which states that;

(1) Every claim filed with the Court shall commence with the filing of a statement of claim in the prescribed form signed or authenticated by the claimant or authorized representative.

(2) Without prejudice to subsection (1), a party may present his or her claim orally to an officer of the Court, and such officer shall cause the claim to be reduced in writing in the prescribed form signed or authenticated by the claimant.

(3) Any joint claim lodged by two or more claimants shall be admitted for determination notwithstanding that the statement has been signed or authenticated by only one or more of them.

(4) Nothing in this section invalidates a statement of claim signed or authenticated by a representative of a claimant or joint claimants.

⁹ Section 12(4) of the SCC Act, 2016.

¹⁰ Section 13(1) of the SCC Act, 2016.

¹¹ Section 13(2) of the SCC Act, 2016.

¹² Section 13(3) of the SCC Act, 2016.

¹³ Section 13(5) of the SCC Act, 2016.

¹⁴ <<http://kenyalegislation.org/8181/exist/kenyalex/actview.xql?actid=No.%202%20of%202016>>.

(5) Any person in whose name a claim is lodged without his signature or mark authenticating the claim shall be required to sign or authenticate the statement of claim before the commencement of the hearing and determination of the claim.

(6) A person who fails to comply with subsection (5) shall have his or her name struck out of the proceedings and whereupon his or her claim shall be deemed to be abandoned.

(7) Any party may lodge his or her statement of claim or defence by electronic means.

Second, **different rules apply as concerns the representation of parties before the SCC.** Representation of parties before the SCC is provided for under **Section 20 of the SCC Act, 2016.** Under **Section 20(1) of the Act,** a party to the proceedings before the Court **must** appear in person or where he or she is unable to appear in person, be represented by a duly authorised representative. Further, **Section 20(2) of the Act forbids legal practitioners from representing parties before the SCC.** However, before permitting a person to act as a representative of a party, the Court shall satisfy itself that the person has sufficient knowledge of the case and sufficient authority to bind the party being represented.¹⁵

Third, **Section 32(1) of the SCC Act, 2016 excludes the strict application of the rules of evidence** in the SCC. Fourth, **stringent rules apply in order to ensure the expeditious disposal of cases** before the Court, per **Section 34 of the SCC Act, 2016:** one, all proceedings before the Court on any particular day so far as is practicable must be heard and determined on the same day or on a day to day basis until final determination;¹⁶ two, judgment given in determination of any claim before the Court must be delivered on the same day and in any event, not later than three days from the date of the hearing;¹⁷ and three, **the Court may only adjourn the hearing of any matter under exceptional circumstances, which must be recorded.**¹⁸

3. ANALYSIS OF THE PROPOSED CHANGES UNDER THE SMALL CLAIMS COURT (AMENDMENT) BILL, 2020

The **SCC (Amendment) Bill, 2020** is sponsored to the National Assembly by Hon. Aden Dualo, the Leader of Majority Party. The Bill seeks to amend the **SCC Act, 2016** as follows:

¹⁵ Section 20(3) of the SCC Act, 2016.

¹⁶ Section 34(1) of the SCC Act, 2016.

¹⁷ Section 34(2) of the SCC Act, 2016.

¹⁸ Section 34(3) of the SCC Act, 2016.

2. Section 12 of the Small Claims Court Act, 2016, hereinafter referred to as the 'principal Act', is amended in sub-section (3) by deleting the words "two hundred thousand shillings" and substituting therefor the words "one million shillings".

3. Section 20 of the principal Act is amended —

(a) by deleting sub-section (2); and

(b) in sub section (3), by inserting the words "where the representative is not a legal practitioner" immediately after the words "under sub-section

(1)".

4. Section 34 of the principal Act is amended by deleting sub-section (3) and substituting therefor the following new sub-section —

(3) The Court may allow up to three adjournments of the hearing of any matter on reasonable grounds which shall be recorded and may, in exceptional circumstances, allow other adjournments."

In essence, the Bill seeks to:

- (i) Amend **Section 12(3) of the Principal Act** in order to **increase the pecuniary jurisdiction of the SCC from the current KES 200, 000 to KES 1 Million;**
- (ii) Delete **Section 20(2) of the Principal Act** to **remove the current prohibition on legal practitioners from representing parties before the SCC;**
- (iii) Amend **Section 20(3) of the Principal Act** to **allow legal practitioners, alongside laypersons, to represent parties before the SCC;** and
- (iv) Delete **Section 34(3) of the Principal Act** in order to **introduce a new provision which allows the SCC to entertain a maximum of three (3) adjournments of a hearing on reasonable grounds, and any further adjournments only under exceptional circumstances.**

3.1 AGAINST INCREASING THE PECUNIARY JURISDICTION OF THE SMALL CLAIMS COURT

Under **Clause 2 of the Bill**, which seeks to amend **Section 12(3) of the Principal Act**,¹⁹ it is proposed that the pecuniary jurisdiction of the SCC be increased from the current KES 200,000 to KES 1 Million. However, such increase in pecuniary jurisdiction of the Court will inevitably amount to substantial injustice. As the comparative analysis below will reveal, the

¹⁹ Section 12(3) of the SCC Act, 2016 provides that; "The pecuniary jurisdiction of the Court shall be limited to two hundred thousand shillings."

pecuniary jurisdiction of SCCs is generally relatively low. This is so because the idea behind the SCC is for judicial institutions to provide easy access to an informal, inexpensive and speedy resolution of simple debt recovery disputes. Increasing this amount from the current KES 200,000 to KES 1 Million will amount to substantial injustice because **the current state of the Kenyan economy is such that KES 1 Million is a lot of money, and not small money.** That being the case, a dispute involving KES 1 Million cannot be subjected to the extremely simplified proceedings of the SCC.

On the contrary, **taking such huge amounts of money to the SCC will necessitate the invocation of strict civil procedure rules**, a fact which will lead to prolonged resolution of cases before the SCC. In turn, this will result in an increase in case backlog in the SCCs, thus being counterproductive and defeating the very purpose for the establishment of the SCC. Besides, **the establishment of too many judicial institutions creates new problems of court bureaucracy and more expenses for the Judiciary to take care of.**

Rather than increasing the pecuniary jurisdiction of the SCC, the factors that delay access to justice should be considered instead and addressed. This may require amending the necessary legislations, such as the Civil Procedure Rules, in order to **make civil litigation simple and less protracted.** This may also involve **merging the Resident Magistrates' Courts with the SCCs and assigning entry level magistrates to the small claims**, thus rendering the SCCs useless. The result would be lesser costs of putting up such SCC premises, in terms of facility and salary expenses for the adjudicators, clerks and other SCCs' staff.

The solution to inaccessible justice due to prolonged and convoluted litigation does not lie in having more courts, but in increasing the number of court staff, particularly judges and magistrates. Case backlog in the Judiciary is yet to be cleared. In that case, if the SCCs are to be maintained, their pecuniary jurisdiction should not be increased so as to give room for the Resident Magistrates' Courts to deal with the more complex civil issues whose monetary value exceed KES 200,000. Per **Section 7(1)(e) of the Magistrates' Courts Act, 2015**,²⁰ the jurisdiction of the Resident Magistrate's Court is capped at KES 5 Million. However, **with the introduction of the SCC, the pecuniary**

²⁰ No. 26 of 2015
<<http://www.kenyalaw.org/8181/exist/kenyalex/actview.xsl?actid=No.%2026%20of%202015>>

jurisdiction of the Resident Magistrate’s Court will have to change in order to accommodate the SCCs.

Since the SCC is intended to provide quick, inexpensive and expedited justice, a cap of KES 200,000 is sufficient in that regard; otherwise, the case backlog will be transferred from the Resident Magistrates’ Courts to the SCCs. Moreover, to prevent concurrent jurisdiction between the Resident Magistrate’s Court and the SCC, there is need to amend **Section 7(1)(e) of the Magistrates’ Courts Act, 2015** to restrict the pecuniary jurisdiction of the Resident Magistrate’s Court to any claim where the value of the subject matter is above KES 200,000 but not in excess of KES 5 Million.

3.2 AGAINST REPRESENTATION OF PARTIES BY LAYPERSONS

Under **Clause 3 of the Bill**, which proposes changes to **Section 20 of the Principal Act**,²¹ the Bill seeks to allow legal practitioners to practice before the SCCs, alongside laypersons; by removing the current ban on legal practitioners from representing parties before the SCCs. Bringing legal practitioners on board is imperative because even in their simplified nature, legal practitioners should still have the legal right to appear in these courts should a party to a claim prefer to be represented by an advocate; quick justice must equally be just if the right to access justice is truly going to be upheld. Even so, the adjudicators of the SCCs would have to ensure that the simplified procedures of these courts are complied with, to avoid delays in the delivery of justice and the backlog of cases normally occasioned by protracted litigation coupled with complex procedures before the Magistrates’ Courts, and other subordinate courts, and the superior courts.

Yet, the Bill, just like the Principal Act, paints a scenario whereby it is legal for laypersons (non-advocates and non-professionals) to appear before the SCCs to legally represent parties to a claim. But, the **Advocates Act**,²² restricts the

²¹ **Section 20 of the SCC Act, 2016** provides as follows;

20. Representation before the Court

- (1) *A party to the proceedings shall appear in person or where he or she is unable to appear in person, be represented by a duly authorised representative.*
- (2) *The representative referred to in subsection (1) shall not be a legal practitioner.*
- (3) *A Court shall, before permitting a person to act as a representative under subsection (1), satisfy itself that the person has sufficient knowledge of the case and sufficient authority to bind the party being represented.*

²² Cap 16 of the Laws of Kenya
<<http://kenyadaw.org:8181/exist/kenyalaw/actview.xcl?actid=CAP.%2016>>.

practice of law to legal professionals; advocates,²³ and certain officers who can act as advocates,²⁴ especially in disputes that are purely civil claims. Conversely, **allowing laypersons to practice law in our judicial institutions, including the SCCs, means opening a Pandora's box, as both the Bill and the Principal Act will defeat the very objective of the Advocates Act by introducing quacks into the justice system to attempt to offer legal advice and representation to parties without the requisite legal training, professionalism, regulation and discipline. How do you regulate quacks! How do you discipline quacks! If laypersons are allowed to 'practice law', I am afraid that the SCCs will be transformed into nothing more than a playfield for conmen, crooks and swindlers.**

It is of utmost importance that the SCCs, if operationalized, should operate within the acceptable standards of legal professionalism, despite their simplified procedures. This means that parties to a dispute before the SCC should either appear before Court in person or be represented by duly authorized legal practitioners.

3.3 AGAINST INTERFERENCE WITH THE DISCRETION OF THE ADJUDICATORS AS CONCERNS ADJOURNMENTS

Clause 4 of the Bill entails an amendment to **Section 34(3) of the Principal Act**,²⁵ to allow for up to three adjournments of the hearing of any matter on reasonable grounds and any other adjournments only on exceptional circumstances. This amendment seeks to rein in on the adjudicator's discretion to allow or not allow adjournment of hearings of small claims, in the spirit of the informal but expeditious adjudication of cases in the SCCs.

On the contrary, regarding the general prosecution of civil suits, **Order 17 of the Civil Procedure Rules, 2010**, like **Section 34 of the SCC Act, 2016**, generally advocates for the hearing of civil suits on a day-to-day basis, but it leaves the grant or denial of requests for adjournments to the discretion of the

²³ Section 9 of the Advocates Act, Cap 16 of the Laws of Kenya. Such advocates must have been admitted as such, their name having been entered upon the Roll of Advocates, and have in force a valid practicing certificate.

²⁴ Section 10 of the Advocates Act, Cap 16 of the Laws of Kenya.

²⁵ **Section 34 of the SCC Act, 2016** provides as follows;

34. Expeditious disposal of cases

- (1) *All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination.*
- (2) *Judgment given in determination of any claim shall be delivered on the same day and in any event, not later than three (3) days from the date of the hearing.*
- (3) *The Court may only adjourn the hearing of any matter under exceptional circumstances which shall be recorded.*

Court. **Order 17** provides that: **“(1)Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment. (2) When the court grants an adjournment it shall give a date for further hearing or directions.”**

Further, regarding the adjournment of the hearing of applications in civil suits generally, **Order 51, Rule 6 of the Civil Procedure Rules, 2010** provides that; **“The hearing of any application may from time to time be adjourned upon such terms as the court thinks fit.”** In this regard, the discretion of the ordinary courts to grant or deny requests for adjournments is equally not tampered with.

It is noteworthy that, under **Section 17 of the SCC Act, 2016**, it is provided that; **“Subject to this Act and Rules, the Court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the Court shall have regard to the principles of natural justice.”** Moreover, pursuant to **Rule 31 of the SCC Rules, 2019**, the SCC shall not be bound by the strict rules of procedure or evidence in the conduct of its proceedings. This means that the SCC is not bound by the Civil Procedure Rules, 2010, but by its own procedures as set out under **Part IV of the Principal Act** and the **SCC Rules, 2019**.

So, what is different about adjournments in the ordinary civil courts and those in the SCCs? Why stringent rules on adjournments before the SCC and not the other civil courts? Is **Article 48 of the Constitution** not applicable to all courts? The right of access to justice, especially through the expeditious disposal of cases, should be upheld equally across the spectrum if the backlog of cases in the Judiciary is indeed going to be merely a memory of the past. Accordingly, the grant or denial of requests to adjourn matters before the SCC should be left to the discretion of the adjudicator of the Court as and when he or she deems it just to do so.

Nevertheless, in order to further understand whether or not the said amendments under the Bill are necessary, it is imperative to understand the genesis and rationale behind the SCC in Kenya. A comparative study of the SCCs elsewhere is equally important.

4. THE HISTORICAL DEVELOPMENT OF THE SMALL CLAIMS COURT IN KENYA

On 11th November 2003, the Government of Kenya launched the **Governance, Justice, Law and Order Sector (GJLOS) Reform Programme** (hereinafter “GJLOS”) in a bid to address the nationwide challenges affecting institutions within the governance, justice, law and order sectors.²⁶ GJLOS was developed in the context of Kenya’s **Economic Recovery Strategy for Wealth and Employment Creation, 2003-2007 (ERSWEC)**, a development policy document launched in June, 2003 and which aimed to promote good governance, respect for human rights, equal access to justice, and respect for the rule of law in Kenya.²⁷

The objective of GJLOS was to formulate sector-wide solutions to the challenges faced in GJLOS institutions, mainly Government ministries, departments and agencies.²⁸ The aim was to develop good governance among the GJLOS institutions and stakeholders and enable speedy and fair dispensation of affordable and accessible justice, especially for the poor, marginalised and vulnerable; through initiatives such as the introduction of SCCs, which would provide a small, quick process to adjudicate minor disputes.²⁹ The other objectives of GJLOS were to, *inter alia*, increase access to justice by increasing the number of Court of Appeal sessions across the country, improving judicial infrastructure by building more courts, increasing mobile courts, and automating court processes and the registries.

²⁶ See e.g., Republic of Kenya, *Governance, Justice, Law and Order Sector (GJLOS) Reform Programme: Policies, Laws and Regulations Assessment Report* (September, 2007) <<https://acjr.org.za/resource-centre/cilas-justice-assessments-report.pdf>>; Republic of Kenya, *Governance, Justice, Law and Order Sector (GJLOS) Reform Programme: Administrative Data Collection and Analysis Report* (May, 2007) <<https://acjr.org.za/resource-centre/governance-justice-and-law-and-order-sector-reform-programme-administrative-data-collection-and-analysis-report>>.

²⁷ *Ibid.*

²⁸ The GJLOS institutions and stakeholders included the State Department for Interior; the State Department for Coordination of National Government; the Office of the Attorney General and Department of Justice; the Judiciary; the Ethics and Anti-Corruption Commission (EACC); the Office of the Director of Public Prosecutions (ODPP); the Kenya National Commission on Human Rights (KNCHR); the Independent Electoral and Boundaries Commission (IEBC); the Judicial Service Commission (JSC); the National Police Service Commission (NPSC); the Independent Policing Oversight Authority (IPOA); the National Gender and Equality Commission (NGEC); the Commission for the Implementation of the Constitution (CIC); the Office of the Registrar of Political Parties (ORPP); and the Witness Protection Agency (WPA).

²⁹ See e.g., GJLOS Advisory Team, *Kenya: Governance, Justice, Law and Order Sector (GJLOS) Programme: Fourth Programme Review, Final Report, Submitted to the Fourth Joint Review Meeting* (2007) p 76 <https://sarpa.org/documents/d0002961/Kenya_GJLOS_2007.pdf>.

Due to the ambitious nature of GJLOS in providing far-reaching reforms in the legal institutions, the programme was considerably funded by a number of donor countries and international organizations. The programme was to be implemented in two phases; one-year Short Term Priorities Programme (STPP), and a four-year Medium Term Strategy (MTS). However, in September, 2009, donors withdrew their funding stating that the programme was overly-ambitious and that it had not yielded any results in the more than six years of its existence.³⁰

Left unaided, the Judiciary launched the **Judiciary Strategic Plan 2009-2012** whose objective was to formulate judicial reforms. In order to achieve this, on 29th May 2009, the government appointed the **Taskforce on Judicial Reforms chaired by Hon. Mr. Justice William Ouko**. The terms of reference of the Taskforce included to consider and advise on short and long term measures for addressing the backlog of cases in the Judiciary. The taskforce submitted its **Initial Report on 10th August 2009** and the **Final Report in July, 2010** recommending measures to aid in reducing the case backlog in the Judiciary. Its key recommendations were *inter alia*, to increase the number of judiciary staff, review court procedures and introduce small claims courts to handle minor cases. Specifically, on the SCCs and minor cases, the Taskforce stated that:

Due to delays in the determination of cases through the conventional court system, some litigants pursue their legal rights through the police, local administration or self help. There are many cases of a minor nature that have clogged the judicial system, which ought not to be in the ordinary courts. The Task Force is of the view that minor cases should be resolved rapidly through less technical mechanisms. In this regard, the Task Force recommends the enactment of the Small Claims Courts Bill to establish small claims courts. A draft of this legislation is appended to this Report as Annex II.³¹

³⁰ See e.g., Murithi Mutiga, 'Police to return reforms funds' (Daily Nation, 10 October 2009) <<https://www.nation.co.ke/news/politics/1064-670762-76t074z/index.html>>; GJLOS Advisory Team, 'Kenya: Governance, Justice, Law and Order Sector (GJLOS) Programme; Fourth Programme Review, Final Report, Submitted to the Fourth Joint Review Meeting' (2007) p 76 <https://sarna.org/documents/d0002961/Kenya_GJLOS_2007.pdf> (The six key intended results of GJLOS as identified at the programme level were: (i) responsive and enforceable policy, law and regulations; (ii) more effective GJLOS institutions; (iii) reduced corruption related impunity; (iv) improved access to justice, especially for the poor, marginalized and vulnerable; (v) more informed and participative citizenry and non-state actors; and (vi) effective management and coordination of the GJLOS programme)

³¹ See Final Report of the Taskforce on Judicial Reforms (July, 2010) p 55 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Final_Report_of_the_Task_Force_on_Judicial_Reforms.pdf>.

Under **Clause 7(2) of the Small Claims Court Bill, 2010**, appended to the Final Report of the Taskforce on Judicial Reforms as Annex II, **the pecuniary jurisdiction of the SCC was set at KES 100,000.**

Then followed the **Judiciary Transformation Framework (JTF), 2012-2016**,³² which sought *inter alia* the simplification of court procedures to reduce costs and the enactment of a Small Claims Court Act to establish the Small Claims Courts, in order to ensure access to and expeditious delivery of justice.³³ Consequently, all this culminated in the enactment of the Small Claims Court Act in 2016.

Accordingly, the rationale behind the establishment of the SCCs being to minimize the time and costs of litigation, this is best achieved by keeping the cap on claims at KES 200,000. The SCCs must equally apply simple rules of procedure and evidence to enable the inexpensive and expeditious adjudication of the said small disputes, and require parties appearing in person and those represented by legal practitioners to diligently adhere to the said rules.

5. A COMPARATIVE ANALYSIS OF SMALL CLAIMS COURTS IN OTHER JURISDICTIONS

Kenya is not alone in the endeavour to establish SCCs. A number of countries have in place small claims courts or tribunals which operate under simplified court procedures in order to ensure the expeditious disposal of minor civil disputes. However, the cap on the pecuniary jurisdiction of these courts varies from jurisdiction to jurisdiction depending on the economic status of each State. For this comparative analysis, the below jurisdictions, which have in place a small claims dispute resolution system, have been selected randomly to help bring out the prevailing idea behind the SCCs, that is, to enable access to justice through a small, quick, inexpensive and informal adjudication process.

5.1 AUSTRALIA

Australia has in place a small claims dispute resolution system.³⁴ However, it is noteworthy that **the small claims dispute resolution system in Australia**

³² See Judiciary, 'Judiciary Transformation Framework (JTF)', 31 May 2012 <<http://kenyalaw.org/kl/efileadmin/pdfdownloads/JudiciaryTransformationFramework.pdf>>.

³³ See Judiciary, 'Sustaining Judiciary Transformation (SJT): a Service Delivery Agenda, 2017-2021', p 19 <<http://kenyalaw.org/kl/efileadmin/pdfdownloads/StrategicBluePrint.pdf>>.

³⁴ See e.g., Australian Competition and Consumer Commission (ACCC), 'Small Claims Tribunals' <<https://www.accc.gov.au/contact-us/other-helpful-agencies/small-claims-tribunals>>; E Eugene Clark, 'Small Claims Courts and Tribunals in Australia: Development and Emerging Issues' 10 University of Tasmania Law Review (1991) <<http://www.austlii.edu.au/au/journals/UTasLawRw/1991/7.pdf>>.

operates in two forms, depending on the state or territory.³⁵ **One form entails the establishment of specialist small claims courts or tribunals, separate from the ordinary courts, to handle minor claims;** for example, the independent Civil and Administrative Tribunals in the Australian Capital Territory, New South Wales, Northern Territory, Queensland, and Victoria. **The other form entails the mere establishment of special and separate court procedures for small claims, within the Magistrates courts' system (a small claims division within the Magistrates' courts);** for example, in Tasmania, Western Australia, and South Australia.

For example, in 2005, in Western Australia, **the Court of Petty Sessions, the Small Claims Tribunal, and the Local Court were amalgamated to create the Magistrates Court of Western Australia,** a single subordinate court with jurisdiction over both civil and criminal matters.³⁶ This amalgamation is said to have enhanced access to justice because it simplified court procedures, and resolved cases faster and at a lesser cost. As concerns civil matters, **the court's pecuniary jurisdiction in respect of minor claims is limited to any claim whose value does not exceed \$10,000 (approximately KES 600,000).**³⁷ Otherwise, the pecuniary jurisdiction of the Magistrates Court of Western Australia in respect of civil matters is generally limited to \$75,000 (approximately KES 5 Million).

In South Australia, small or minor claims are handled by the South Australia Magistrates Court as there are also no specialist small claims courts or tribunals.³⁸ **The small claims are filed in the Civil (Minor Claims) Division of the South Australia Magistrates Court, as opposed to the Civil (General Claims) Division of the Court which handles claims whose value is above \$12,000 but not in excess of \$100,000.**³⁹ So, basically the South Australia

³⁵ See E Eugene Clark, 'Small Claims Courts and Tribunals in Australia: Development and Emerging Issues' 10 *University of Tasmania Law Review* (1991) p 204 <<http://www.austlii.edu.au/au/journals/UTasLawRw/1991/7.pdf>>

³⁶ See Government of Western Australia, Department of Justice, 'Magistrates Court' (1 December 2015) <https://courts.justice.wa.gov.au/M/magistrates_court.aspx?uid=0300-7242-1972-1430>.

³⁷ See e.g., Small Business Development Corporation, 'Recover a debt through the Magistrates Courts' <<https://www.smallbusiness.wa.gov.au/business-advice/financial-management/recover-debt-through-magistrates-court>> ; Jemina Jo, 'Minor Case Claims - Western Australia' <<https://www.guloxmart.com.au/civil-law/wa/minor-case-claims/>>.

³⁸ See Courts Administration Authority of South Australia, '\$12,000 or less' <<http://www.courts.sa.gov.au/RepresentYourself/CivilClaims/MinorClaims/Pages/default.aspx>>.

³⁹ See Courts Administration Authority of South Australia, 'Civil Claims' <<http://www.courts.sa.gov.au/RepresentYourself/CivilClaims/Pages/default.aspx>>.

Magistrates Court deals with **small claims up to the value of \$12,000 (approximately KES 800,000)** using simplified court procedures. If the value of the subject matter exceeds \$12,000 but no more than \$100,000, the Magistrates Court will still hear the claim but use the procedures of the ordinary courts. It is also notable that in respect of minor claims before the South Australia Magistrates Court, parties are required to appear in person, as legal practitioners are generally barred from representing parties in relation to the minor claims; except in special circumstances, such as where the other party is a legal practitioner, or where both parties agree to legal representation, or where one party believes they would be unfairly disadvantaged if they do not get legal representation.⁴⁰ That said, legal practitioners are not barred from helping the parties in preparing the legal documents to be filed nor in advising parties about the adjudication process of the minor claims.

5.2 **SOUTH AFRICA**

In **South Africa**, the **Small Claims Courts Act, 1984**⁴¹ established the SCCs.⁴² However, subsequent amendments were made to the Act by the **Small Claims Courts Amendment Act, 1986**.⁴³ The SCCs have jurisdiction to adjudicate on **any civil claim whose value does not exceeding R20,000 (approximately KES 100,000)**.⁴⁴ The nature of causes handled by the Courts are provided for under **Section 15 of the Small Claims Courts Act, 1984**, as amended by **Section 8 of the Small Claims Courts Amendment Act, 1986**, as follows:

- (a) *actions for the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette;*
- (b) *actions for ejectment against the occupier of any premises or land within the area of jurisdiction of the court: Provided that where the right of occupation of the premises or land is in dispute between the parties, that right does not exceed in clear value to the occupier the amount determined by the Minister from time to time by notice in the Gazette;*

⁴⁰ See Rule 13(4) of the Magistrates Court (Civil) Rules, 2013 <<http://www.courts.sa.gov.au/Lists/Court%20Rules/Attachments/294/Magistrates%20Court%20Civil%20Rules%202013.pdf>>.

⁴¹ No. 61 of 1984 <https://www.justice.gov.za/legislation/acts/1984_061.pdf>.

⁴² Section 2 of the Small Claims Court Act, 1984.

⁴³ No. 92 of 1986 <https://www.gov.za/sites/default/files/gcis_document/201503/aua-92-1986.pdf>.

⁴⁴ The Republic of South Africa, Department of Justice and Constitutional Development, 'Small Claims Courts' <<https://www.justice.gov.za/scc/scc.htm>>.

- (c) actions based on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette;
 - (d) actions based on or arising out of a credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005), where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette; [Para. (d) substituted by s. 172 (2) of Act 34 of 2005.]
 - (e) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette;
 - (f) actions for counterclaims not exceeding the amount determined by the Minister from time to time by notice in the Gazette, in respect of any cause of action mentioned in paragraphs (a) to (e).
- [S. 15 substituted by s. 8 of Act 92 of 1986.]

A party to the proceedings before the SCC shall appear in person and shall not be represented by any person, except for juristic persons who are to be represented by either their duly nominated directors or any other duly authorized officers.⁴⁵ The SCCs are separate from the Magistrates' Courts and are presided over by a **Commissioner for Small Claims**, who is an advocate, attorney, or magistrate of five years' practice.⁴⁶ The pecuniary jurisdiction of the ordinary Magistrates' Courts (or District Courts) in relation to civil cases is generally capped at R100,000.

5.3 THE STATE OF KENTUCKY IN THE UNITED STATES OF AMERICA

In Kentucky, small claims are handled by the **Small Claims Division of the District Courts**, the lowest courts in Kentucky's Court system.⁴⁷ **The value of the small claims is capped at \$2,500 (approximately KES 250,000),**

⁴⁵ Section 7(2) and (4) of the Small Claims Court Act, 1984.

⁴⁶ Sections 8 and 9 of the Small Claims Court Act, 1984.

⁴⁷ Ky. Rev. Stat. § 24A.220 <<https://casetext.com/statute/kentucky-revised-statutes/title-4-judicial-branch/chapter-24a-district-court/small-claims/section-24a220-establishment-of-small-claims-division>>; See generally, 'Small Claims Handbook: A Citizen's Guide to Handling Small Claims Complaints in Kentucky' <<https://kycourts.gov/resources/publicationsresources/Publications/P6SmallClaimsHandbookweb.pdf>>.

exclusive of interest and costs.⁴⁸ As concerns the subject-matter jurisdiction of the Court, it is provided that:

(1) The small claims division shall have jurisdiction, concurrent with that of the District Court, in all civil actions, other than libel, slander, alienation of affections, malicious prosecution and abuse of process actions, when the amount of money or damages or the value of the personal property claimed does not exceed two thousand five hundred dollars (\$2,500) exclusive of interest and costs.

(2) The division may also be used in civil matters when the plaintiff seeks to disaffirm, avoid, or rescind a contract or agreement for the purchase of goods or services not in excess of two thousand five hundred dollars (\$2,500) exclusive of interest and costs.

(3) The division shall have authority to grant appropriate relief, except no prejudgment actions for attachment, garnishment, replevin or other provisional remedy may be filed in the division.⁴⁹

Furthermore, the filing of the following actions in the Small Claims Division of the District Courts is prohibited; an assigned claim or a class action; and any action by a person, firm, partnership, association, or corporation engaged, either primarily or secondarily, in the business of lending money at interest, nor any collection agency or collection agent, in furtherance of their business.⁵⁰ In any case, legal representation of parties to small claims by an attorney-at-law is permitted, but not required.⁵¹

6. POSSIBLE CONFLICTS AFTER THE OPERATIONALIZATION OF THE SMALL CLAIMS COURTS IN KENYA

If the SCCs are operationalized under the existing legal framework under the **SCC Act, 2016**, the **SCC Rules, 2019**, and the proposed amendments under the **SCC (Amendment) Bill, 2020**, there are possible conflicts that will arise in the operations of the SCCs and the Resident Magistrates Courts (hereinafter “RMCs”).

The following is a summary of the possible conflicts that will arise in the workings of the courts and the Judiciary following the operationalization of the SCCs:

⁴⁸ Ky. Rev. Stat. § 24A.230 <<https://casetext.com/statute/kentucky-revised-statutes/title-4-judicial-branch/chapter-24a-district-court/small-claims/section-24a230-jurisdiction-authority>>.

⁴⁹ *ibid.*

⁵⁰ Ky. Rev. Stat. § 24A.240 <<https://casetext.com/statute/kentucky-revised-statutes/title-4-judicial-branch/chapter-24a-district-court/small-claims/section-24a240-appearance-of-attorneys-actions-prohibited-personal-representatives-as-parties>>.

⁵¹ *ibid.*

NO.	ISSUE	PROVISION	POSSIBLE CONFLICTS	RECOMMENDATION
1.	The subject-matter jurisdiction of the SCCs	<p>Section 12(1) of the SCC Act, 2016, whereby the SCCs will entertain civil claims in the nature of: (a) a contract for sale and supply of goods or services; (b) a contract relating to money held and received; (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property; (d) compensation for personal injuries; and (e) set-off and counterclaim under any contract.</p>	Apart from simple debt recovery disputes, the other civil claims that the SCCs will be required to adjudicate upon are rather complex and require the grant of discretionary damages. Such disputes are bound to prolong litigation before the SCCs and equally create disparity in the award of damages in SCCs across the country.	The subject-matter jurisdiction of the SCCs should be limited to straightforward debt recovery disputes and should not be broadened to include complex civil matters requiring the grant of discretionary damages, such as tortious claims, and certain contractual disputes, among others.
2.	The pecuniary jurisdiction of the SCCs; concurrent with that of the RMCs	<p>Section 12(3) of the SCC Act, 2016, whereby the pecuniary jurisdiction of the SCCs is capped at KES 200,000. (The proposal to increase the pecuniary jurisdiction of the SCCs to KES 1 Million under the Bill should be rejected.)</p> <p>Section 48 of the SCC Act, 2016, which gives litigants the right to lodge claims in other courts, ad states that; <i>"Nothing in this Act precludes a person from lodging a</i></p>	Under Section 7(1)(e) of the Magistrates' Courts Act, 2015, the jurisdiction of the RMCs is capped at KES 5 Million, without a lower cap. Hence, there will be concurrent jurisdiction between the SCCs and the RMCs for the subject civil claims whose value does not exceed KES 200,000.	Amend Section 7(1)(e) of the Magistrates' Courts Act, 2015 to restrict the pecuniary jurisdiction of the RMCs to any civil claim where the value of the subject matter is above KES 200,000 but not in excess of KES 5 Million; except for the types of civil claims which are expressly excluded from the jurisdiction of the SCCs.

		<i>claim that is within the jurisdiction of the Court in any other Court if that person elects to institute proceedings in that other Court to hear and determine that claim."</i>		Amend Section 48 of the SCC Act, 2016 to give the SCCs exclusive jurisdiction over the subject civil claims whose value is KES 200,000 or less.
3.	Qualifications of the SCCs' adjudicators vis-à-vis the Resident Magistrates; and the career progression of the SCCs' adjudicators	Sections 5 and 6 of the SCC Act, 2016 , whereby the JSC is empowered to appoint adjudicators for the SCCs from among persons who are advocates of the High Court of Kenya and have at least three years' experience in the legal field.	Coupled with the requirements under Section 32(2) of the Judicial Service Act, 2011 , a Resident Magistrate shall be appointed from among persons who are advocates of the High Court of Kenya and who have three years' post admission experience and a current practicing certificate. So, what is the job group and salary scale for the SCCs' adjudicators in comparison to that of the Resident Magistrates, despite their similar qualifications? What is the career progression for the SCCs' adjudicators?	Merge the SCCs with the RMCs and create a Small Claims Division within the Civil Registry to cater for the small claims. The small claims will then be presided over by Resident Magistrates as an entry level to the judiciary and thereafter they will be allowed to entertain other civil claims. Alternatively, let the small claims be handled by any Resident Magistrate, using special and separate procedures for small claims. This does away with the need for independent SCCs and adjudicators; hence, the need to appoint more Resident Magistrates instead.

4.	Appeals from the SCCs	Section 38 of the SCC Act, 2016, Rule 30 of the SCC Rules, 2019, and Order 42 of the Civil Procedure Rules, 2010; whereby appeals shall lie directly from the SCCs to the High Court.	In by-passing the Magistrates' Courts and providing that appeals lie from the SCCs directly to the High Court, this creates a conflict with the jurisdiction of the Magistrates' Courts and tampers with the High Court's jurisdiction as well. This will also add to the backlog of cases in the High Court.	The judgments and orders of the SCC adjudicator should be final, with only the option of review; but no appeals to any other court.
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7. CONCLUSION

As aforementioned, the objective of the SCC is to expedite the adjudication of civil matters involving money or property valued at KES 200,000 or less. An increase in this amount, thus an increase in the pecuniary jurisdiction of the SCC, will amount to substantial injustice in this Court because any amount above that is not small money in Kenyan economic terms. Ideally, **any civil dispute of an amount or value higher than KES 200,000 should be handled by the Resident Magistrate's Court. In the alternative, the SCC should amalgamate with the Resident Magistrate's Court, with the entry level into the judicial profession being the handling of small claims.** This should be followed by an immediate appointment of more Resident Magistrates.

On the other hand, **Section 20 of the SCC Act, 2016 should be amended to allow parties to only appear in person or be represented only by duly authorized legal practitioners,** but with strict rules and guidelines on how to simplify their litigation in order to achieve the objectives of the SCC. Thus, **laypersons should not be allowed to offer legal representation to parties appearing before the SCC.**

Consequently, the proposed amendments under **Clauses 2, 3 and 4 of the SCC (Amendment) Bill, 2020** should be amended or reviewed accordingly. If not, the Bill should be rejected, so as to: (1) prevent an increase in the pecuniary

jurisdiction of SCCs from KES 200,000 to KES 1 Million; (2) prevent the legalization of the practice of law by laypersons and quacks; and (3) prevent any tampering with the discretionary power of the SCCs' adjudicators to grant or deny requests for adjournments when just to do so.

Finally, **the requisite amendments under the Magistrates Court Act, 2015, the Judicial Service Act, 2011 and others under the SCC Act, 2016** should also be pursued in order to eliminate the conflicts between the SCCs and the Resident Magistrates' Courts; as pertains to the pecuniary and subject-matter jurisdictions of the two courts, the qualifications of the SCCs' adjudicators vis-à-vis those of the Resident Magistrates, the career progression of the adjudicators, and the handling of appeals from the SCCs.

Prof. Tom Ojienda, SC, Past President of the East Africa Law Society, Chairman of the Law Society of Kenya, Vice-President of the Pan-African Lawyers Union and Council Member of the International Bar Association

Cc. Speaker of the National Assembly
Clerk of the National Assembly
Judicial Service Commission
Law Society of Kenya
Media

WILBERFORCE AKELLO
ADVOCATE OF THE HIGH COURT OF KENYA
(PRACTICE NO. LSK/2020/01100)
TRANSNATIONAL BANK PLAZA, 9TH FLOOR,
P.O BOX 67845-00200
NAIROBI.

DATE: 24TH APRIL 2020

TO :
THE CLERK
THE NATIONAL ASSEMBLY
NAIROBI.

NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE OF JUSTICE AND LEGAL AFFAIRS
NAIROBI.

Dear Sir,

RE: SUBMISSIONS OF A MEMORANDUM ON THE SMALL CLAIMS COURT
(AMENDMENT) BILL, 2020

Reference is made to the above noted matter.

To facilitate the objectives of the Small Claims Court Act and ensure access to justice, quick, inexpensive expedited resolution of small claims devoid of strict of formality, I propose the following:

1. Section 20(2) of the Small Claims Court Act should be amended. This is to allow representation by legal practitioner of choice in tandem of constitutional principles. Section 20 as present will create possible conflicts with articles 49 and 50 of the Constitution of Kenya 2010 as it purports to exclude Advocates from practicing in the Small Claims Court is patently unconstitutional. Legal representation by qualified legal practitioners is one of the facets of access to justice. Section 20 should therefore be amended to provide that "*A party to the proceeding shall appear in person or by an Advocate*".
2. Section 20(3) of the Small Claims Court Act should be deleted. This is to ensure that a party can act in person or by appointed legal practitioner. This is to ensure that there is no possible conflict with the Advocates Act and Order 9 of the Civil Procedure Rules. This is also to ensure that all the practitioners in that court are regulated as well as guarantee the claimant's right to file their cases therein and act in person without hindrance.

3. Pecuniary jurisdiction of Kshs. 200,000 should be retained. Section 12(3) of the Small Claims Court Act should remain without amendments. Accordingly, clause 2 of the proposed Amendments Bill should be abandoned. The rationale for this as follows:
- a. The Chief Justice may determine by notice in the Gazette and review the pecuniary jurisdiction once the infrastructure of these courts have been provided and tested as underscored in section 12(4). This is tandem with the provisions under the Magistrate Act.
 - b. Please note that this is an informal court where a Claimant may present his or her claim orally, in his or her ethnic language, sign language and strict rules of evidence are not applied. Can such informal court deal with a contractual claim of 1 Million? An increase to 1 Million will create substantial justice. 1 Million claim is a big claim that cannot be judiciously determined in the informal set up of the Small Claims Court.
 - c. I submit that such proposed increase will create enormous injustice as the Small Claims Court will be overburdened by numerous cases thereby defeating the very intention of the Act provision of quick access to an inexpensive and speedy resolution of simple civil debt recovery claims. This is an informal court with informal infrastructure and by allowing a big claim of 1M to be determined in an informal set up would cause substantial injustice. The same will invoke strict procedure rules which will defeat the very intention of the Small Claims Act.
 - d. Kindly also note that the proposed pecuniary jurisdiction lies with the Magistrate Court. It will create parallel jurisdiction which will create confusion within the justice system. Increasing the jurisdiction to 1 Million will basically transfer backlog to the informal Small Claims Court.
 - e. Further note, in South Africa, the Small Claims Court has pecuniary jurisdiction of equivalent of Kshs. 100,000. The United States of America and particularly in the States of Kentucky and Kansas, the Small Claims Court have pecuniary jurisdiction of equivalent of Kshs. 250,000/-. Accordingly, an increase in this amount to Kshs. 1 M will occasion substantial injustice.
4. Delete section 8(b) of the Small Claims Act. This court requires competent and qualified Registrar to ensure efficient administration. The rationale is, to allow a paralegal or clerk as Registrar of the Small Claims Court may diminish the efficiency of the courts to ensure quick, inexpensive disposal of debt recovery claims. Section 8(a) should be retained. The proposed amendments on this heading is consistent with the qualifications and competency of other Registrars as provided in the Judicial Service Act.

5. Section 33 of the Small Claims Court should be further amended to allow costs to follow events and further allow the Small Claims Court Magistrate discretion over costs as consistent with the provisions of the Civil Procedure Act.

6. Section 11 of the Small Claims Court Act to be amended to include give the Small Claims Court jurisdiction over works injuries arising from the foundation of Work Injuries Benefits Act. This is in addition to the jurisdiction over personal injuries. The rationale is that the ordinary wanjiku can get quick access to workers justice at the Small Claims Court (up to a pecuniary of Kshs.200,000) instead of the option of the more bureaucratic Director of Occupational Liability/Director of Labour Office.

7. Section 34 of the Small Claims Act should be further amended to provide for discretion of the Small Claims Court Magistrate to adjourn a matter in exceptional circumstances but the six months period be inserted as the maximum period(cap) within which a suit should be heard and determined. This is well within the objectives of the Act of providing quick, inexpensive access to justice devoid of strict rules of formality.

8. Finally, noting that this is informal court that aims to facilitate access to justice and quick determination of small claims, I propose that Small Claims Court Act provides for Schedule in the Act which provides for a cap on reduced/smaller court filing fees without alterations. This will assist the ordinary and poor wananchi in accessing justice without financial hindrances.

9. I hope the National Assembly Departmental Committee of Justice and Legal Affairs will consider the foregoing to ensure quick, inexpensive access to justice within the framework of the Constitution of Kenya 2010.

Kind regards,

WILBERFORCE AKELLO

KENNEDY OGUTU, LL.B. (Nbi), LL.M. (Harvard)
Tutorial Fellow, Department of Private Law
University of Nairobi | School of Law
kenogutu@uonbi.ac.ke | +254 723 433 460

April 24, 2020

Mr Michael Sialai
Clerk of the National Assembly
Parliament of Kenya

Dear Sir,

Re: Memorandum on Small Claims Court Amendment Bill 2020

It is my pleasure to present the following views for consideration by the National Assembly as it deliberates on the Bill to amend the Small Claims Courts Act.

The stated object of the bill is to promote the effective disposal and management of small claims which affect the small and medium enterprises, and to align the principal act with Articles 48 and 51 of the Constitution on access to justice and legal representation.

Towards this end, the bill introduces 3 key changes to the Small Claims Court Act:

1. It increases the pecuniary jurisdiction of Small Claims Courts from KSh. 200,000 to KSh. 1 million.
2. It permits advocates to represent parties before the Small Claims Court. This is in addition to representation by persons who are not advocates.
3. It limits the number of adjournments to three, although additional adjournments may be allowed in exceptional circumstances.

Amendment 1 – Increasing Pecuniary Jurisdiction

I am opposed to this amendment for the following reasons:

The objective of this amendment is to allow claims by SMEs to be handled by the Small Claims Court whose jurisdiction is presently capped at KSh. 200,000. However, there is nothing in the amendment that suggests that the enhanced jurisdiction is for SMEs only. As such, this amendment will also open Small Claims Courts to claims by individuals of up to 1 million Shillings.

Whereas the current limit would exclude most claims by SMEs, this amendment will expand the jurisdiction of the courts for all claimants and not just SMEs. A vast majority of cases that are filed before Magistrates' Courts are currently within this range. Rather than reduce the timelines for the resolution of small claims, this amendment will flood these courts with cases, resulting unwillingly in the very same delays the court was intended to address in the first place.



M. SIALAI

It should be remembered that a small claims court is just that – a court for small claims. In the Kenyan context, court cases of 1 million Shillings cannot be characterized as small claims, particularly where they are filed by individuals and not corporate bodies.

Since retaining the limit at KSh. 200,000 will lock out many SMEs, Parliament should set two different pecuniary limits for small claims courts – one for individuals (KSh. 200,000) and another for SMEs - corporations, partnerships, unincorporated associations, government bodies and other legal entities - (KSh. 1 million).

Additionally, Parliament should initiate broad reforms in the justice sector to reduce delays in the administration of justice. SMEs and others whose claims fall outside the jurisdiction of the Small Claims Court will then benefit from the expeditious and inexpensive resolution of their cases in the mainstream courts. All Kenyans who come to our courts deserve the expeditious and inexpensive resolution of their disputes as mandated by the Constitution, and measures should be imposed to ensure this is achieved across the entire justice sector.

Amendment 2 – Permitting Advocates in the Small Claims Court

I am opposed to this amendment for the following reasons:

a. Permitting Advocates before the Small Claims Court

The Small Claims Court is meant for simple and straight-forward claims that can be resolved in a day or two without the input of advocates. Permitting advocates will be counterproductive as it will likely introduce sharp practice that will result in delays and eventually defeat the very essence of Small Claims Courts.

Persons who wish to retain Advocates in their cases have the liberty to approach the Magistrates Courts with their claims.

It has been argued that prohibiting advocates from small claims courts is against the constitution. Quite pointedly, the Bill states expressly that it seeks to align the principal statute with Article 48 and Article 50 of the Constitution.

However, there is nothing in the Constitution that would make it unconstitutional to prohibit advocates from representing parties before the Small Claims Court.

Article 48 on Access to Justice provides that "The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice." Although representation by counsel is often cited among the ingredients of the right to access to justice, it should be noted that there is no express mention of representation by an advocate under Article 48. Instead, advocates are only mentioned under Article 50.

Whereas Article 50 talks about fair hearing, the Article is more concerned with rights of accused persons in criminal proceedings. Article 50(1) states that "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body." In Article 50(2), the Constitution breaks down the right to fair trial in criminal proceedings, which includes the right of an accused person to choose to be represented by an advocate.

It has been argued that Article 25 elevates the right to fair trial by listing it among only 4 rights that cannot be limited under any circumstances. However, the right to fair trial arises only in criminal proceedings and it is only in criminal proceedings that the right to choose to be represented by an advocate cannot be limited.

The right to have an advocate in civil proceedings – if at all such a right exists – is not listed under Article 25 among the four sacrosanct rights that may not be limited. As such, the Constitution allows any such right to be limited, provided the limitation be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

It is my submission that the prohibition of advocates from Small Claims Courts is both reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The overall objective of such limitation is to pave way for the expeditious and inexpensive resolution of disputes. Where a party is not happy with the outcome of a case at the Small Claims Court, s/he will be at liberty to appeal to the High Court where legal representation will be permitted.

b. Permitting Representation by Non-Advocates

Although this is not an express objective of the amendment bill, the Small Claims Act – as amended – will permit persons who are not licensed as advocates to represent litigants before the court.

I suppose the intention of permitting non-advocates is to allow claimants and respondents to be assisted – rather than *represented* – in the proceedings by their friends, family or other close associates who are familiar with their cases. This provision will also allow owners, managers or other officials of SMEs to represent them in court without forcing small enterprises to hire lawyers whose fees can be prohibitive.

Despite these noble intentions, the provision will expose litigants to all manner of cons. There is already a vast number of quacks masquerading as advocates or court staff who line court corridors preying on litigants who need guidance with their cases. These individuals are unregulated and this means there is no limit on how they conduct themselves. With no regulatory limits on what they charge persons they 'assist', there is a real danger that they can exploit litigants who come before Small Claims Courts thereby making litigation before these courts overly expensive.

Lack of regulation also means there is no regulatory body that is responsible for their conduct, and where complaints about their conduct can be filed. This exposes litigants who may be conned, and who will then be forced to initiate complaints with the police, thereby frustrating their quest for justice even further.

It should be remembered that the principal Act already contains numerous provisions aimed at addressing the challenges that unrepresented litigants would face. These include simplified procedures, standard forms and the exclusion of the strict rules of evidence. The prohibition of advocates also helps level the playing field between the lay parties.

Lawyers are usually invaluable in court proceedings due to the overly technical nature of litigation. Proceedings before mainstream courts are characterized by numerous technical rules, complex documents that require expertise to draft, and a technical language not spoken by many outside the legal profession. The aura within mainstream courts is also quite intimidating, and many

Individuals who would otherwise ably speak for themselves will lose the courage within formal courts.

By doing away with these technicalities, litigants can easily navigate their way around the Small Claims Court without needing the assistance of lawyers or other representatives, and Parliament should not be guilt-tripped into permitting lawyers to practice before these courts.

It is standard practice in many jurisdictions to prohibit advocates in proceedings before small claims courts. These include countries whose constitutions contain provisions similar to those in our constitution that guaranteed the right to fair hearing and access to justice.

Amendment 3 – Limiting Adjournments to 3, save for exceptional circumstances

I support this amendment for the following reasons:

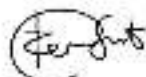
This amendment fits well with the overall objective of the Small Claims Court Act, which is to ensure that small claims are resolved informally and inexpensively but in accordance with established principles of law and natural justice.

By saying that "The Court may only adjourn the hearing of any matter under exceptional circumstances..." the Act currently permits an unlimited number of adjournments which is antithetical to the objects of the Act. As such, the limit on the number of adjournments will go a long way in ensuring the expeditious resolution of small claims.

In addition to limiting the number of adjournments, a further amendment should be introduced to impose a time limit on the resolution of small claims. A limit of 30 days from the date of filing seems reasonable.

Thank you very much for the opportunity granted to Kenyans to contribute to Parliamentary business through the submission of such memoranda.

Yours Faithfully,



KENNEDY OGUTU, LL.B. (Nbi), LL.M. (Harvard)



REPUBLIC OF KENYA

MINISTRY OF EAST AFRICAN COMMUNITY AND REGIONAL
DEVELOPMENT

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When replying please quote:
REF: EAC/5/6

23rd April, 2020

Mr. Michael R. Sitali, MBS
Clerk of the National Assembly
Parliament Building
NAIROBI

Dear *Hon. Sitali,*

MEMORANDA ON THE SMALL CLAIMS COURT (AMENDMENT)(NATIONAL
ASSEMBLY) BILL NO.4, 2020

The Small Claims Court (Amendment) Bill No. 4 2020 that is currently before Parliament, seeks to facilitate reforms that are instrumental in supporting the operations of Small and Medium Businesses as part of the Ease of Doing Business agenda.

As the Ministry responsible for the Ease of Doing Business agenda across Government, we support the changes to the Act and we look forward to its speedy enactment. After further review of the bill, we propose the following amendments be made:

Clause 3 (a) & (b)

We propose that Section 20 of the Act be amended to allow for only legal representation in addition to self-representation which is already allowed in the Act. This will allow young advocates joining legal practice to be able to support the operations of this court. Further, we propose that the fees advocate in this court charge be reduced to ensure small businesses benefit from reduced costs. The National Government has already waived all court fees in this court (100% waiver) with effect from 1st April 2020.

The proposed amendments under Section 20 are therefore provided as follows:

Section 20 sub-section (1) – 'A party to the proceedings shall appear in person or be represented by an Advocate.'



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Kenyans



Sub-section (2) – 'The remuneration of an Advocate appearing before this Court shall be not more than three quarters and not less than half the amount prescribed under the Advocates Remuneration Order, 2014.'

Clause 4


We propose that the Committee introduces an additional amendment to the Small Claims Court (Amendment) Bill, 2020 by introducing a new sub-section (5) under Section 34 to prescribe a sixty (60) days' time frame for determination of claims before this Court.

The proposed text for Section 34 sub-section (5) is as follows:

'All proceedings before the Court shall be heard and determined within sixty days from the date of lodging the claim before the Court.'

The Ministry appreciates your continued support in the Doing Business reform agenda.

Yours,


Hon. Adan Mohamed, EGH
CABINET SECRETARY
Eros.

Copy to: Hon. William Chaptuma
Chairman
Justice, Legal and Constitutional Committee
National Assembly

Hon. Adan Duale, EGH
Leader of Majority
National Assembly
Parliament
NAIROBI

Hon. Justice Paul Kihara Kariuki
Attorney General, Republic of Kenya
Sharia House
NAIROBI

Office of the Chief Justice and
President of the Supreme Court
The Judiciary
NAIROBI



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Open and wide East African Integration for Sustainable Development and improved livelihoods of all Kenyans

Vision:

Kenya



From:
Nguyo Wachira Patrick,
0722967470
P o Box 25575 - 00100,
Nairobi.
nguyowachira@gmail.com

24th April, 2020

To:
The Clerk,
National Assembly
Parliament Road
Nairobi

Dear Sir,

(1) blast

SUBMISSION OF MEMORANDUM
SMALL CLAIMS COURT AMENDMENT BILL NO 4 OF 2020

Thanks for the request for participation as published on 17th April, 2020.

BACKGROUND OF THE COURT

The main purpose of the Small Claims Court is to enhance access to justice. The Magistrate Court has clogged justice by providing high costs of accessing the court and too much legalese in its proceedings. Globally this has led to the emergence of the small claims court.

The development of commerce and entrepreneurship has forced the justice and legislation arms of governments to adopt an expedited means of dispute settlement to also encourage investment.

The main reason for the creation of such a litigation court/Small Claims Court should be an expedited trial that is cost effective. The expedited trial should be conducted within the framework that enhances access to justice for all irrespective of resources or jurisdiction. Success of such a court will also lead to wide global acceptance of our jurisdiction as an investment friendly nation.



SECTION 20 ON LEGAL REPRESENTATION

This is a contentious issue. No straight answer can be acceptable to all parties appearing in that court. My suggestion is that we have 3 categories of representation and Appearances. That is;

1. The claimant can appear and articulate his claim in person.

This part on representation is clear and not contested.

2. Counsel has a right to appear once appointed by the principal claimant.

However counsel fees should be limited to encourage the disadvantaged poor access justice. Counsel should charge not more than half of any applicable item of fee provided for in the Remuneration Order.

3. Other representatives to be allowed only with the leave of the court. The court shall be at liberty to revoke the leave so granted if sufficient reasons arise.¹

Let the adjudicator/court be at liberty to determine and allow any other person (of interest to the claim) represent the principal claimant. These other allowable persons may include;

A manager or director of the claimant company with a sufficient letter of appointment. A director of a small claimant company may be locked out of representation for his organization despite being aware of the transactions leading to claim in court.

A widow(er) should be allowed to step in the shoes of the departed spouse before the completion of the probate process but the proceeds of the claim will be in the name/in favour of the estate.

A son/daughter should be allowed to represent the parent who is out of the jurisdiction of the court.

All the above mentioned scenarios are legitimate and worth the exemption of mandatory attendance of the principal claimant or an advocate. These are the main

¹ This is the position in Canada where paralegals and law students are allowed (Law Society Act RSO 1990). ISBN 978-1-4868-4052-6 © Queen's Printer for Ontario, January 2020. https://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/What_is_Small_Claims_Court_EN.html

reasons why the small claims court exist and away from the magistrate court which costs are prohibitive.

The court should be allowed to review genuine case by case of the person representing the principal claimant. Let the court limit the person representing the principal claimant. The court will rarely allow a masquerader or any other person without the knowledge of the claim appear before it. Unqualified persons representing the claimant should be kept out of that court. The small claims court should encourage the filing of small claims. Representation does not affect the process of proving the authenticity of the claim. Furthermore only the legitimate claimant will receive the amount awarded by the court and not his representative.

If it appears that the person representing the claimant lacks sufficient cause, basis, does not understand the issues in court, the court may revoke the representation forthwith. It will thereafter cause the claimant to appear in person thereafter.

The person representing the claimant should not be entitled to any fee or payment for representation.

The court should guard the unscrupulous representatives representing multiple claimants. The court should only on very rare occasions allow non advocates to represent parties in court. Once the court is allowed to approve the representation, the court should guard the legal profession sufficiently but also ensure no unauthorized self profiteering persons practice law in small claims court at the expense of advocates.

In Canada and Australia the small claims court allows other representatives to appear only with leave of the court. They are not entitled to any fees.

ENHANCED VALUE OF CLAIMS FROM KSHS 200,000 TO KSHS 1,000,000.00

The writer supports the enhancement of the amount to kshs 1,000,000 based on the international standards listed here below.

The latest international developments in the practice of civil procedure are the commonness in which jurisdictions have adopted the Small Claims Court.² These are

² The European Union Small Claims Court.

unique courts specialized in small trade and commercial disputes. The cases will usually only be of pecuniary claims. The jurisdictions with the largest pecuniary amounts are; Australia (state of Queensland) which allows up to \$ 25,000 dollars, England and Wales and America (State of California) jurisdictions both which are approximately 10,000 USD or 10,000 pounds (about kshs 1,000,000.00),³

However due to different state federal systems every state has a different small claim procedure and monetary limits in these countries. The underlying common factor is that they hear small claims. The situation in Australia is that some states have donated jurisdiction of a minimum of 10,000.00 Australian dollars. The Queensland Small Claims court deals with minor civil disputes, which involve amounts up to \$25,000. It is regulated by the Civil and Administrative Tribunal.⁴ In the United State each state has its different small claim procedure. The United States however have a ceiling on the amount of the claim as 10,000.00 dollars.⁵

FILING OF MULTIPLE SUIT IN THIS COURT

A party who files multiple courts to the Small Claims Court should pay higher court filing fees. I propose that the 5th suit by any individual or corporation within the same year should be paid for court filing fees of a double amount.

Thank you.

Nguyo Wachira

Advocate, LLB, LLM & PhD Candidate (on access to justice)

³ See part 26 and 27 of the Civil Procedure Rules and Directions: Small Claims – England and Wales on the website of the European e-Justice Portal; D. Haines, T. Trieder, 'England & Wales', in Dent Recovery in Europe, ed. G. Holzhauser, C. Suter (Nomos 2007), p. 142

⁴ Is statutory organization responsible for reviewing administrative law decisions of some government of Queensland departments and agencies, and also adjudicating some civil law disputes. The tribunal was established under the *Queensland Civil and Administrative Tribunal Act (2009)*

⁵ Caution is emphasized that the currencies of the different countries have different valuations.

There is legitimate concern by the Society on the propriety of an authorised representative other than a legal practitioner appearing before the Court. The role of an Advocate in the institution of civil claims is recognized by the **Section 11 of The Civil Procedure Act** in following words:

"Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts; Provided that— (1) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court;..."

Order 9 of The Civil Procedure Rules categorizes recognized agents of a party and Advocates. This dichotomy does not however, empower an unqualified person to act on behalf of a party in Court in the same manner as would an Advocate. **Section 20 (1) and (3) of the Act** as it is now and may be, upon deletion of **subsection (2)** and amendment of **subsection (3)** permit anyone with "sufficient knowledge of the case and sufficient authority to bind the party being represented" to appear before the Court as would an Advocate. The **Act** does not stipulate what amounts to sufficient knowledge of a case or authority to bind the party represented. This will open a Pandora's box and create a breeding ground for fraudsters and corruption. There is need to guard against the real likelihood of the Court being taken over by quacks and unqualified persons competing for legal work with Advocates. It is prudent that a party either appears in person before the Court or be represented by an Advocate.

An Advocate is defined in **Section 2 of The Advocates Act, Cap 16 of the Laws of Kenya (The Advocates Act)** as any person whose name is duly entered upon the Roll of Advocates. On the other hand, an unqualified person is defined in **Section 2** as one not qualified under **Section 9 of The Advocates Act**. Substantial resources are incurred in training one to be an Advocate, in an elaborate education programme regulated by the Government of the Republic of Kenya and the Society. Over one thousand Advocates are admitted every year, a substantial number setting up law firms upon admission. The practice of Advocates is regulated to ensure high standards of legal representation with disciplinary and penal consequences for offenders. There will be no mechanism of holding unqualified persons appearing before the Court, accountable. What is more, permitting unqualified persons to appear before the Court will defeat the very essence of educational and legal training for Advocates.

We are mindful of the need to reduce costs of matters before the Court, an idea which the Society fully embraces. The minimum instruction fees for claims before the Court as per **The Advocates (Remuneration) (Amendment) Order, 2014** is Kenya shillings twenty two thousand five hundred

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Riziki Emukule (Coast Representative)



(Kshs 22,500.00). The maximum is Kenya shillings one hundred and thirty five thousand (Kshs 135,000.00). A balance can be struck between the need to reduce legal costs whilst maintaining the quality of legal representation before the Court. We will also, have met our statutory obligation to ensure that there is work for youthful Advocates and for most Advocates who otherwise appear before the Resident Magistrate's Court for matters that fall within the jurisdiction proposed to be given to the Court.

It is our responsibility under **Section 4 of the Law Society of Kenya Act No 21 of 2014 (Law Society of Kenya Act)** to guarantee several safeguards in the practice of law. Relevant to the matter at hand are four. **One**, ensure that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide. **Two**, protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law. **Three**, represent, protect and assist members of the legal profession in Kenya in matters relating to the conditions of practice and welfare. **Four**, establish mechanisms necessary for the provision of equal opportunities for all legal practitioners in Kenya. The Court is the best forum for creating employment for youthful Advocates, a matter that resonates with the Government's agenda of youth empowerment under **Article 55 of the Constitution**.

Accordingly, we propose that that **Section 20 of the Act** be amended as follows:

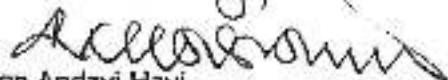
Subsection (1): A party to the proceedings shall appear in person or by an Advocate.

Subsection (2): The remuneration of an Advocate appearing before the Court shall be not more than three quarters and not less than half the amount set out in the Advocates Remuneration Order.

The need for an expedited hearing before the Court is discernible in the intended substitution of **Section 34 (3) of the Act**. However, that goal will not be achieved unless there a set time frame for determination of claims. We therefore, suggest that the claims be determined within 60 days of the date of filing and that **Section 34 of the Act** be amended to provide for the time limit instead of the intended substitution.

We are available to appear before the National Assembly to expound further on the propriety of the view expressed hereinabove in so far as the **Bill** is concerned.

Yours Sincerely,



Nelson Andayi Havi,
President, Law Society of Kenya

Nelson Havi (President), Carolyn Kamende (Vice-President)
George Omwansa, Herine Kabita, Roseline Odede (General Membership Representatives)
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