

RECENT DEVELOPMENTS IN COMMERCIAL JUSTICE IN KENYA: THE COMMERCIAL JUSTICE COURT USER COMMITTEE

Andrew Chege Waitara

Introduction: The Commercial Justice Environment in Kenya

Background and significance

There is widespread consensus not just in the economic literature but also among lawyers and legal scholars that the judiciary is a vital factor in the Rule of Law and more broadly in economic development. Increased investment, commerce and trade are considered essential in reducing poverty and raising standards of living in any country. Pursuing better standards of justice for business is considered a priority on the path to better public services and more accountable government through increased tax revenues and lower levels of unemployment. These in turn help poor countries enhance their prospects for economic development.

Conversely, ambiguous laws and poor law enforcement discourage legitimate business investment and can facilitate the theft of public and private resources. Kenya has been through significant legislative reform including a robust constitutional reform process yielding a document that has received acclaim nationally and internationally. However, the country is increasingly appreciating that even the best substantive law will not bring the rule of law without effective enforcement by a sound judiciary.

A judicial system characterised by huge commercial case backlogs, complex legal procedures, manufactured delays and low clearance rates adversely affects the enforcement of commercial contracts and therefore private investments. Moreover, protection against the state itself is made easier when the judiciary can resolve a controversy raised by a private party against the state based on constitutional provisions or parliamentary legislation.

Therefore a significant positive correlation exists between a robust, impartial commercial justice system and a conducive business environment. This safeguards the players' matters as well as shields them from the excesses of the bigger market players and the regulator (i.e. the government). The economic benefits of a strong judiciary in positively impacting commerce in turn mean that the government benefits through increased collection of revenue through taxation. This is particularly important at the time of writing this paper when Kenya's government is in dire financial straits and is exploring all possible revenue-generation mechanisms.

During the 1990s there was an outcry from the local business community as well as international firms represented locally that the enforcement of contracts and the recovery of debt took an

inordinately long amount of time in the Kenyan justice system. Aggravating this issue was the ensuing uncertainty. Indeed businessmen have been heard to say that they are not so much concerned with the outcome of the case in their favour or otherwise, as with a decision being reached in a timely manner. This was not happening. The Commercial Division of the High Court at Milimani was therefore established with a view to having a specialized court that could better address these matters.

Positives

Strengthened human resource capacity.

Overall, the judiciary has witnessed an overall growth in the number of judges from 43 to about 160 at the time of writing this article. Judiciary staff have increased from 3 to 5 thousand. There has been a substantial increase in physical infrastructure as well.

Exceptional growth has been witnessed in the commercial and tax courts at Milimani in terms of the number of judges posted and their understanding and disposition of commercial matters. The rate at which cases move through the system has improved remarkably.

Cognizant of the importance of magistrate's courts in resolving commercial issues, the Chief Magistrate's jurisdiction was increased to Kshs. 20 million.

Indeed the Evaluation Report by the Judiciary's Directorate of Personnel Management of 2020/21 ranked the Commercial and Tax Division as the best performing division of the High Court with a case clearance rate of 128% and a reduction of case backlog at 11%.

These improvements have significantly contributed to the improvement of Kenya's ranking on the ease of doing business index. In the latest report, Kenya is ranked 3rd in Africa and 56th in the world.

Case management

Certificates of urgency

There have been improvements in efficiency through technology and automation. When parties file their applications under certificates of urgency the applications are auto-assigned to the judges in the division. A list is then generated which is shared with judges and the deputy registrar for ease of tracking.

Should the allocated judge be unavailable the information is communicated to the registry and the matter is reallocated to another judge following the directions of the presiding judge. A judge can then log into the system, access the certificates and the pleadings filed by parties and then issue orders.

Alternative dispute resolution.

Court annexed mediation

Court-annexed mediation is a form of Alternative Dispute Resolution whereby cases which are brought to court for litigation are referred to mediation for possible settlement.

Its origin can be traced to the Constitution of Kenya 2010, which requires the judiciary to explore and promote alternative dispute resolution mechanisms, including mediation.

Chief Justice Emeritus Dr. Mutunga gazetted the Mediation Pilot Rules in 2015 which became operational at the Commercial and Family division on 4th April 2016. Building on this, Chief Justice Emeritus Hon. Maraga signed Practice Directions on Mediation on 8th May 2017. The mediation process was piloted within the Commercial and Family Divisions of the High Court in Nairobi. The parties can request a court to refer their case to mediation, particularly when court cases have remained unresolved for years. The success rate of the cases referred to mediation in the Commercial and Tax Division stands at 55%.

The Small Claims Court (SCC)

For the timely resolution of disputes, an analysis of commercial disputes was undertaken by the judiciary. Through these initiatives, the SCC was inaugurated in Kenya. The SCC (SCC) is established by the Small Claims Act 2016. This is a subordinate court in the structure of the court system in Kenya under Article 169 (1) of the Constitution. It allows claimants and respondents to represent themselves under simplified rules of procedure and evidence in cases with a cumulative value not exceeding Kshs1 million. Such cases include recoveries of debts, torts, minor injuries, money held and money received. The SCC has no jurisdiction in matters of employment, rental arrears and land. Cases are concluded within 60 days which is a remarkable achievement in a jurisdiction where 3 years is considered very good time for the judicial resolution of a commercial dispute.

As per the SOJAR report 2022, the SCC is established in 11 locations across Kenya, including Machakos, Kajiado, Nyeri, Naivasha, Nakuru, Eldoret, Kakamega, Kisumu, Mombasa, Thika, and Meru. In addition, the Judiciary increased the SCC's human resource capacity by designating 25 magistrates as adjudicators, increasing the court's ability to hear cases and render decisions within 60 days.

By widening the doors of justice, the SCC has fundamentally altered the adjudicatory landscape and has already resolved 9,315 cases worth KSh1.431 billion.

The Nairobi Centre for International Arbitration (NCIA)

The NCIA is a state corporation established by Parliament vide Act No. 26 of 2013 as a centre for the promotion of international commercial arbitration and other forms of dispute resolution

mechanisms. It also caters for domestic arbitration and other forms of dispute resolution such as mediation.

An option well worth looking into, it offers a neutral venue as well as institutional support. It has a board of directors composed of professionals from across the East Africa region. Daily management is tasked to the Registrar/CEO and a team of professionals who head various departments and units.

Challenges

Human Resource and Technology

There are varying competencies of judges in commercial disputes. This leads to differing qualities of judgements. Furthermore, this leads to forum shopping among litigants and there is a danger that some of the more competent judges may become overwhelmed and demoralised.

There are differing procedural efficiencies in case management. One finds for example that some judges begin much later than others. In the handling of preliminary matters and call-overs there are differing speeds in this area with some judges being very slow and attracting speculation amongst members of the bar of reluctance to proceed to full hearing since this is the most labour-intensive part of the trial.

As far as case backlog is concerned, whereas there is improvement in cases moving through the system there is room for improvement in revival of old cases. There is also room for improvement in terms of increases in judicial personnel including judges, magistrates and registrars who have taken over the handling of many procedural matters.

The extraction of documents from the registry primarily typed proceedings orders and decrees is problematic. Ideally, these should be provided routinely and as a matter of course. Instead, it often takes time and the use of contacts within the judiciary to get them. It is often a case of ‘who you know’. This creates opportunities for rent-seeking behaviour and impedes the very enforcement of contracts that is at the heart of commercial justice. Technology offers an opportunity to surmount these hurdles. Notably, proceedings and orders at the Criminal Division of the High are extracted daily and uploaded onto the judiciary portal. This is something for the Commercial Division to emulate.

Remaining on the theme of technology, whereas interlocutory matters are now routinely handled virtually the same cannot be said for full hearings. Suspicion remains that full hearings are not amenable to virtual disposition for various reasons including the danger of witness coaching. It needs to be investigated whether recourse to technological expertise and solutions may allay these concerns.

Representation.

As previously mentioned, CJCUCs have as their predecessor BCUCs. The experience with BCUCs is that the bulk of practitioners either did not know they existed or were not in any way invested in them. BCUCs were seen as the preserve of elite law firms.

As matters stand decisions of BCUCs run the risk of running into resistance due to a perceived lack of legitimacy and inclusion.

There is a need to address this representation deficit. Different means of doing so can be considered including having representatives from smaller law firms and advocates with fewer years of post-admission experience. There could also be representation of lawyers from outside Nairobi given the central importance of Milimani Commercial Courts.

To be further considered would be access for vulnerable and traditionally under-represented groups.

Alternative Dispute Resolution

There is limited awareness of ADR. The majority of court users are unaware of these processes. Court-annexed mediation has not been fully integrated countrywide and at present is available in about 12 counties.

Furthermore, the funding status of court-annexed mediation is dissatisfactory. Various mediation stations have struggled from lack of funding and there appears to be no specific budgetary allocation for mediation, which instead relies on discretionary funding from the Registrar of the High Court. Thus whenever there is a move towards austerity such discretionary funding is at unusual risk and mediators do not get paid or receive resources for their training.

Emerging issues

Cybercrime:

With a tech hub worth more than Sh120 billion, Kenya is not only the region's Silicon Savannah but also the epicentre of cybercrimes. Some of the major global cyber frauds have been initiated from Nairobi, notable among them the incident where Fairfax County in the US lost Sh56.8 million to phishers in Kenya's capital.

According to business consulting firm Serianu Kenya loses about US\$295m (Sh33.5 billion) to cyber criminals every year, an amount that has been increasing steadily.

A significant number of companies and individuals are choosing to negotiate with cybercriminals in order to avoid any damage to their reputation and user trust that may be caused by a public trial.

When the cases go to court, they drag on for years and conviction rates are low. Legal and forensics experts now point to the country's lack of technical expertise, tools and capacity, all of which affect the quality of investigations and litigation.

Counterfeiting

Kenya is a regional hub for trade and its ports are a gateway for international trade for neighbouring countries such as Rwanda, South Sudan, Uganda and the eastern Democratic Republic of the Congo. These countries rely heavily on the Port of Mombasa for imports.

Due to this, Kenya is an appealing key distribution point for counterfeit products.

The existence of various laws to curb the vice has not done much to stop illicit trade in Kenya as such crimes have been treated in the past as victimless crimes with law enforcers dismissing such cases as petty crimes. As a result of this misunderstanding, the perpetrators of this vice continue to freely enrich themselves while on the other hand exposing innocent consumers to severe health and safety hazards. What remains to be done then is the establishment of a strict and comprehensive system of enforcement and the judiciary has a key role to play in this.

The Court Users' Committee

CUCs are a platform that brings together actors and users in the justice sector in order to enhance public participation, and stakeholder engagement, develop public understanding of court operations and promote effective justice sector partnerships. They serve to hold courts accountable to all actors within the justice chain.

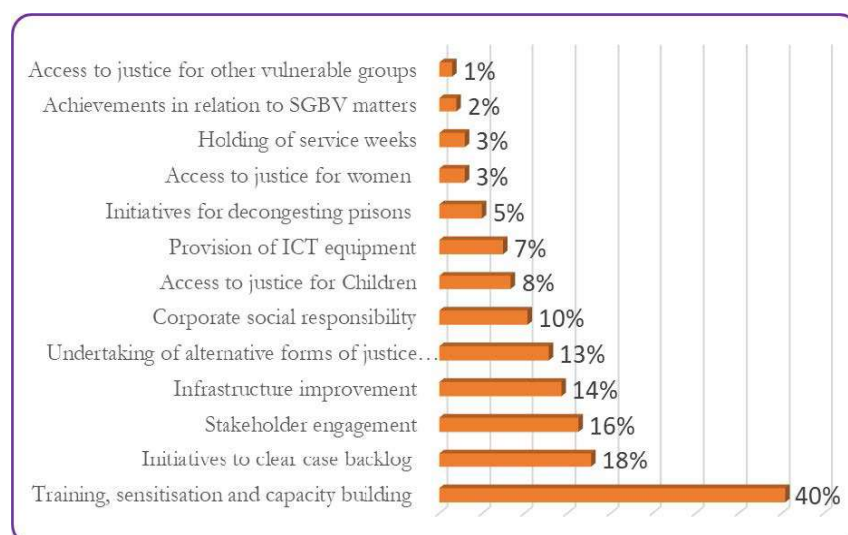
In doing so, they aim to promote effective justice sector partnerships for a coordinated, efficient, effective and consultative approach to the administration of justice.

Section 35 of the Judicial Service Act 2011 which deals with the purposes and functions of the National Council on the Administration of Justice (NCAJ) institutionalises CUCs by providing that the NCAJ shall facilitate the establishment of court user committees at the county level and mobilise resources for purposes of the efficient administration of justice. The judiciary regards them as critical forums to help address challenges to the efficient and effective delivery of services at the individual court level and has availed grants to at least 127 CUCs to achieve this objective.

The judiciary requires CUCs to resolve local disputes as regards the administration of justice through the formulation of local solutions. They are required to meet quarterly and to have and implement work plans. Matters that the CUCs cannot handle are escalated to the NCAJ for deliberation and direction.

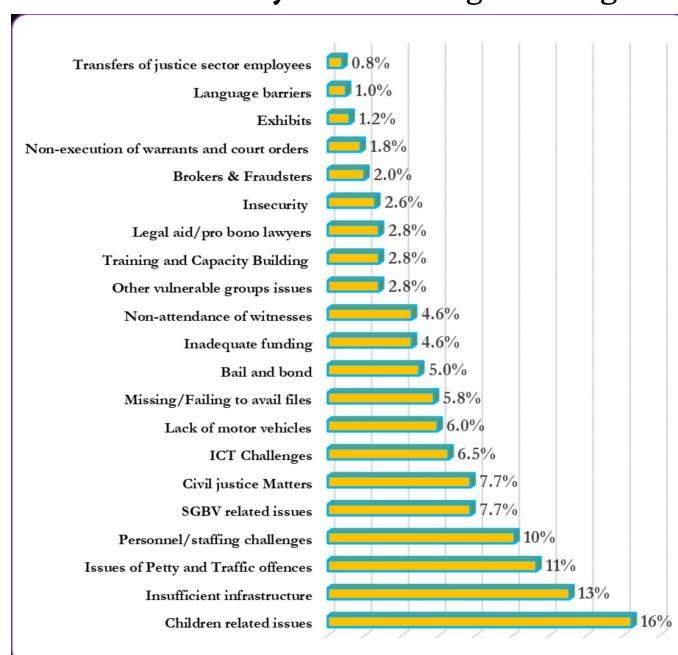
There are 40 high court or county CUCs, 125 magistrate-level CUCs, 37 ELC CUCs, 2 ELRC CUCs, and 5 commercial justice CUCs. There are 7 CUCs for children's justice, 14 for Kadhis courts, and 6 for tribunals.

Table 1: Summary of CUC achievements countrywide



Training, sensitization and capacity building are far and away the most successful activities. Notable gains have been made in initiatives to clear case backlog as well as stakeholder engagements. Much work remains to be done as regards the related areas of SGBV and vulnerable groups.

Table 2: Summary of recurring challenges



Notably no one challenge dominates. Children, infrastructure, petty offences and personnel challenges are in the fore. Surprisingly the issue of transfers of personnel is one of least concern unlike the situation for CJCUCs as will be discussed below.

The Commercial Justice Court Users' Committee

Origins and Role

The Commercial Justice Court Users' Committee (CJCUC) is a committee established to promote cooperation and communication between the users of the commercial justice system in Kenya and the courts. The committee is made up of representatives from various organizations, including the judiciary, the private sector, professional bodies, and civil society organizations.

In September 2016 the "Needs Survey for Commercial Justice in Kenya" report was finalized for the Investment Climate Programme of the Embassy of the Kingdom of the Netherlands in Kenya. The report provided an overview of the needs and impediments of commercial litigation in Kenya and indicated key areas where support was needed.

Specifically, assistance was to be provided to the Judiciary to further strengthen Kenya's business climate by encouraging increased investment through building confidence in its commercial justice systems, ensuring quality and efficiency, response to key indicators of improved business climate including availability of court structures and processes for commercial matters; strong case management that includes standardisation, regulations and electronic case management systems; other ongoing court automation improvements, including the ability to file, serve, and pay fees electronically; and the availability and regulation of alternative dispute resolution methods for commercial matters (inclusive of both arbitration and voluntary mediation).

The interests of the Embassy coincided with those of local players who voiced their support through representative organisations mainly KAM and KEPSA. Bearing in mind Nairobi's international nature and the presence of international business entities, various issues had been raised regarding the commercial court's fitness for purpose by both local and international entities. Such matters included inexplicable delays and disappearances of files and/or filed documents.

Through this collaboration between the Judiciary and the consumers of justice, the BCUC was born.

The Commercial Justice Court Users' Committee in Kenya was established in 2011 as the Business Court Users' Committee (BCUC), following the enactment of the Commercial Court Act in 2010. Various informal interactions were organised at the personal initiative of the head of station at the time, the Dutch Embassy and industry representatives including KAM. The BCUC was the child of these initiatives.

Certain challenges were conceded by the judiciary including those mentioned above. However, the judiciary also took these opportunities to clarify certain issues, including that adjournments often arose not from the bench but from the bar and lawyers would agree to adjourn a matter with

their clients being none the wiser. This was also an opportunity for the judiciary to explain how costs work and why a party may need to pay their own lawyer despite having been awarded costs since party and party costs are controlled by law and advocate fees may exceed this. Importers often wondered why their goods were seized despite paying duty and the issue of counterfeit goods was clarified.

These conversations made clear the benefits of an informal consultative forum in the administration of commercial justice. The BCUC was thus established to promote access to justice for commercial court users and to enhance the efficiency and effectiveness of the commercial justice system in Kenya.

The Commercial Justice Court Users' Committee plays a critical role in ensuring that the commercial justice system in Kenya is fair, efficient, and accessible to any persons seeking its services. Its functions are aimed at improving the quality of services provided by commercial courts, promoting access to justice for commercial litigants, and enhancing the efficiency and effectiveness of the commercial justice system.

In terms of membership, where there is a High Court station the presiding judge is usually the chair of the CJCUC. The LSK is entitled to one member. Key members are umbrella or representative bodies of commercial entities engaging in business in that particular part of the country. For Nairobi, these would include KAM, KEPSA and the representative bodies of the banking and insurance industries. In Kisumu, these would include representatives of the sugar industry and chambers of commerce. The AG and Registrar of Companies are also often represented.

The committee was initially chaired by the Head Of Station, Milimani Law Courts and included representatives from various stakeholders in the commercial justice system, including judges, lawyers, commercial litigants, and other justice sector actors. The committee met regularly to discuss issues facing commercial court users and to identify opportunities for reform. It furthered its informatory role by publishing two guidebooks in conjunction with KAM on commercial justice on the one hand and insolvency on the other. There were also CSR initiatives such as supporting prisons at Christmas time.

When the presiding judge was transferred to Kisumu, that station received the advantage of someone experienced in stakeholder consultations with the result that the Kisumu station embraced the BCUC enthusiastically

The BCUC was relaunched on June 15, 2022, in Nairobi by the Chief Justice, and is currently operational in Kisumu, Eldoret, Mombasa and Nakuru Counties. The committee was reconstituted as the Commercial Justice Court Users' Committee, with a broader mandate to promote access to justice for all commercial court users, including small and medium-sized enterprises.



Launch of Commercial Justice Sector Court Users Committees on 15th June, 2022. Front row left to right: Ms. Faith Odhiambo, Vice President LSK, Anne Amadi, Chief Registrar of the Judiciary and Secretary NCAJ, H.E. Governor James Ongwae, Vice Chairman Council of Governors, Hon. Justice Martha Koome, EGH, Chief Justice & President of the Supreme Court of Kenya & Chairperson, NCAJ, Hon. Lady Justice Lydia Achode- Principal Judge High Court, Hon. David Osiany the Chief Administrative Secretary for the Ministry of Industrialization, Trade & Enterprise Development, Ms. Teresa Mugadza Country Director IDLO, Dr. Moses Marang'a - Executive Director, NCAJ²¹⁵

The CJCUC promotes and ensures ongoing cooperation between the participants in the commercial sector; it offers a venue for the discussion of current bottlenecks in the commercial justice sector; it improves public involvement, feedback mechanisms, dialogue, and engagement in the provision of commercial justice; and it provides for organized business community involvement in the advancement of commercial justice reforms in the nation²¹⁶. The committee meets quarterly to discuss issues facing commercial court users and to develop advocacy strategies to promote access to justice and enhance the efficiency and effectiveness of the commercial justice system.

The main objective of the CJCUCs is to improve the delivery of commercial justice in Kenya by providing a forum for dialogue between court users and the courts. The committee serves as a platform for court users to express their concerns and provide feedback on the performance of the commercial justice system. Among the priority areas is to focus on case backlog reduction through a multi-sectoral approach characterized by a chain interlinking various justice sector players that

²¹⁵ Ibid. 55.

²¹⁶ Judiciary (n 6) 20.

interrelate and collaborate at various levels. Other areas of focus include efficient and effective case management, enhancing access to justice and its expeditious delivery, records management and collaboration with other judicial stakeholders on the automation of judicial services.

The CJCUC works closely with the Commercial Division of the High Court to address issues that affect the delivery of commercial justice in Kenya. The committee provides input on the development of policies and procedures that affect court users, including the establishment of new courts and the introduction of new court rules.

Through its engagement with court users, the CJCUC also promotes awareness and education about commercial law and the commercial justice system in Kenya. This helps to empower court users and ensure that they are better able to navigate the judicial system and assert their legal rights. This explains the increasing number of courts staying judicial proceedings to allow for arbitration in cases that bear arbitration clauses in contracts.

The Positives of the CJCUCs in the Administration of Justice in Kenya

The Commercial Justice Court Users' Committees (CJCUCs) in Kenya have made significant contributions to the administration of justice in the country. Some of the positive impacts of CJCUCs include:

Personnel: Quantity and quality

Since its establishment, the committee has played a key role in promoting access to justice for commercial court users in Kenya. It has advocated for reforms that enhance the efficiency and effectiveness of the commercial justice system, including the use of technology in court processes and the establishment of specialized commercial courts. The committee has also engaged with stakeholders in the commercial justice system to promote reforms that address the challenges facing commercial court users and to ensure that the commercial justice system is responsive to their needs.

As a result, marked growth has been witnessed in terms of the number of judicial personnel allocated to the commercial court as well as their understanding and ability to dispose of commercial matters. Commercial matters litigated before courts have increased in number, reflecting an increased confidence in the commercial justice system. Also witnessed has been a reduction of the backlog of cases in the commercial courts and improved quality of justice delivery.

Capacity building

There has been close collaboration between the Commercial Division and the CJCUC in training in complex and/or new areas of law as follows:

- i. Most recently there was a tax training for Judges and Legal researchers held between January and February 2023.
- ii. The experiences of the Milimani CJCUC have positively influenced similar developments in other parts of the country through the movement of staff, information sharing notably presentations by the CJCUC secretary on best practices, and benchmarking.
- iii. In 2018 Judges were trained on the Movable Property and Security Rights Act in conjunction with the Kenya Bankers Association and the Office of the Attorney General.
- iv. Judges in 2017 were trained in tax by experts from the Association of Kenya Insurers, Kenya Association of Manufacturers and PriceWaterhouse Coopers.

Additionally and as a result of said collaboration, 2 Guidebooks on important issues in the commercial sector have been published:

- i. Commercial Law Guidebook in 2017
- ii. Guidebook on Company and Corporate Insolvency Law in 2020.

Stakeholder Engagement.

The CJCUCs have facilitated greater stakeholder engagement in the commercial justice system. They provide a platform for dialogue between commercial court users, judges, lawyers, and other justice sector actors. Through their engagement, the CJCUCs have helped to build trust and promote collaboration between stakeholders in the commercial justice system.

Through these engagements, the justice sector actors have been able to identify and acknowledge gaps in their operations. This makes it easier to identify room for improvements within the commercial justice sector. For example, the business sector has had the opportunity to explain to judicial officers the impact of such things as counterfeiting, overloading of vehicles and illegal charcoal burning to inform their decisions during sentencing.

Case management

Technology & Data

As a result of stakeholder engagement, particularly involving IBM research and IDLO, filing procedures applicable for commercial cases for e-payment by the Judiciary were mapped in order to show a visual flow of activities, process owners and case milestones. An e-filing solution for the Judiciary was launched on 1st July 2020 which has changed the entire landscape of the management of court procedures and processes.

There has been full automation and digitization of the Commercial and Tax Division and the Milimani Chief Magistrates Courts through the operationalization of e-filing, e-payment, court recording and transcription, the Document Management System and the Case Tracking System. The CTS has enabled the scheduling of cases on a continuous basis rather than turning away litigants on the basis of closed diaries. It automatically generates cause lists thus eliminating instances where cases with dates were not listed on the daily cause lists.

Automated recording in courts has been automated through the Court Recording and Transcription System (CRTS). By replacing the previous system of handwritten transcripts, it has greatly improved the efficiency and effectiveness of judicial officers. The process is faster and easier on judicial officers who are free to listen to and analyse what is happening in court instead of having their faculties fully occupied by writing and which greatly eases the process of obtaining transcripts.

Progress has been witnessed in terms of the Integration of IT as well as the automation of services. The e-filing user interface was improved through its integration with advocate management, order issuance and small claims platforms. Also, the requirements for the design of a mobile phone application were used to roll out messaging services to facilitate feedback from court users without access to computers.

One result of the e-filing system has been the removal of human interaction on routine matters, e.g. filing of cases and applications as well as requests for applications. This has resulted in a plethora of cascading positive effects. Opportunities for corruption have been reduced. Advocates are pleased with a reduced need for litigation clerks and personnel costs generally. Clerks are no longer necessary to do physical service as court rules have been amended to allow for electronic service. As a result of the Judiciary Advocate Management System (JAMS), supported by IDLO, Advocates are now able to track cases easily firm-wide. There is no need to call for physical files and it's easy to have an overview of the firm's progress. The firm calendar for example enables partners to see how busy the firm is and to keep cases alive.

Another positive aspect of IT integration has been virtual court sessions. Despite initial resistance from the more techno-sceptical members of the bar (who it is submitted were the majority), there is now widespread consensus on the value of virtual sessions for mentions and interlocutory applications.

In terms of data, the commercial division has signed a performance management and measurement understanding on behalf of the judges and staff of the division. Pursuant to this the division files on a daily basis daily court returns according to a template that the judiciary performance management directorate uses to generate various reports including time to disposition, clearance rate and age of pending cases. This sets the stage for data-driven identification of bottlenecks and decision-making.

Other instances of improved case management²¹⁷

- Improved functioning of the date's section to facilitate the appearance of cases in the daily cause list.
- Better access to physical files due to improved physical infrastructure.
- Continued minimization of mentions and the prioritization of hearings.
- Improved efficiency in the registry process particularly interlocutory judgements, certificates of urgency and the publishing of decrees, notices and warrants.
- Quarterly service weeks.
- Increased number of the days for the signing of summons.
- Posting of proceedings, decrees, rulings, judgments, notices and warrants on the KLR portal.

Finally, it must be remembered that Kenya has come from a scenario where judges wrote proceedings in longhand. Submissions were oral and written submissions were deprecated with the Court of Appeal ruling in 2002, at a time when it was the highest court in the land that written submissions had no force of law and were a denial of a party's statutory rights to effectively persuade the court in their favour²¹⁸. There was no access to e-resources. The use of technology has been a revolution in the efficient use of judicial officers' time and has facilitated the timely disposal of cases.

ADR

The CJCUCs have recognized and encouraged other avenues for resolving disputes through mediation and arbitration, where non-state actors are willing to work with state actors towards the success of the accessibility of justice. Of particular note is the use of alternative dispute resolution mechanisms, such as mediation and arbitration to resolve disputes. For a long time in Kenya, ADR in commercial cases was synonymous with arbitration. The CJCUC at Milimani noted that due to cost arbitration was not for all commercial court users. Also noted was a trust deficit between clients and lawyers, where the former were not always sure that the latter were acting in their best interest, especially in ensuring the expeditious disposal of cases. The matter of advocates consenting on adjournments without their clients knowing has already been noted.

Mediation represents a homegrown solution to this conundrum where the parties are facilitated to speak to one another through a neutral, court-appointed mediator. This mediator is even paid by the court making it a cost-effective solution. The reduction of cost and time involved in resolving commercial disputes has improved access to justice.

²¹⁷ NCAJ (n 14), Appendix 3.

²¹⁸ Robert Fanali Akhuya v R. (2002) Civil Application NAI. 194 of 2002.

CJCUCs have noted the importance of embracing SCCs as a key ally for increased expediency in commercial justice delivery. The Commercial and Tax Division under the leadership of the presiding judge exercises a supervisory role over the Milimani SCC.

Training programs and workshops on ADR have also been organized by CJCUCs.

Policy Influence.

The CJCUCs have influenced policy reforms in the commercial justice system. They have made recommendations to the government and the judiciary on reforms needed to improve the commercial justice system. Some of the reforms that have been implemented include the establishment of specialized commercial courts and the use of technology in court processes.

The CJCUCs have played a critical role in building the capacity of commercial court users. They have organized training programs and workshops for judges, lawyers, and other justice sector actors on best practices in the commercial justice system. Through their capacity-building efforts, the CJCUCs have helped to improve the quality of justice delivery in commercial courts.

IDLO has facilitated various trainings for judges and magistrates. Among the areas of training have included Tax and Insolvency.

Advocacy.

The CJCUCs have been vocal advocates for the rights of commercial court users. They have advocated for reforms that address the challenges facing commercial court users, including the high cost of litigation and the limited use of alternative dispute resolution mechanisms. Through their advocacy efforts, the CJCUCs have helped to ensure that the commercial justice system is responsive to the needs of commercial court users.

Investor confidence.

The culmination of the foregoing has been improved business and investor confidence in the judicial system in Kenya. Kenya's ranking in the ease of doing business has improved as a direct result of increased stakeholder involvement and participation in commercial justice delivery.

Challenges facing the Commercial Justice Court Users' Committee.

The Commercial Justice Court Users' Committee in Kenya faces several challenges that hinder its effectiveness. These are further discussed below.

Scope of responsibility

Role Ambiguity: The roles and responsibilities of CJCUCs and their members may not be clearly defined, leading to confusion and overlapping responsibilities. This can result in inefficiencies, unnecessary conflict and a lack of accountability.

Difficulty in identifying and addressing key issues: The committee's ability to identify and address key commercial justice issues may be compromised by inadequate representation, as it may not fully understand the challenges and opportunities facing different stakeholders.

Insufficient use of data and technology may make it difficult to identify root causes of key issues such as identification of who bears the primary responsibility for delays.

Representation and Membership

Stakeholder mapping: there is at present an absence of clear criteria as to who should be members and why. There may be parties who are required to be in CJCUCs who are not represented. CJCUCs are composed of stakeholders from the commercial justice sector, including judges, lawyers, and business representatives. However, some important groups may be underrepresented, such as small businesses or marginalized communities. Of note is that Kenya Power does not appear to be represented on the CJCUC yet its operations impact business, especially manufacturing, substantially. The same may be said of KRA. This may have the following consequences:

- i. Limited diversity of perspectives: This in turn can lead to imbalanced decision-making experiences in the committee's work which in turn can negatively impact the committee's ability to understand the challenges and opportunities in the commercial justice system, and advocate for reforms that address these issues.
- ii. Legitimacy issues: Inadequate representation may affect the committee's legitimacy, credibility, and trustworthiness, as stakeholders may view the committee as not fully representative of their interests and concerns.
- iii. Limited ability to promote reforms: Inadequate representation may hinder the committee's ability to influence policy and promote reforms that support the efficient and effective functioning of the commercial justice system.
- iv. Reduced impact of the committee: The committee's ability to have a meaningful impact on commercial justice issues is affected by inadequate representation, as its recommendations and advocacy efforts may not fully reflect the needs and priorities of all stakeholders.

Transfers: When a CJCUC member is transferred, they go together with their expertise, enthusiasm and any training they may have received. This combined with a lack of a secretariat which stores institutional memory negatively affects CJCUC effectiveness.

Limited Secretarial support, institutional memory and use of technology

The record-keeping and documentation function often falls on registrars and other personnel who have been appointed in an ad hoc manner and who have not necessarily been afforded the appropriate resources to adequately address such a crucial issue. It is to be recalled that these are people who, at the best of times, already have a heavy workload. This also limits the capacity to which technology can be employed to address committee issues. The consequences of this include:

- i. **Limited access to information:** The committee may not have access to timely and accurate information about the functioning of the commercial justice system, including data on court filings, case outcomes, and trends in commercial disputes. This can limit the committee's ability to identify key issues facing commercial court users, develop evidence-based advocacy strategies, and promote reforms that enhance the efficiency and effectiveness of the commercial justice system.
- ii. **Reduced efficiency and effectiveness:** the foregoing means that decision-making may not be driven by data and other evidence affecting the ability of the committee to meet its goals. This can limit the committee's ability to conduct research and identify key issues facing commercial court users, develop advocacy strategies, and implement initiatives that promote access to justice for commercial court users. It also limits reporting ability and consequently the ability of the NCAJ to monitor and evaluate the performance of CJCUCs

Structure and decision-making

Role Ambiguity: The roles and responsibilities of CJCUCs and their members may not be clearly defined, leading to confusion and overlapping responsibilities. This can result in inefficiencies and lead to a lack of accountability.

Data Sharing and Privacy Concerns: Sharing information across different organizations can be difficult due to concerns about data privacy and confidentiality and data protection. CJCUCs may need to develop policies and procedures to ensure the proper handling and protection of sensitive information.

External pressure: As CJCUCs grow in influence and effectiveness, they may face political pressure or interference that can undermine their independence and impartiality. This can lead to a lack of trust in the committee's decisions and may ultimately harm the commercial justice system. This could be witnessed in class action suits in commercial justice.

Funding and sustainability

CJCUCs struggle to secure sufficient funding to support their operations, leading to limitations on their ability to conduct outreach, training, and other essential activities. The committee requires adequate and sustainable funding to support its activities and achieve its mandate of promoting access to justice for commercial court users in Kenya.

The funding is often ad hoc rather than being part of, for example, an annual budget. Members do not share responsibility for funding and the judiciary is the only institution that has institutionalized its contribution to the CJCUC²¹⁹.

Limited funding is a key challenge facing the Commercial Justice Court Users' Committee in Kenya, and it inhibits the committee's ability to carry out its functions effectively in the following ways:

1. **Reduced ability to hire personnel:** Limited funding makes it difficult for the committee to hire a secretariat consisting of specialized personnel such as record keepers, research analysts, communication specialists, and project managers.
2. **Inability to implement comprehensive and sustained programs:** The committee's ability to develop and implement comprehensive programs that address the needs of commercial court users is restricted by inadequate funding.
3. **Reduced outreach activities:** Limited funding affects the committee's ability to conduct outreach activities, such as public education campaigns, stakeholder consultations, and training programs, which are critical for promoting awareness of commercial justice issues and building stakeholder engagement.
4. **Reduced advocacy efforts:** Inadequate funding hinders the committee's advocacy efforts, which are necessary for influencing policy and promoting reforms that support the efficient and effective functioning of the commercial justice system.
5. **The bulk of CJCUC funding is provided by the donor community.** Overreliance on any one source of funds has negative impacts on sustainability. Alternative Dispute Resolution Mechanisms:

Appeals from SCC:

The success of the small claims system, especially its speed, is catching industry players unawares. Insurance companies for example have had to make payouts at a much faster rate than they were accustomed to, which creates incentives to appeal all decisions to the High Court, not because of the merits of the case but to take advantage of the delays inherent in the regular court system.

The current system of appeals defeats the very purposes, advantages and success of the SCC.

²¹⁹ This is the case for CUCs generally.

Outreach

ADR

There is insufficient awareness of alternative dispute resolution (ADR) mechanisms.

There is limited uptake of mediation amongst the advocate community, perhaps due to concerns that this form of dispute resolution reduces their ability to recover costs

There appears to be limited knowledge amongst the public and indeed the legal fraternity of the NCIA and the opportunities it affords as regards arbitration

This can be a hindrance to the success of the Commercial Justice Court Users' Committee in Kenya in the following ways:

- i. Limited uptake of ADR mechanisms: Commercial court users may not be aware of the benefits of ADR mechanisms, such as mediation and arbitration, and may not use these mechanisms to resolve their disputes. This can lead to an overreliance on the courts, which may result in delays, costs, and inefficiencies.
- ii. Reduced access to justice: The lack of awareness of ADR mechanisms may result in reduced access to justice for commercial court users who cannot afford the costs and delays associated with traditional court processes.
- iii. Limited impact of committee's initiatives: The committee's initiatives to promote ADR mechanisms may have limited impact if commercial court users are not aware of these mechanisms or do not see their benefits.
- iv. Limited stakeholder engagement: The lack of awareness of ADR mechanisms may limit the committee's ability to engage with stakeholders such as the judiciary, commercial litigants, lawyers, and other justice sector actors, who may not see the value of promoting these mechanisms.
- v. Limited advocacy efforts: The committee's advocacy efforts to promote ADR mechanisms may be hindered by the lack of awareness among policymakers and the public about the benefits of these mechanisms.

Conclusion and Recommendations

Addressing the challenges requires a strategic approach that involves strengthening the governance and structure of CJCUCs. This includes clarifying roles and responsibilities, improving representation and diversity, securing adequate funding, developing policies and procedures for data sharing, and ensuring independence from political interference. We begin with a brief overview of key result areas and then move to the recommendations themselves which are discussed under the headings of Internal Management, Membership, ADR, Capacity Building and Communication (outreach).

Key result areas

It is noted that the above-mentioned recommendations are not ends in themselves but are to result in beneficial outcomes for the commercial justice system. Key result areas for the CUCs include:

Expeditious and professional disposal of cases

- i. Cases should be disposed of within a reasonable time and in a predictable fashion.
- ii. Ensuring integrity and availability of court files and all documentation.
- iii. Ensuring court files are up to date.
- iv. Ensuring proceedings and orders can be extracted expeditiously. Technology offers an opportunity to get around these hurdles. Notably, the High Court Criminal Division has made exemplary progress in this area. Proceedings and orders are extracted daily and uploaded onto the judiciary portal. This is something for the Commercial Division to emulate.
- v. Appropriate legislation, policies and practice directions to ensure alignment with digitization initiatives.
- vi. Clearing case backlog occasioned by unexecuted warrants, uncollected revenues etc. through:
 - a. Increased dedicated personnel. A total of 5600 cases are pending in the division against a workforce of 7 Judges.
 - b. Establishment of optimal timeframes.
 - i. Including moving to hearings as fast as possible. Time could be allocated such that hearings in all courts begin at a specified time, say 11 a.m.
 - ii. The Kisumu station has implemented a so-called Rapid Results Initiative where a specific judge is posted to work on backlog files. So far 200 files have been identified for processing²²⁰.
 - c. Enforcement of timeframes,
 - d. Data-driven identification of bottlenecks towards access to justice,
 - e. Efficient procedural case management,
 - f. Use of technology; transcription and video technology to ease logistical operations during the hearing of cases.
 - g. Ways and means could be explored to determine whether full hearings can be conducted virtually.
 - h. Caseload and workload policies.
- vii. To earn the confidence of the business community.
- viii. To promote the application of Alternative Dispute Resolution mechanisms in accordance with the provisions of Article 159 of the Constitution.

²²⁰ Kisumu CJCUC minutes 16/12/22.

- a. The development of ADR in Kenya in general and mediation in particular shows plenty of promise. Mediation is a homegrown solution to local issues. It encourages win-win outcomes and is very cost-effective.
- b. Moreover there is a feeling among judicial officers that the solution to commercial disputes is often uncomplicated in substance but is complicated in procedure by endless and often frivolous applications by counsel. Mediation takes away the incentive to engage in this kind of opportunism²²¹.
- ix. To be alive to the dynamic nature of commercial justice and deal with emerging areas including anti-counterfeiting and cybercrime.

Internal Management

CJCUCs operate in an environment of financial, personnel and time constraints. This calls for effective committee work in order to make collective decisions.

Clarifying Powers, Roles and Responsibilities.

- i. Each committee should come up with a written description of what is expected of the committee summarizing its purpose and authority.
 - a. This could be done along the following lines: ‘The committee operates under the auspices of the Judiciary, and its members are appointed by the Chief Justice of Kenya to discuss issues facing commercial court users, identify opportunities for reform, and develop advocacy strategies to promote access to justice for commercial court users. The committee also engages with stakeholders in the commercial justice system to promote reforms that enhance the efficiency and effectiveness of the commercial justice system’.
 - b. It is suggested that the committee meets quarterly, creates an annual calendar of activities and that the quorum for each meeting shall be at least half of the members.
- ii. Each committee should develop and allocate specific duties through:
 - a. The development of work plans that are in line with key result areas as further discussed below.
 - b. Where necessary working groups and sub-committees may be formed to steer forward conversation on specific issues.

c. It is noted that the Nairobi BCUC as it then was had identified five focus areas

²²¹ NCAJ Standing Committee on Court Users Annual Planning and Development Workshop for 2023. 16-17 March 2023, Elementaita.

and created corresponding working groups as follows:

- i. Automation initiatives.
 - ii. Reduction of Case Backlog, Lost files and poor filing systems.
 - iii. Ease of doing business index.
 - iv. Enhancing information sharing/capacity building and learning among stakeholders.
 - v. Addressing negative public perception of the Commercial Justice system.
- d. Members may wish to revisit these efforts and see whether such a structure remains relevant or needs to be modified or discarded.

Financial management and sustainability

- i. Each CJCUC should have an operational fund and budget. The burden for funding CUCs should not fall solely on the judiciary but should be contributed to by diverse members in proportion to their financial ability. The committee should explore alternative sources of funding. The NCAJ should insist that other CUC members both from the government or private sector bear their fair share of the financial burden.
- ii. To avoid conflicts of interest, it is important that private sector contributions come from representative bodies rather than individual companies.
- iii. Equally important is allowing non-financial contributions from different sector players. These may range from advanced ICT experts economists, statisticians, finance professionals and environmental experts.
- iv. As mentioned earlier each committee should have a treasurer who coordinates resource mobilization and management of the CJCUC finances, facilitates the CUC Secretariat as it coordinates CUC operations, prepares and submits quarterly financial and other necessary financial reports. This person may come from the judiciary but may also be drawn from any one of the representative umbrella bodies that may have particular expertise in this area.
- v. Each CJCUC should ensure full transparency and accountability for funds received and spent.

Technology

There is an unfinished agenda in terms of the deployment of technology. Specifically, there needs to be development of an audio recording and transcription workflow and process management system; and inclusion of mediation cases within the CTS.

There is a need to review existing legislation, court rules and practice directions to ensure that these support and are not in conflict with the gains made in the use of technology. An increase in appeals challenging the digitization process has been noted.

There is an inherent need for the wider adoption and connectivity of technology in litigation matters as well as in the operations of the CJCUCs. There are litigants who may not have access to technology. Committees should discuss ways and means to assist them. Furthermore, the adoption of technology is largely limited to Nairobi and ought to be expanded countrywide.

Magistrates' courts are key stakeholders in commercial justice and need to be included in the technological revolution. As matters currently stand, the issue of proceedings for appeals is causing major delays. Automation will speed things up as well as clear backlog.

Incorporation of data-driven decision-making:

In conjunction with the Directorate of Performance Management, data can show where for example bottlenecks exist as regards case delays. This can inform:

- i. Prioritisation of activities
- ii. Decision making.

It is suggested that

- i. Each CUC has one official in charge of receiving and storing information.
- ii. A central data repository be established and managed by the NCAJ with the mandate of receiving and analyzing documentation received from CUCs.

Membership:

- i. The committee requires a diverse and representative membership that reflects the interests and concerns of all commercial court users, to ensure that its activities are relevant, impactful, and legitimate. Efforts should be made to enhance stakeholder engagement and increase the committee's diversity, promote effective representation and achieve the committee's mandate of promoting access to justice for commercial court users.
- ii. Whereas diverse groups take into account a range of opinions, and enhance credibility and widespread acceptance, the larger the group the more difficult it will be to convene and manage. It is clear that the committee cannot and should not accommodate all individual stakeholders. This would not only be unmanageable, but would risk creating a situation where matters before courts are discussed in committees. These competing interests of broad-based representation on one hand and manageability/judicial fairness to all need to be balanced.
- iii. Research suggests that effective committee work will be enhanced when the Chair is able to manage conflict constructively. Thus the Chair ought to be someone with the appropriate stature and experience. These generalist facilitation skills are more important

than specialist knowledge in any aspect of the subject matter that will be discussed by the committee.²²²

- iv. Members should establish criteria as to who is to be represented and who is not. This stakeholder mapping exercise could begin with a group of core members numbering about 5-9 consisting of the most crucial and committed members. It is of crucial importance that membership criteria are objective and explicit.
- v. One way of dealing with the tension described above (between representation and manageability/fairness) could be that committees take a firm position that participation of the business community shall only be through *representative organisations* and not individual companies or individual persons.
- vi. It has been noted that the Chief Magistrate's court is key to the handling of commercial issues, dealing with matters up to a pecuniary jurisdiction of Kshs. 20million. The magistracy should be seen as part and parcel of CJCUCs as well as any efforts to improve commercial justice and ought to be involved in all initiatives just like the High Court.
 1. As an example the same increase in personnel dealing with commercial matters that the High Court is enjoying ought to be witnessed in the Chief Magistrates Courts which are currently experiencing an overwhelming number of matters before them.
- vii. There is a need to gain the interest and support of a wider cross-section of law firms. Different means of doing so can be considered including having representatives from smaller law firms and advocates with fewer years of post-admission experience. The LSK has already established such classifications and can be called upon to advise as regards their adaptation. There could also be representation of lawyers from outside Nairobi given the central importance of Milimani Commercial Courts.
- viii. The committee should be restructured to ensure full representation of all stakeholders in the justice system, including marginalized groups and the public. This could be further driven by the development of subcommittees that would champion the agenda of sub-sectors, such as labour matters, regulatory compliance, banking and information matters, insurance-related matters as well as trade-related disputes.
- ix. Members should be open to inviting any persons who have an impact on commercial justice. It has been noted earlier that there is a distinction in membership between regular CUCs and CJCUCs but where appropriate the memberships may overlap. A case in point is the Kisumu CJCUC which has considered inviting representatives from the AG, ODPP and even the county representative²²³.

222 Oliver, Hollingworth, Briner, Swann, Hinds and Roche (2018), 'Effective and efficient committee work: A Systematic overview of multidisciplinary literatures', Evidence Base Issue 2.

223 Kisumu CJCUC, Minutes of Meeting, Acacia Premier Hotel, 27/9/22.

ADR

Mediation and Arbitration

- i. More work needs to be done to entrench mediation in the commercial justice system given its advantages discussed earlier. Judicial officers are very optimistic about the vast potential of mediation, with some even going as far as to speculate that over half of filed cases can be disposed of in this manner were more work to be done to entrench mediation²²⁴. This can substantially ease the burden on judges, who often have 20 or more matters on their daily cause list.
- ii. There is a need for a better understanding of why mediation has not achieved its full potential and what can be done about it.
- iii. ADR mechanisms also offer the opportunity for criminal law and the police to be less involved in commercial matters. An overlap of criminal and commercial law occurs in such crimes as obtaining by false pretences. The police would rather focus on serious crimes and ADR mechanisms with their speed and flexibility could be a boon to them.
- iv. There is a need to engage with advocates to develop win-win outcomes that will ease their adoption of mediation and recommend it to their clients. This already happens in tax and the tax tribunals. Lessons can be drawn from here. Potential benefits to advocates include that they themselves are almost inevitably appointed the mediators. Also, quicker disposal of cases means that any individual law firm is able to handle a higher number of cases and recover increased costs thereby. Increased confidence in the commercial justice system means more people will be inclined to go to court which is to the benefit of the legal fraternity.
- v. Industry players can screen cases themselves and identify which are suitable to take forward to mediation. It is noted with approval that this is already happening in the banking industry.
- vi. Cases that have gone through mediation or the SCC unsuccessfully could be screened and where appropriate referred to arbitration instead of appeal to the High Court, especially where contracts included arbitration clauses. This would avoid the situation where appeals from ADR processes languish for long periods in the High Court.
- vii. Outreach activities promoting ADR could be held in conjunction with the NCIA. Such activities could include partnerships, public participation forums, conferences and training programmes.

²²⁴ NCAJ Ibid (n 23).

Appeals from SCCs:

- i. There is a need to advocate for legislation, court rules and/or practice directions that specify explicitly when and under what circumstances appeals from SCCs are allowed. It is recommended that the scope for such appeals should be as narrow as possible if the gains from SCCs are to be sustained.
- ii. It is noted with approval that commercial courts have been cognizant of the challenge of appeals as delaying tactics and there is in place an informal agreement to mirror the short SCC timelines upon appeal. There are also proposals to apply the simplified SCC procedure on appeal as well.
- iii. These informal procedures and proposals need to be formalized through legislation as recommended above.

Capacity building

- i. The capacity constraints in commercial courts. Capacity building should be in response to identified challenges and geared towards solutions including training in technical and/or emerging areas of law. The latter can emerge due to technology or legislative reform.
- ii. Areas requiring training include tax, insolvency, banking and intellectual property.
- iii. Capacity building should be regular rather than ad hoc. It should be incorporated into work plans and incorporate identified best practices. There is a lot of enthusiasm amongst CJCUC members to share particular skills and expertise. Commendable efforts have already been made by partners but the commitment needs to be sustained and part of a regular schedule. Furthermore, magistrates need to be included; these efforts so far have been concentrated on judges.
- iv. Certification after training is recommended to enhance participation and to serve as an objective indicator of progress on the part of participants.
- v. Capacity building should not be limited to the substance of the law but also to procedure and in particular case management. Advocates have noted differing competencies of judicial officers in managing cause lists, preventing abuse of the court process through frivolous interlocutory applications and generally disposing of matters efficiently. The more competent judicial officers could share their experience and strategies with their colleagues. This could be facilitated through the judicial training institute.
- vi. Capacity building of judicial officers should also extend to the impact of their decisions and of unnecessary delays on the commercial environment.
- vii. The publication of handbooks by the CJCUC has been very well received not just by members of the judiciary but my members of the bench. This needs to continue. Furthermore, publication is one thing but these books need to be distributed where they are needed.

- viii. There may be a need to build capacity in the area of monitoring and evaluation to enable members to properly discharge that part of their role that requires them to assess judicial performance and the performance of the CJCUC itself.
- ix. Sustained and robust monitoring and evaluation of the courts' performance and their own progress.
 - a. Accountability to NCAJ which should regularly evaluate the committee regularly based on
 - i. Whether it is operating effectively in light of the purposes for which it was established.
 - ii. Whether those purposes are still valid or require adjustment.

Communication, public awareness and outreach

- i. There is a need to embrace continuous communication, building awareness and community outreach programs towards the court users that they serve.
- ii. NCAJ is either developing a communications strategy or has one already which can be used by CJCUCs and refined to their specific requirements.
- iii. The continuation and enhancement of court service weeks and open days as ways of clearing the backlog and engaging with the community
- iv. The committee should develop and implement a comprehensive public awareness campaign to increase awareness of its functions and activities and to promote access to justice for all.
- v. The committee needs to prioritize initiatives that promote ADR mechanisms, such as awareness campaigns, training programs, and stakeholder consultations. The committee should also collaborate with other justice sector actors to promote ADR mechanisms and ensure that they are integrated into the broader commercial justice system. By doing so, the committee can enhance access to justice, promote efficient and effective dispute resolution, and achieve its mandate of promoting access to justice for commercial court users.

Representative bodies and their corporate members as well as individual litigants need to be made aware that they can influence their own lawyers to minimize adjournments. Court files are public documents and clients can peruse them regularly to ascertain whether their lawyers are contributing to delays.