



## Mapping Legal Inclusion in Kenya



### Provisory Legal Inclusion Mapping Report

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[www.microjustice4all.org](http://www.microjustice4all.org)

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# Legal Inclusion Mapping Kenya

## I. Introduction

### A. SDG 16: leaving no one behind

In 2015, world leaders adopted the UN Global Goals for Sustainable Development 2016-2030. SDG 16 tackles the issue of legal inclusion and good governance: ‘a) to promote peaceful and inclusive societies for sustainable development, b) provide access to justice for all and: c) build effective accountable and inclusive institutions at all levels.’

The challenge for governments, policy makers, lawyers, international organizations, NGOs and other stakeholders for the next decade then is: How to close the global legal gap while ‘leaving no one behind’?

### B. Legal Inclusion Mapping Method

**What is Legal Inclusion?**

The situation in which people (and nature)

- a. have their basic legal needs satisfied through adequate registrations, contracts, or their ‘status’ demonstrated in any other form, which enables them
- b. to enjoy legal protection by means of effective access to remedies and the court system, and
- c. to have access to the rights, benefits and entitlements of the society in which they live.

The Legal Inclusion Mapping Method, developed by Microjustice4All (MJ4All), is a simple and cost-effective tool to implement the targets formulated in SDG 16. The Mapping Method focuses on the legal empowerment of vulnerable citizens.

The national legal framework already in place usually provides its citizens with rights and protection. However, it often is the case that due to a lack of legal-administrative documents or of status recognition otherwise excluded groups are not able to access their rights and enjoy legal protection.

The entire population needs to arrange administrative and private law issues related to property, housing, business, inheritance etcetera in order to be legally included. Only a tiny percentage in a country has to deal with courts in conflicts and penal law related procedures. The latter is also essential for legal inclusion to exist, but the administrative and private law issues of the vast majority needs is an area that has been overlooked by most working in the justice sector. The research done by the MJ4All mapping teams shows that the most urgent legal exclusion problems come down to six areas:

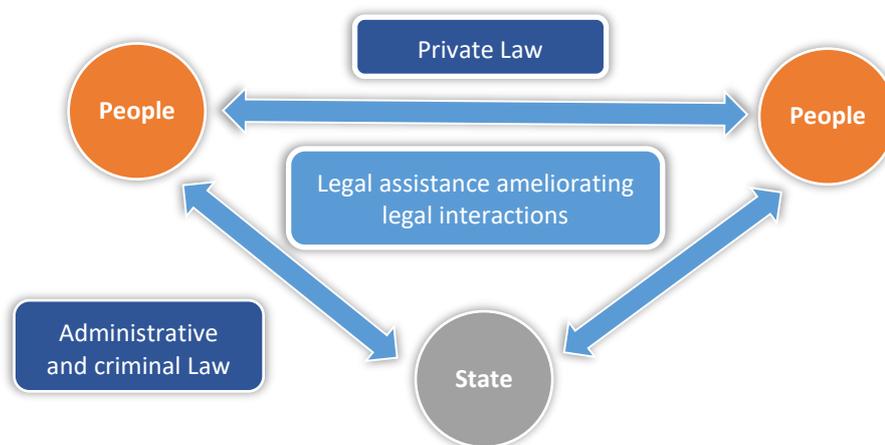
1. **Civil documentation:** birth certificates and documents relating to personal identity which give access to education, health services, social benefits, microfinance and voting
2. **Property and housing:** land property registration and documents relating to property transfer and rental issues which provide legal protection and access to loans
3. **Income and work:** documents for setting up businesses, co-operatives and other legal entities, contracts and basic labour issues
4. **Family law:** papers related to inheritance, divorce, and child recognition

5. **Disasters and conflict:** issues and documents relating to manmade or natural disasters legal rehabilitation of refugees, IDPs and other disaster victims
6. **Natural environment:** environmental issues and documents related to legal personality, representation and recognition

### The Mapping Process

Since early 2018 Microjustice4All has developed the Legal Inclusion Mapping Method as a tool to implement the targets formulated in SDG 16. Three sets of legal inclusion indicators are mapped, which relate to the three agents of legal inclusion:

- a. the ability of **'people'** to access and protect their rights
- b. the way the **'State'** has organized the access to basic legal needs and the judiciary, and
- c. the accessibility, affordability, and quality of **'legal assistance'**



### *Legal Interactions between 'People'/'People' and 'People'/'State', supported by 'Legal Assistance'*

If a person is poor, uneducated, and belongs to a group at risk, it is likely that (s)he will be legally excluded if the state services, institutions and the judiciary are not easily accessible, and legal assistance is out of reach. The table below illustrates the key elements that are mapped on both a country-wide and the excluded groups' level in order to provide recommendations on making the legal system more easily accessible and to provide the needed legal assistance services to include the excluded part of the population.

## Mapping Legal Inclusion

| Agents of legal interactions | Mapping legal inclusion: indicators on country level   | Mapping inclusion situation of Excluded Groups per group   | SDG 16  |
|------------------------------|--|--|---|
| People                       | Society: <ul style="list-style-type: none"> <li>• Poverty level</li> <li>• Education Level</li> <li>• Groups at risk</li> </ul>  | Description of the vulnerability of the specific excluded group  | Peaceful and Inclusive Societies for Sustainable Development    |
| State                        | Accessibility, affordability, transparency and quality of the legal and institutional framework  | Legal and Institutional framework applied to the specific group, and research into the legal tools available for their legal empowerment | Effective, accountable and inclusive institutions on all levels |
| Legal Assistance             | Accessibility and quality of legal assistance  | Legal assistance available per excluded group  | Access to Justice for All                                       |
| Output                       |  |  |   |
|                              | Comprehensive Legal Empowerment Plan to achieve Legal Inclusion with the stakeholders: <ul style="list-style-type: none"> <li>• Recommendations for legal empowerment at the state level</li> <li>• Legal Empowerment Service Provision for excluded groups</li> </ul> |  | Implementation Tool & Progress Monitoring Framework for SDG 16  |

### Legal Inclusion mapping teams

The legal inclusion mapping teams, consisting of lawyers and professional researchers, engage with experts and stakeholders on various levels. The teams identify legally excluded groups by doing extensive desk research and surveys. They make use of questionnaires and interviews with hundreds of citizens, social and development organizations, academia, businesses and representatives of the excluded groups to get an accurate picture of their legal vulnerabilities. Besides this, consultations take place with legal experts, government institutions and the justice sector to get the relevant legal expertise and know how to solve those legal vulnerabilities.

### Comprehensive Legal Empowerment Plan

After the research and analysis phase is concluded, the MJ4All mapping teams draw up a Comprehensive Legal Empowerment Plan to implement sustainable and inclusive solutions to meet the excluded groups' legal needs. The Plan involves both stakeholders in the specific excluded groups and stakeholders in the legal and Government sector.

### Implementation and monitoring

The third and final phase of the Legal Inclusion Mapping consists of setting up an Implementation Plan and a Progress Monitoring Framework. This includes establishing legal inclusion targets and drawing up a timeline for the implementation of modifications to reach SDG 16. It also involves the introduction of innovative tools for the legal-administrative and institutional framework.

## C. Implementation of Legal Inclusion Mapping in Kenya

From June to November 2018 a Kenyan team of three lawyers and one social scientist has conducted the mapping under the guidance and support from the legal empowerment experts and researchers from Microjustice4All. The research phase of the mapping consisted of:

- Surveys with the population at large and the groups at risk regarding their legal situation (having their legal paperwork, experience with the state institutions, the judiciary, and legal assistance services among others).
- Consultations and in-depth interviews with legal expert, the legal aid providers, the state agencies working on making the legal system and state services accessible, such as the advisor on digitalization and innovation to the Government and to the Chief Justice, the Kenya Law Reform Commission, and various social organisations working with the vulnerable groups, and with representatives of the vulnerable groups themselves.
- Desk research on both mapped legal themes as well as on some key vulnerable groups in Kenya.

The results are collected and organised according to the structure of the table 'Mapping Legal Inclusion' above. This information serves as the basis for the report.

Outputs of the mapping that are summarised in this report are:

- Survey Report, providing primary data on the legal inclusion level of the people.
- Description of administrative-legal procedures to fulfil basic legal needs (primary resources) and the judiciary (mainly on basis of secondary sources).
- Description of the Legal Assistance Service Providers, and their accessibility.
- Description of the vulnerability of specific Excluded Groups, and how the legal-institutional framework be applied to legally empower them through legal assistance.
- Comprehensive Legal Empowerment Plan

## D. Mapping results & recommendations in summary

In the first place, overall there are very positive developments in Kenya as a consequence of the 2010 Constitution and the digitisation of the public sector. The main issues of concern for the legal inclusion of all are:

1. Forces within the institutions that are blocking these processes, e.g. in the land registration
2. To access the digital governance, one has to be educated and trained in ICT and be able to fill out forms correctly. In general, most people need (legal) assistance to access the system and protect their rights. At present, legal assistance is too expensive for the vast majority of Kenyans, for a large part, due to the monopoly on legal services of the registered advocates who have to charge a minimum fee specified per type of legal service.
3. There are a number of legal-administrative areas that need simplification, providing transparency and taking away the 'gatekeepers' such as inheritance procedures and the role of the chief in some basic administrative procedures.

A sustainable legal services infrastructure is needed for the legal empowerment of the Kenyan population at large. In the first place, people should be able to easily access information on their rights and the ways to access them, and they need to be able to hire affordable and reliable legal assistance services.

On the basis of these findings, a Comprehensive Legal Empowerment Plan for the legal inclusion of all in Kenya is proposed.

## II. Country Mapping on the Basis of Legal Inclusion Indicators

### A. People

#### 1. Poverty & Education level Indicators

- **Population size** of Kenya: 49.7 Mio. <sup>1</sup>
- **Poverty** levels indicators: 36.1 % below national poverty line (23 Mio people)<sup>2</sup>. The poverty line is the minimum level income deemed adequate in a particular country (US\$1.90 per day in 2011 in Kenya Purchasing Power Parity).
- **Education levels** indicators:
  - Primary school attendance for boys 72.4 % <sup>3</sup>
  - Primary school attendance for girls 75 %
  - Secondary school attendance for boys 39.5 %
  - Secondary school attendance for girls 41.6 %
- A heavy divide in literacy levels can be observed between urban and rural areas in Kenya:<sup>4</sup>
  - literacy levels in urban areas (Nairobi, Mombasa, Kisumu, Kiambu) – 0.9185 <sup>1</sup>
  - literacy levels in rural areas (Mandera, Samburu, Marsabit, Turkana) – 0.2415<sup>1</sup>

#### Conclusion:

36.1 % of population live below the poverty line of US\$ 1.90 a day. 25 % of the population did not attend school, therefore must be considered uneducated whereas 60% has not attended secondary school. The in-depth interviews and survey results have shown that not only the 36 % of people living beneath the poverty line feel excluded, but that a large majority of the population does not have access to legal protection and legal services. In the rural areas, the situation is much worse; the large majority of the people is perceived to be completely cut off from the protection of the law and excluded from the state system due to:

- Low levels of education
- Poverty that makes basic documents and legal assistance too expensive to attain to protect their rights, such as land rights and inheritance
- Distance from the institutions and legal service providers

Despite the current jurisprudential development in the country credited to a revamped judiciary and emerging discourse in access to justice occasioned by the generosity of the new constitution, many local communities remain outside the legal protection framework. This research has demonstrated that people are often unaware of their legal needs, including the relevant steps and requirements to arrange their legal household. We have instances where the scenario is changing and communities showing consciousness to have birth, marriage, death certificates and title deeds as well as keen understanding of inheritance procedures. Further, people have shown interest in contracts (loan, sales, purchase, rent, employment, leases) and even wills. The primary cause for this unfortunate

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<sup>1</sup><https://data.worldbank.org/country/kenya>

<sup>2</sup><https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-poverty-incidence-in-kenya-declined-significantly-but-unlikely-to-be-eradicated-by-2030> **The poverty line** is the minimum level of [income](#) deemed adequate in a particular country. Ravallion, Martin *Poverty freak: A Guide to Concepts and Methods*. Living Standards Measurement Papers, The World Bank, 1992, p. 25

<sup>3</sup>[https://www.unicef.org/infobycountry/kenya\\_statistics.html#0](https://www.unicef.org/infobycountry/kenya_statistics.html#0)

<sup>4</sup>MacDougall, E. E. (2013). Education and poverty in Kenya: a district level analysis. Simon Fraser University, British Columbia, Canada.

scenario is lack of knowledge on how to draft such documents, where to find assistance, inability to decipher which requirements are expected nor the cost implications, besides having inadequate information on the chronological steps to document acquisition.

A concern in the current development of digitalisation of the public sector as the 'E-Citizen' to increase the accessibility of the public sector and legal-administrative issues (see part B the State below) is that people lack the needed skills to correctly access these ICT platforms.

## 2. Survey Results

Some examples from our survey research below confirm the need for legal empowerment as identified and already point out specific areas in which legal empowerment is especially needed:

- 75,1% (316 respondents) indicated they have identification documents.
- 54,4% (229 respondents) indicated not to have any health insurance.
- 55.6% of the people who have their own house indicated that they do not have the necessary documents
- 43.6% (243 respondent) indicated to be member in a community organization that has legal personality
- 75.1 % (316) of all respondents experienced a dispute either personally or in their family
- 77.7 % (327) manifest the importance of prevention of legal problems through having correct legal documents

The above examples show not only the need and willingness of people for proper legal documentation but also points strongly towards land related issues as a key issue within the Kenyan society.

See more detailed information in the **Legal Inclusion Survey Report**, for which 421 Kenyans in urban and rural areas spread over the country have been interviewed. According to the survey monkey size calculator<sup>5</sup> a sample size of 420 on a population of 49.7 million provides a level of confidence of 95% and a margin of error of 4.785%.

## 3. Groups at risk of legal exclusion

In the first place among the poor:

- The rural poor, in particular women & children as a special group of concern, especially where it concerns land ownership, inheritance and marriage/death certificates.
- Urban poor, living in the informal settlements outside the protection of the law.

Within these two main groups the following groups at risk were chosen as research subjects to assess their access to justice and therefore their legal inclusion:

- Slum population
- Micro-entrepreneurs
- Women and Children
- Small farmers
- Nomads
- Indigenous rainforest populations
- People in detention
- Muslim and Somali Kenyans
- Refugees, asylum-seekers and migrants, especially from Somalia

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<sup>5</sup> <sup>5</sup> Sample size calculator: [www.surveymonkey.com/mp/sample-size-calculator](http://www.surveymonkey.com/mp/sample-size-calculator)

## B. Legal Inclusion Dynamics of the Governmental and legal-administrative institutional framework

### 1. Accessibility of the Various Procedures to access Basic Legal Needs

The drastic change in Kenya's administrative and legal landscape cannot be gainsaid since 27th of August 2010. The promulgation of the Constitution of 2010 and consequent enabling laws, have to a large extent created new institutions, decentralized and devolved powers and decision making to 47 counties. The general spirit and desire in the Constitution to get services and governance closer to the people is manifest in Kenya's Vision 2030 in a paradigm that is depicted in her Development Program of 2008-2030. The purpose is to transform the country into a newly industrialized, middle income country providing high quality of life to all its citizens by 2030 in a clean and secure environment. In line and support of these developments and plans is Kenya's effort as regards the **simplification and digitalization of its governance and judiciary with the aim to make the institutions and judiciary accessible for all and combat corruption by eliminating the "gate-holders"**:

- **E-Citizen** ([www.ecitizen.go.ke](http://www.ecitizen.go.ke)), providing 209 digitalized state services, serviced by most Ministries, departments and state agencies. Not all these services are yet active, but the objective is to render all state services available online: birth certificates, national IDs, real property transactions, business registrations, driving licenses among others. At the moment, a smaller number of services is online. There is some resistance from advocates, for instance, who have a prominent role in real property transactions. Due to the ongoing legal dispute over its legality, the property transfer service has been taken offline until this dispute is settled.
- **Huduma Centres** are present in almost every county, and gradually spreading to sub-county level, also through 'Huduma Mashinani', bringing the Huduma Centre to the grass roots in organized campaigns. The Huduma Centre is a **one-stop shop** for a number of State services. The Huduma Centre of Kibera/Nairobi offered 16 state services at the end of November 2019: Registration of Self-Help Groups to get access to the Women Enterprise Fund (since 2015), birth and death certificates, duplication of ID cards, apply for a PIN of the Kenya Revenue Authority and tax returns, National Social Security Fund etc.
- **Digitalisation of the courts** which shortly all will have internet Wi-fi (650 courts), that are all fully automated with case management systems, in which all documents are filed and cannot be altered. As of January 2019, 32 courts will have implemented a full audio-recording and transcription systems in which the parties will receive the transcript by e-mail within 30 minutes after the hearing. This tremendously reduces the backload and possibility of corruption, which both are in large part due to the manual writing of the transcript.
- **Digitalization of all laws of Kenya and Case Law** ([www.kenyalaw.org](http://www.kenyalaw.org) ) since the 1960s by the Kenya Law Reform Commission making the law easily accessible and transparent.
- **Commission on Administrative Justice** (CAJ), also known as the Office of the Ombudsman is a constitutional Commission established under Administrative Justice Act (2011), pursuant to Article under 59 (4) and Chapter Fifteen of the Constitution, whose role is to enforce administrative justice and promote constitutional values by addressing maladministration through effective complaints handling and dispute resolution.
- Efforts made by the Government to implement article 48 of the Constitution that ensures **Access to Justice** for all persons for a reasonable fee that shall not impede access to justice, such as the

passing of the Legal Aid Act and small-claims act introducing lower courts for cases of a value of under Shilling 200.000,- (around Euro 1700).

At the same time, we can see that there are big **challenges** to overcome:

- With the devolution process to implement the 2010 Constitution, the number of public offices and centres of power have increased, which has resulted in increased bureaucracy, competition of roles, duplicity and stifled processes that have exacerbated likelihood of corruption and absence of direction on basic services in administrative procedures.
- The patronage system and related corruption is endemic. To confront the government (agencies) in anything one would need a middleman/fixer. Despite all efforts, the old forces are often resisting and blocking the implementation of the developments to make the procedures efficient, effective, transparent, accessible while taking away the 'gate-keepers'.
- Brutal behaviour of the executive forces such as the national police and the county inspectorate, especially in the illegal settlements like the slums, demolishing houses and shops overnight without warning and arbitrarily detaining youngsters.
- Access to justice for a reasonable fee will still be out of reach of most, even if the Legal Aid Act is implemented successfully, as it does only cover the indigent and not in all procedures. The minimum fees of advocates services are unaffordable not only for the indigent, but for the majority of the Kenyan population. The continued price monopoly of the advocated makes justice inaccessible for most.

#### The role of the chief as gatekeeper and his competition with the ward administrator

An example of these problems with the devolution, creating confusingly overlapping administrative authorities in the community are the roles of the 'Chief' and the 'Ward Administrator'. The Chief is the representation of the national Government on county level, appointed by the office of President/internal security, operating under the County Commissioner (state representative in the county). The chief delivers the services related to the functions that belong to the State. He is the primary centre to approve, verify and validate identification of persons, land and other assets at the community level among others.

The Ward Administrator is a political appointment of the County Public Service Board, and is accountable to the County Executive. His competence includes the county services (health, education, community land) delivered to the grassroots, plan with communities on development activities, such as identifying needy students for bursaries, providing indication of which infrastructure requires repairs etc.

The presence of the two is in practice confusing and sometimes acts as bottleneck in access to justice. Apart from this confusion, the role of the Chief as gatekeeper is a source for concern. His role is essential as a bridge between the population in his village (which may be ample) and the Government. The idea is that he knows the situation of the people in his area and for that reason can provide information to state bodies and the courts regarding the people in his village, their land and inheritance. The problem in this is that:

- he cannot know the situation of all, especially in bigger villages
- he is often not well-educated, applies the traditional customs, which may be against the Constitution (specially where it concerns equality of women), and
- as gatekeeper he is often corrupt

His shortcomings directly impact the legal situation of the individuals in his village. He has for example to ascertain identity in order to get a National ID (which often is a problem for the Muslim, and Muslim-Somali population); he decides thus whether you exist or not, and in practice rarely anyone would appeal against his decision. His advice and input are requested for all kind of procedures. For example,

for an inheritance procedure in the courts, the court often refers to the chief to authenticate who should be the heirs, especially in case in which the name on the title deed is still of the grandfather and the entire lineage has to be demonstrated.

## 2. Description of administrative-legal procedures to fulfil basic legal needs

For each procedure to fulfil a basic legal need the following aspects have been mapped:

- why one needs it,
- the procedure (institution, requirements, steps, duration, costs),
- Obstacles and problems encountered
- whether people:
  - need legal advice, and in what? Is there a need to draft any legal document?
  - Do people get legal assistance in these?
  - get these documents/arrange these issues successfully
- What part of the population has this document?
- Do the documents indeed serve the needs for the document described above?

Below follows a description in summary of the administrative-legal procedures.

### 1. Identity-related documents

#### 1.1. Birth certificate

Needed, inter alia, for:

- To obtain ID (since the enactment of the Birth and Dead Registration Act later 1990s) as of the age of 18
- For the registration and permission to take final exams both in primary and secondary school
- To get a passport and proof of citizenship (when you are under 18)
- Proof of parenthood/recognition of Child: if the father passes away, mother can claim her child legally if the brother takes it

In the past it was more complicated to obtain a birth certificate as one had to go to the Civil Registry in the county capital, waiting in long lines, etc. That has changed since 2015 with the Huduma Centres where one can now obtain the birth certificate with a medical declaration of birth of the Hospital or of the Chief if the child was not born in a hospital. Since recently the application process has been streamlined and Huduma Centers even strive to provide the birth certificate on the same day. This is however not uniform across the country as some Huduma centres take weeks or months depending on whether one gives a bribe or not. Even in these instances, children and people who originate in what is known as border areas such as Kajiado, Busia, Mandera, Turkana, West Pokot, and Mombasa tend to face more rigorous and sometimes humiliating vetting process before registration is affected.

Obstacles:

- Hospitals may be slow in giving the birth notification and registering them in the system
- One has to get the birth certificate in the place of birth
- Lack of awareness
- Time consuming
- Especially in the rural areas, the distance to a Huduma Center can still form a substantial obstacle
- Failure to have parents' ID or death certificate to those who do late registration for birth certificate

## 1.2. National Identity Document (ID)

Needed, inter alia, for:

- Proof of citizenship (above 18)
- To get a KRA-PIN = Kenya Revenue Authority Pin
- To get an employment contract
- To open a bank account
- To apply for a passport
- To access state benefits
- Succession Process: to prove your identity and receive a confirmation of Grant
- To register a SIM card and use MPESA services (a widely used method of mobile money transfer & payment in Kenya)

Requirements:

- Over 18 years old
- Signature on the application form by the Chief in many cases, to ascertain the identity
- original birth certificate and your parents' ID cards, or alternatively, death certificates.
- Make request with the National Registration Bureau when you turn 18, providing the mentioned documents.
- School Leaving Certificates for primary level education

Obstacles:

- Chiefs are sometimes reluctant to sign the form. Especially the Muslim/Somali Kenyans experience this problem due to discriminatory tendencies.
- Parents who do not have their ID's/death certificates.
- Lack of school leaving certificates, for lack of school fees and many other reasons

## 1.3. Death certificate

Needed, inter alia, for:

- To receive the pension and insurance benefits of a deceased relative
- To start an inheritance procedure
- To receive a state pension as a widow
- To obtain legal guardianship of a child
- For the children of the deceased to obtain ID and passport

To obtain a death certificate one has to show the original ID and burial permit or notice of the deceased.

- The person deceased did not have an ID.
- Long distances to Huduma Centres are a hindrance, especially in the remote rural areas
- Death certificates are sometimes withheld from the widow (mostly by her in-laws) with the aim to exclude the widow from the succession procedure.

## A death certificate as the primary proof to show one's widowhood, needed to access related rights and benefits

Esther (32) is a rural farmer. She is a widow and a mother of 5 children. Esther's father-in-law has confiscated the death certificate of her late husband. She cannot access any state benefits meant for widows because she cannot produce the death certificate as proof. She has also missed short term government employment opportunities of the national youth program (Kazi Kwa Vijana), which gives privilege to individuals at risk, like widows. She can neither access the Constituency Development Fund bursaries for her children to go to secondary school. A death certificate is not only a proof of someone's death but simultaneously functions as the primary proof to show one's widowhood. The example of Esther illustrates the difficulties encountered when this proof is not available.



### Family-related documents

#### 1.4. Marriage on the basis of 2014 Marriage Act:

The main novelty in the new Marriage Act of 2014 is that all types of tribal customary marriages provide the basis for obtaining a marriage certificate.

The Marriage Act of 2014 recognizes 5 types of marriage:

- Civil
- Religious, which means Christian
- Hindu
- Muslim, governed by Islamic law/Sharia, with the Khadi Courts competent for marriage, divorce and succession exclusively in case that both parties give their consent. Polygamy is allowed.
- African marriage according to the customs of the specific tribe. This may also include the polygamous marriage, in which at present the women have to give consent for an additional wife to enter the marriage.

The applicable Family Law depends on the type of marriage. But all traditional laws have to adhere to the Constitution of 2010 and, most importantly, may therefore not be discriminatory against women.

De facto the position on women within the various types of marriages is still largely subordinate to that of their male spouse. This was confirmed in the interviews that were conducted with women in which almost all women indicated that they had land, but it was owned by their husband, and that they all think it is normal that the land and other belongings of the deceased father/husband is

inherited by the only the sons and male in-laws. Contradictory to the Constitution of 2010, women in Kenya are, with almost no exceptions, exempted from land ownership, especially in rural areas.

General legal consequences of a marriage in Kenya are:

- Matrimonial property, which consists of all possessions that the couple has obtained after marriage, except for what they inherited (that remains outside the matrimonial property)
- Responsibility/Custody over the children

#### Marriage certificate

Before 2014, one could only get a marriage certificate for a civil or religious marriage. With the Marriage Act of 2014, one can also request for a marriage certificate by registering the customary marriage at the Register of Marriage. Since 1<sup>st</sup> August 2017 the registration of all types of marriages has become mandatory as the sole proof, and the marriage affidavit earlier sworn to be acceptable.

However, when one wants to register his or her marriage, which is not a civil marriage, in the registry to obtain a marriage certificate, one will have to provide prove of the marriage. This proof can be obtained according to traditional customs. The Chief, with consultation to the particular families is expected to proof marriage, by the families recognizing the marriage relationship, where dowry may not arise as an issue. However, when asked most people will explain to you that they are not married because of the dowry that they see as a hurdle and mention as the reasons why their marriage is not registered.

#### A marriage certificate is needed, inter alia, for:

- Legal protection of the matrimonial property in case of decease, mainly to protect the wife and children with regard to interference of in-laws, especially in case of decease of the husband
- To access the inheritance of the deceased
- Division of property in case of divorce
- To receive the pension of the spouse, especially if (s)he is deceased
- Custody/guardianship over children
- Alimony

#### Obstacles:

- people are not aware of the function and importance of a marriage certificate to protect both spouses and children in case of death or divorce.
- Mostly couples cohabituate, especially in rural areas, as the dowry is too high for them to get formally wedded.
- Lack of awareness on the need to register and the procedure, as to where and how
- The institutional cost of KSH 3900
- Traditional customs

#### **1.5. Children**

- Recognition of child by father simply by having his name registered on the birth certificate. The parent registering the child has to bring the ID of both parents.
- Child Support: responsibility equal on both parents mentioned on birth certificate

## **2. Inheritance procedure**

In Kenya, people often don't start or complete the formal inheritance procedure. Therefore, they are unable to fully enjoy access to the registered goods which they inherit. It is, for example, impossible

for them to obtain a loan on the basis of their land ownership because this is still in the name of their deceased parent. Also, without completing the inheritance procedure it is impossible to access the bank account of the deceased and the money in those accounts eventually goes to the state.

#### Obstacles:

- Time & resource consuming: with or without a will, an inheritance procedure is always lengthy and implies a court procedure with many steps; it can take years before a confirmation of grant is obtained. Even a simple inheritance with a will, with one sole executor, uncontested, with the best advocate will at least take 14 months.
- Lack of knowledge: people are unaware of the procedure and steps and how to do it. That is why most (poor) people do not do the inheritance procedure, which has as consequence that the real property and registered vehicles remain in the name of the deceased.
- Costs: formally, there is no advocate needed during the inheritance process, but to know the rules and to draft all court documents, one needs to have legal knowledge. As only an advocate in Kenya is allowed to provide legal services for a fee, one would need to hire an advocate. However, the minimum fee according to the Advocates' remuneration order is too high for most, and thus doing an inheritance procedure is out of reach for most Kenyans.
- Wills are commonly not used, which further complicates matters.
- Conflicts between beneficiaries often hinders the conclusion of inheritance procedures, especially due to lack of knowledge of the rules governing an inheritance.

As a result of these obstacles, a formal inheritance procedure is only a realistic possibility for the rich and upper middle classes. It is not accessible for roughly 70% of the population, who as a result, face the legal issues mentioned above.

#### *Inheritance of lands still in name of the grand-parent*

Another issue with inheritance in the past was the ignorance on the need of having a title deed in one's own name. This is now changing. People are becoming more conscious on the need of a title deed with their name on it. In many regions where there is freehold, people never had bothered to pick up the title deed in the past. Now, if one would like to get a title deed in their name there are two steps to take:

- Inheritance procedure needs to be followed to clarify the succession, in which the lineage of heirs with the respective pieces of land is mapped. The court usually refers to the chiefs to sit with the family and to write this up.
- Once the court issues the grant on your name, you can go to the Property Register to get the title deed

There is a huge need for this type of inheritance procedure, especially in Western Kenya.

### **3. Real Property-related (land and housing)**

#### Land issues and conflicts

Land related issues have characterised the history of post-independence Kenya. This is in part a result of the fact that institutions responsible for land governance, notable the Land Registry, are notoriously chaotic, corrupt and inefficient. This was due to change as of May 2017 when the Land Registry was digitalized, but the ICT system collapsed shortly afterwards, and all applications have been processed manually again since then. It seems that vested interest contributes to lack of the will to make the digitalized Land Registry work. Other persisting issues regarding land are:

- Land grabbing by male in-laws: this occurs mainly when the male house and/or landowner has deceased and his brother(s) and/or father claims his land at the expense of the widow and children.
- There are prevalent instances of multiple registration of land, falsely engineered due to corruption leading to several titles being availed for same parcel of land. The process to make this right takes a while as often the matters ends up in court. Besides threats tend to abound on the original land owner, or the least endowed party.
- Due to the fact that land is almost always inherited by multiple family members, the pieces of land become every time smaller, which decreases the viability of the agricultural use. There is a need for land consolidation for which legal constructions are needed.
- Failure to register inherited land granted by parents often leads to conflict as to the real owner of the allocated land especially where equal allocation is not perceived to have been done.

### The real property landscape in Kenya

In Kenya there are various land titling systems:

- Private land, which may be a) freehold or b) leasehold
- Land without titles, which in large part concerns the Community Land of or tribal lands that should be registered now with the Community Land Act of 2016
- Governmental land, which can be privatized through letters of allotment, that stipulate the conditions under which this may happen (price, freehold, or lease etc)

The legal situation in Kenya regarding land ownership was as follows until the modifications in the land registration on the basis of the 2010 Constitution and subsequent legislation.

In **Cities** mainly leaseholds, but there are also exceptionally situations of freehold.

In the **rural areas** there was a variety of modes of ownership prevailing, namely:

a. **Freehold titles** in the West and middle of the country, and also big freeholds in the coastal area, have been adjudicated in various ways during history, and therefore gives an erratic patchwork of title regimes:

- 1920s-1963 - registration of the Crown Lands on the basis of the Registered Land Act (RLA) with surveying with beacons,
- from independence in 1963 the Registered Index Map was used, in which the map provides the master plan in contrary to the beacon surveying in which the reality on the ground is leading.
- With the Land Act and Land Registration Act of 2012 there is return to surveying based on beacons. In addition, all existing titles are being unified in one (digital) system.

The adjudication of freeholds was relatively truthful in the 1960/70s in the central and western part of Kenya, but when the land adjudication finally happened in the Coastal region in the 1980s, the Land Registry had become corrupted and the land in the coast was titled on the name of a few powerful persons to the detriment of the coastal people living on this land. This is the source of injustice.

b. **Community land** in the North and South (Masai, Samburu, Turkana, mainly the lands of the Nomads), which has only partially been registered, leaving the communities vulnerable to private and government interference in their territories.

c. **Allotment letters** of County District Office on Government lands which was previously owned by the Brits. Officially, these are temporary titles, offered by the Government. Therefore, they do not count as a prove of ownership and one cannot receive, for instance, a bank loan on the

basis of his or her allotment letters. They can, however, be transferred and inherited and under conditions stipulated in the allotment letter turned into freehold or leasehold.

- d. **Non-surveyed Land without any titles**, with only users' possession. These plots are mainly located at the Coast
- e. **Leasehold** is also a frequent title for agricultural land. The leasehold for agricultural use used to be 999 years.

This has all changed with the Constitution of 2010, chapter 5, the Land Act of 2012, Land Registration Act of 2012, National Land Commission Act 2012 and the new Community Land Act of 2016:

- Freehold titles are now harmonized, and people are encouraged to obtain the free hold title deed on their name. For this people will often have to a) sort out the inheritance procedure from the past (see above under inheritance, and after b) obtain the title deed on their name.
- Non-Kenyan citizens cannot hold land for a period longer than 99 years. As a result, freeholds revert to the State that is obliged to grant a 99-year lease for peppercorn rental. And obviously leaseholds of non-Kenyan citizens that are longer than 99 years will be reduced to 99 years.
- Community Land should be registered by the concerned tribes on the basis of the Community Land Act of 2016.

#### Transfer of free hold title deeds

As mentioned, the transfer of title deeds has been the monopoly of the conveyors (advocates who provide the stamp on property transfer papers), who charge a price higher than most can pay. The transfer takes place at the Land Registry.

With the digitalisation of the Land/Property Register and with the E-Citizen this should have all become much easier and accessible. However, as mentioned the digital Land Register has not been operational as the Law Society of Kenya has undertaken a court case against the Kenyan State against the transfer of title deeds through E-Citizen. Hence, the transfer of title deeds is still an expensive manual process.

#### Conclusion: Legal needs in real property

In rural areas there is a huge legal need for inheritance procedures, getting the title deeds, establishment of freeholds titles, and the registration of communal lands.

#### Obstacles:

- Resistance from both the Land Register and the Advocates (who act as conveyors for the transfer of title deeds) to the digitalisation and innovative means to speed up the process.
- Costs for surveying are high and the authorities responsible for surveying the plots are coping with a large backlog. This also hinders the transfer of allotment letters to title deeds because plots with an allotment letter attached to it are not necessarily surveyed.
- Due to the reasons above, the process to obtain a title deed is very time-consuming. It is not online yet, and one has to go back all the time to the Land Registry to follow the progress.
- Costly process due to charges and corruption if you want to speed up.
- The new Community Land Act still has to be implemented and the first community land title has yet to be registered on the basis of the new act.
- Lack of understanding on the process for applying for title deed among the rural folks and no set timeline as to when it can be processed which gives room for corruption.

## **4. Economic and social activity related areas, registrations and documents**

### **4.1. Business registrations**

All types of business registrations can now be easily done at the E-Citizen portal. The costs are low and it is relatively simple. Before the E-Citizen started, advocates had a monopoly for a minimum rate of KES 60,000.00

One needs his or her business formally registered to enter legal relationships and access to various services including loans.

- But one should know what business registration is appropriate, what the steps are, one needs to prepare the articles of association, and one needs to know how to fill out the forms. Even though the E-citizen portal has made these services easily available, many still require assistance and education on the benefits of a business registration.
- The various types of business vary from the 'chama' or self-help group (=a registered chama), sole-proprietary for a simple business, partnership to various types of companies with legal personality.
- Chamas are often solidarity groups of either women, youth or a mixture of both genders, established with an economic or social agenda. Chamas may be registered as a self-help group in the Huduma Centres, which would be necessary for accessing the Women's Enterprise Fund (government program) or to open a bank account as a group.

**4.2.** Permits, depending on the type of business, can mostly be done in E-Citizen as well.

**4.3.** Taxes can be relatively easily done online.

Our findings above are supported by the Doing Business index 2019, on which Kenya scores a 70.31 out of a 100 in the lower middle-income category, almost 20 points higher than the sub-Saharan average and which, more importantly, acknowledges the progress which Kenya is making by explicitly mentioning the benefits of the process of digitalisation. However, filling of taxes requires education and knowledge as to how to fill in the forms online through I-tax.

## *Breaking the Catch 22 of informality, legal insecurity, recurring injustice, and poverty through legal empowerment*

In practice it is not so easy for people in the informal sector to get their business registered and to obtain the necessary business permit(s) as they experience the day-to-day struggle for survival in which they have nothing left to invest for tomorrow. The legal uncertainty they live in is the very reason that they cannot leave this poverty spiral.

There is the ambiguous situation in the informal settlements, that people have no registered business, nor permits, but that the relevant authorities are condoning their presence and economic activity, even doing sanitary controls in the business premises, providing formal instructions to ameliorate the circumstances with x amount of time.

As an example, one could take Frank, a young entrepreneur who conducts his businesses in Kibera, the biggest slum of Nairobi. Frank is eager to formalise his business for a number of reasons but is reluctant to invest in the necessary permits due to the legal uncertainty he encounters in other areas, mainly with regard to his business premises. Kibera is to a large extent still unregistered land. It is therefore very difficult, if not impossible, to obtain legal protection for the land on which one resides. Frank has already been suddenly evicted by his landlord after he made improvements to the structure he was renting and, on another occasion, has found his cybercafé demolished overnight by county authorities while not leaving any trace of his computers and furniture. Would Frank have had a proper rental agreement, his landlord might have been more reluctant to evict him, and would Kibera have been registered, either as community land or leasehold, Frank, could have obtained a title. Now that Frank had no papers to prove, he had a legal business and that he had a title to the premises, he felt that he could not complain against the demolition of his assets. As a result of the aforementioned, it is crucial that all legal needs of an entrepreneur like Frank are considered and addressed in order for him to obtain legal certainty with regards to his business operations.



*Before the demolition in  
26 April 2018*



*After the demolition in June 2018*

## **5. Legal Organisation of a group**

- 5.1.** For a long time, it was very difficult to register CBO or NGO in Kenya. The reason for this was that the government had the perception that both were anti-government. This suspicion has been backed by the fact that, after the last to elections, a number of NGO's have participated in the litigations to nullify the results. Due to this existing tension between the organisations and the government there were a number of NGO's shut down before the last election because they supposedly received donor money from the opposition and were influencing the public opinion to the disadvantage of the government.

Due, inter alia, to various litigations, non-profit organisations are now recognized as playing a vital role in the Kenyan society. Community Based Organizations can be registered relatively easily with the Registrar of Societies, under the office of the Attorney General. This service is available on the E-Citizen platform as well as at the Huduma Centres. They can only operate within their geographical area of operations. The reason why people often prefer a CBO over an NGO is that the registration for the latter may still be quite challenging. In the past before the new CBO legislation was implemented, NGO's often registered as a Company limited by guarantee to avoid the stringent rules that was applicable for the NGO registration.

- 5.2.** Religious groups of all religions in Kenya (e.g. Christian, Muslims, Sikhs, Hindus and Bohras) can be registered as a Faith Based Organization. Religion plays a big role in the Kenyan organization and FBO's often function as proxies of churches and other religious institutions (mosques, temples etc) to do their community works. Members of an FBO are bound by religion as opposed to geography, as is often the case for CBOs. However, FBOs can also function as a bridge between various religious institutions which do not want to work together directly but attain a communal cause through a partnership in an FBO.
- 5.3.** The post-election violence of 2007/8 is freshly etched in the memories of Kenyans. The eruption of violence was orchestrated along tribal lines demonstrating the sensitivity of this topic. The formation of purely tribal/ethnic organisations is formally forbidden, also in politics. The implementation of this prohibition is difficult and in practice organisations are often still consisting of members which share the same ethnic background. Furthermore, when an organisation is not formally registered the monitoring process becomes almost impossible. Given this situation it is interesting that ethnic communities now can register their communal lands on the basis of the Community Land Act of 2016, that explicitly names ethnicity as one of the indicators to establish a community land.

## **6. Contracts**

In Kenya, there is no culture of contracts. Although there are numerous conflict situations which could have been avoided or resolved by the use of contracts, people are not aware of the potential benefits derived from the use of contracts. Rather, they avoid the use of contracts and the obligations which the use would entail. In general, people do not want to be liable for breach of contract, even if they have the intention to comply with the contract.

In principle, there are no formal obligations to which a contract has to consent before it is enabled in court. However, there are exceptions to this rule. For example, for the sales of real property a stamp of a conveyer (which is an advocate) is needed.

Lack of awareness and knowledge on the beneficial characteristics of the various contracts are the main obstacles to widespread usage of those.

It is important to note that especially in the underdeveloped rural parts of Kenya there still exists a persistent lack of awareness and knowledge on both the procedures and relevance of most legal documents. As a result, these people are legally excluded and detached from the legal framework of Kenya.

### 3. Social-economic welfare provided by the State

The two main benefits provided for by the state are the National Health Insurance Fund (NHIF) and the National Social Security Fund (NSSF).

When one is employed formally one is automatically enrolled in the NHIF and one's employer is supposed to pay the monthly fee. If one is not employed formally, which is the case for the large majority of Kenyans, one has to enrol and contribute on one's own account, which people often fail to do for various reasons. The poorest of the poor cannot pay the minimum amount to enrol and, perhaps even more importantly, the health care one receives is dependent on the amount you contribute. The latter results in notoriously bad services for those who are unable to contribute substantially. Adding to this are the continuous scandals and accusations of corruption of these social institutions, which makes people reluctant to enrol.

The NSSF is a compulsory pension scheme for employees, paid by the employers. It copes with the same difficulties as the NHIF in that the returns are dependent on the amount that one has contributed, hence often very minimal. Our research has shown that the NSSF scheme is hardly used by people without formal employment contracts and that the vast majority of Kenyans makes no arrangements for their future pensions.

One can conclude that a lack of finance and formal employment is by far the biggest obstacle in accessing any state benefit. The enjoyment of state benefits in Kenya only works properly for those earning a substantial salary and who are formally employed.

However, as in other fields, the Kenyan government seems to admit the currently available state benefits fail to address the needs of the whole population. At the time of writing, a Universal Health Coverage pilot has just begun in parts of the country with the aim of eventually addressing the whole population. This pilot is supported by the private company Pharm Access which, amongst others, in the facilitation of [digital registrations](#), [health financing](#), and [delivery of services in a cost effective and transparent way](#). This Private-Public Partnership is good example how Kenya is exploring innovative solutions to the various issues which it faces as a country. It will be interesting to see how the UHC scheme will develop in the future and if it will live up to the expectations.

### 4. The Judiciary

The 2016-2017 annual *State of the judiciary & the administration of justice report* of Kenya stipulates ICT innovations within the Judiciary as a one of its most prominent means to improve access to justice and, as mentioned, there is a lot going on in the digitalisation of the courts. This will tremendously benefit the efficiency of the court and will help to get rid of the backloads. At the same time, the transformation has not yet fully passed, and courts still have a very bad reputation as comes to costs, duration, corruption levels, and, linked to this, uncertainty of the outcome.

In a court proceeding there is no need for legal representation by an advocate as is required in many countries. The advantage is that one can start a proceeding on his/her own behalf (and even a group action) and that one does not have to make any advocate's costs.

The problem is that one has to know the procedures and be able to prepare the necessary legal documents. For this, people need help to be aware of the steps, requirements, costs, and have the know-how on how to draft the legal documents.

#### **4.1. Civil - justice sector**

Despite the increased accessibility of the courts and their increased efficiency as described above, the courts in general are out of reach for the largest part of the population due to lack of awareness of how it works, the costs, duration.

These findings and those above find backing in the Rule of Law Index on which Kenya scores very low with regards to *absence of corruption* in general and *accessibility & affordability* and *no unreasonable delay* in civil justice sector in specific.

#### **4.2. Criminal justice sector**

Characteristic of the Criminal Justice system is that court representation is an exception and is only offered for those facing a severe penalty. There are around 55000 inmates in Kenya of which 22000 are in remand because the bail is set too high for them to meet. According to a recent audit of the Legal Resource Foundation, 65% of those in remand are not assisted by an advocate and they risk being in remand for a long time before a verdict is brought. Moreover, there are only 20 paralegals of a private entity (see below under legal assistance providers) with a permanently base in prison, covering all prisons in Kenya. These paralegals give the inmates information on how to defend themselves and linking them to an advocate if possible.

#### **4.3. Alternative Conflict Resolution**

Kenya has an important tradition of alternative dispute resolution according to the customs of the various communities, where the elders and chiefs play an important role.

Although in general it works efficiently, the ADR mechanisms have a number of pitfalls, of which the main ones are:

- The contradiction between the Constitution of 2010 and the traditions of the tribes and religions. Whereas under the new Constitution women have the same rights as men (such as land rights), under the tradition the women are discriminated upon and have no right to land. Mostly the elders and chiefs are men.
- Absence or lack of standardized procedures (guidelines) underpinning mediation processes by traditional authorities, corruption, mediocrity and ridicule are endemic in this system.

Furthermore, The Constitution of 2010 acknowledges and promotes ADR mechanisms as a viable alternative to the costly and time-consuming court procedures. Most organisations provide legal aid (see below) support people uniquely with ADR.

## **C. Legal assistance**

### **1. Commercial Legal Assistance in legal and administrative processes**

#### **1.1. Advocates**

One has to be admitted as an Advocate and hold a current practicing certificate to provide legal services. Being an admitted Advocate is not only required for court representation but for a number of other non-court related legal services and transactions, such as land dealings, company securities, company formation, administration of deceaseds' estates, intellectual property registration, litigation et cetera. On the basis of the section 35 and 36 of the Advocates' Act minimum fees are established for each type of legal service in the Remuneration Order. The Law Society of Kenya would consider it to be a criminal offence if a person, who is not registered as an Advocate, would provide legal assistance against a small fee in one of the areas where the registered Advocate has a monopoly. However, free legal aid provision is possible.

The advocates (in their role as conveyer) are required to sign for a real property transfer for a fee of substantial percentage of the value of the real property. As discussed, this may change with the E-Citizen in case the plans are followed through and people would be able to transfer the title deeds online without the intervention of an advocate (conveyor).

The monopoly on legal services for a minimum fee makes hiring legal expertise too expensive for most Kenyans. People have to figure out all types of legal matters by themselves and represent themselves in court.

#### **1.2. Brokers, fixers, agents**

As traditionally one could only arrange things in connection with the government institutions through your network and facilitation money, there are people who are called 'brokers', 'agents' or 'fixers'. Their role, though, is mired with a lot of corruption allegations, navigating the bureaucratic bottlenecks found in many state-led services processes. Their role would decrease with the increasingly digitalized services of the E-Citizen.

#### **1.3. Administrative service for filling out forms on e-Citizen**

With the E-Citizen portal, cyber cafés help people to access the state services online, filling out the forms for them. Shilling 100 per procedure is the minimum fee per process in Kibera, and in the rural town of Kakamega a cybercafé would charge 250 to 500 shilling per procedure. The problem is that these young entrepreneurs often do not have a lot of formal and basic legal education themselves and there is a risk that forms will be filled out with mistakes.

### **2. Non-commercial legal assistance providers: free legal aid for the indigent**

The Government has only devised free legal aid policies for the indigent through the legal aid providers established as a consequence of the Constitution of 2010 in the Legal Aid Act of 2016:

#### **2.1. National Legal Aid Service:**

At present has offices in a few counties, with 4 advocates throughout the country. It focusses on mediation in family related matters, only when it is established that people are indigent. No court representation, no assistance in criminal procedures (yet). The National Legal Aid Service is supposed to coordinate and oversee all free legal aid service provision to the indigent in Kenya and to roll out in the 47 counties

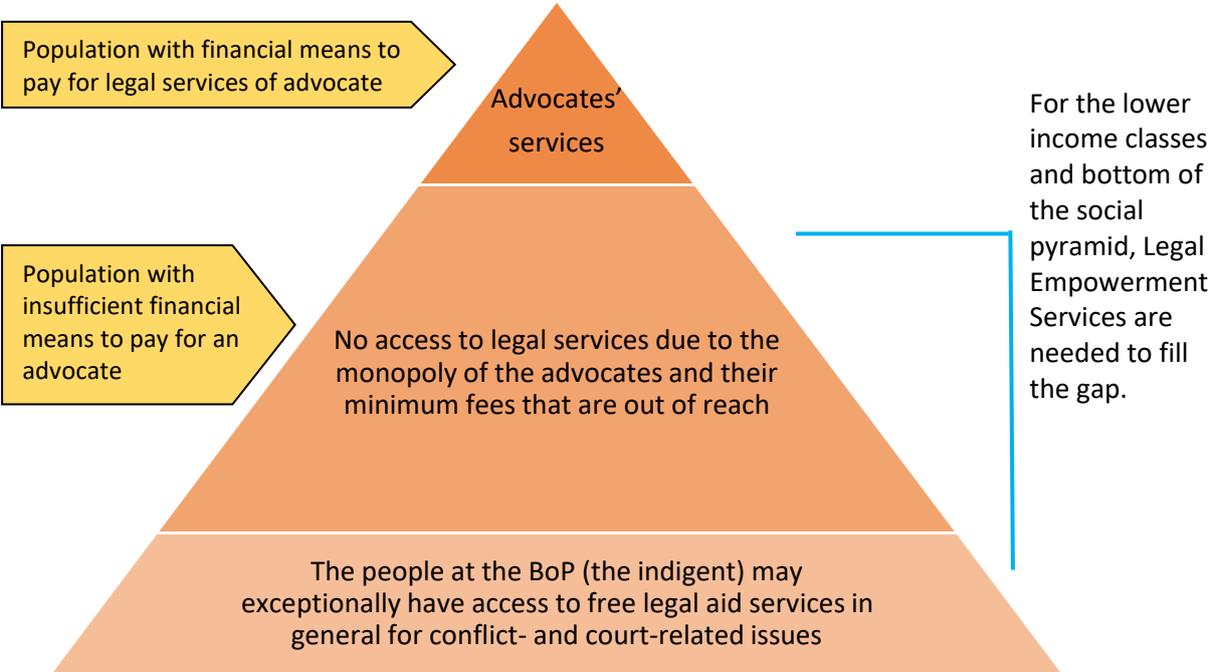
The Legal Aid Service is almost exclusively supported and funded by the international Community. E.g. the International Development Law Organisation (IDLO) has designed their National Action Plan of December 2017.

**2.2. Accredited NGOs to work within the framework of the National Legal Aid Service of which the most important ones are:**

- Legal Resources Foundation (LRF) with their paralegal program in the prisons. All over the country there are only 21 paralegals in the prison, checking if the due process procedures are followed, advising the incarcerated and helping them to get an advocate exceptionally (pro bono and paid ones). Initiated by LRF, in court users’ committees the stakeholders in the criminal justice meet 4 times a year to discuss and solve the challenges and observations.
- FIDA – helps women with legal issues and court presentation from its offices in various places of the country
- Kituo Cha Sheria – provides legal advice and has a focus on ADR for solving civil conflicts

Conclusion

Most legal services’ providers are in the three largest cities. The rural areas are scarcely covered. Free legal aid to the indigent exists rudimentary, is mainly supported by the international agencies and donors, and only occasionally provides for court representation through advocates working pro bono. While the legal aid capacity for free legal services to the indigent is very limited and the legal services of advocates are only affordable for people with a high income. As long as the price monopoly of the Advocates on most legal services persists, there are no sustainable legal assistance services structurally available for the largest part of the Kenyan population. Especially those who are neither rich nor indigent are excluded from legal services.



## D. Legal exclusion in Kenya

**In conclusion, combining the three sets of indicators a) poverty/education b) accessibility & effectiveness institutions and court c) available legal services:**

**Who is legally excluded and what is needed to legally empower them?**

The poor with focus on the vulnerable groups can still be seen as legally excluded as they have no awareness of how to get their rights realized and they have no access to legal services. The more so, in this situation of fundamental injustice perceived by them, they do not see the interest of being legally embedded and protected.

However, there is hope and the situation already has started to change with the E-Citizen, Huduma centres, the digitalisation of the courts and Land Registry. A change of mentality can be detected, and people become aware of the need to arrange their rights and paperwork, but they don't know how to do this. There is a need for help:

- To find clear information on their rights and the necessity of their paper work, and on how the procedures work
- To receive help with filling out the online state services
- To get assistance in the legal aspects of the procedures as contracts, articles of association and other requests forms and documents

Without this information, awareness creation and legal assistance, all poor and the groups at risk more specifically described under A, may be considered legally excluded.

Apart from the population in general, the legal services must be geared to specific groups through cooperation with organisations working with these groups. Thus, there is an important need to increase the legal services capacity in the prisons.

**The excluded groups report** describes for each of the excluded groups their vulnerability, their legal issues, and the legal issues translated into legal tools to prevent the vulnerability and/or to solve their problems. For each group, standardized legal services will be recommended as well as the way to distribute these services.

### III. Comprehensive Legal Empowerment Plan

The Comprehensive Legal Empowerment Plan proposes:

1. A framework under which the sustainable legal assistance services can be organized.
2. Recommendations for building up the institutional capacity

#### 1. Recommended Legal Empowerment Program

##### A. Legal services know-how; product development

**legal services** in general for all to help access the state services on E-Citizen and to arrange basic legal needs in general.

##### *a. Basic legal needs: accessible information and standardized service development*

Per basic legal need to develop standardized legal services in a handbook including:

- information on the reason why this is so important
- procedure and steps
- templates of legal documents with variables in an ICT tool for various types of contracts, articles of association etc

The standardized legal services should be developed in:

- civil documentation
- family related matters: marriage, children, divorce
- Inheritance: information the procedure, the steps and needed templates for the legal documents requested by the court and a standardized virtual mediation tool
- Land and houses: standardized registration of free holder titles in rural areas, and the transfer of title deed, standardized community land registration (as soon as the implementation legislation is known), establishing and transfer of leases in urban areas
- Business registrations
- Registrations standard templates for needed legal documentation
- Standard contracts in a variety of situations

##### *b. Legal constructions to address a social problem and empower the group*

Legal concepts and constructions may solve many of the problems that the vulnerable groups face. Below, just a few first ideas are explored to be developed in the Legal Empowerment Program.

- To deal with the fragmentation of the land rights through inheritance and to encourage a consolidated use of the land at the same time a legal construction could help out. A legal construction may support the separation of ownership rights and the use of the land while protecting the rights of the owners not using the land. One could think of various legal constructions, for instance, of having the land worked by a company that leases the land from the owners, in which only one or 2 of the brothers work.
- Standardized digital mediation tool for inheritance and divorce, outlining the interested parties, the goods and issues at stake and the applicable rules.

## Distribution of information and service provision

The handbooks should be distributed in various ways through people and organisations working with the poor in general and the excluded groups:

- Cybercafe's that help the people access the E-Citizen: they should be trained and supported by a legal empowerment organisation which trains them with the Legal Empowerment Handbook, and they provide support to them when the clients of the cybercafes have legal problems for which they need a lawyer, or have doubts about the procedure.
- Similar programs as for the cybercafes for groups working with specific excluded groups. See the *report on the Excluded Groups* with specific recommendations for legal assistance programs for them.

For the people in the rural areas the need for a such a service is even more pressing.

People in the rural areas have less awareness of their rights and the basic legal needs to protect them. They are far from the institutions, Huduma Centres and legal service providers. There is a urgency for setting up legal service provision infrastructure upon the lines described above. The E-citizen services offer an opportunity to narrow the gap; the state services are now available, and the rural people need someone who can help them with these.

## 2. Recommendations for the Legal Institutional Capacity Building

Land ownership is the key legal issue in Kenya and related to this is inheritance. It is the largest source of conflict and of discrimination against women where traditional forces and authorities defy the Constitution of 2010 in which women have equal rights on land ownership. Connected to Land is thus Inheritance. These two areas are the most confused, complex and non-transparent in Kenya, making it impossible to have justice done to a humble person in face of the rich and powerful. A simplification of the processes related to these is key to accessing justice in Kenya.

The Judiciary only works for a small group of Kenyans who can afford to hire a good advocate and who have the needed contacts. In theory, poor people can represent themselves in court but in practice they lack the knowledge and know-how to do this.

Many consulted legal experts firmly agree on the abolishment of the use of the courts as a standard for many administrative procedures, such as inheritance and divorce. It is essential to simplify these administrative procedures and make them increasingly accessible while simultaneously unburdening the courts.

In short, the main institutional recommendations would be:

1. To continue the excellent processes of making the Government services accessible through E-Citizen and the Huduma Centres, and to have more services at the Huduma Centres with a wider distribution network.
2. To expand and further develop this digitalization in the E-Citizen, in the Courts, and the Land Register, and in the latter to insist on making it work in practice. Increased Access to Justice & legal protection, transparency, efficiency of the institutions while combating corruption will largely depend on the ability to implement successfully the simplification and digitalisation of the public sector. Kenya can be congratulated on its efforts in these, and now has to put its

efforts in creating the political will to have this process succeed, combatting groups and individuals who block this in their self-interest.

3. The laws based on the 2010 Constitution that have been passed should be operationalized, such as the Community Land Act and the small claims court.
4. With regard to land registration, the digitalisation of the Land Registry should be continued . Obligatory should be the introduction of a number of additional ICT tools, such as:
  - digitalisation should be further developed to replace the beaconing surveying by fit-for-purpose digital solutions. A simple smart phone with a surveying app is a sufficient method, inexpensive, fast, providing security.
  - to avoid fraud title deeds, block chain title deeds should be introduced.
5. While developing the digitalisation of government services increasingly, solutions have to be developed for the lack of ICT knowledge and its application of the Kenyan population in general to access the ICT internet services and to fill out forms correctly. An important contribution to solve this would be to build up effectively the legal empowerment service program as proposed in the first part of this comprehensive legal empowerment program.
6. Effectively sorting out the overlapping roles of the Chief and the Ward Administrator. First of all, it causes the existence of too many centres of powers. Actually, the role of the chief (as part of the President's office) on the county level does not represent the devolution spirit of the 2010 Constitution. The more so, as demonstrated in the mapping, recommended is repealing the role of the Chief in his various 'gate-keeper' positions (to get an ID, in inheritance the court frequently refers to his services, in land matters etc) that is still profoundly existent in the system. His role opposes the movement of transparency and increasing efficiency through digitalisation. If in the gatekeepers' roles the Chief keeps his powers, the a transparent, easy redress mechanism has to be put in place, clearly communicated to the affected, for any decision he takes.
7. To simplify the inheritances procedures and abolishing the use of the courts in a non-litigious inheritance, and to encourage use of wills. There is no reason to have courts procedures as a standard requirement.
8. To assist the informal sector, especially in the slums to break out of the vicious circle of informality.

The vicious circle of poverty, legal insecurity and permanent cycles of injustice have to be broken, by starting at the basis, guaranteeing that the business premises are legally protected. There is a need for the use of renting contracts. The local authorities should refrain from arbitrary destroying business premises (without warning) and should provide timely clarity on their plans concerning the buildings and structures in the slum areas.

In term, it is essential that the government will eventually consider solutions to formalise the residencies in some way, be it through communal ownership, leaseholds or any other innovative method.
9. The minimum fee and the monopoly of the admitted Advocates on a large number of legal services should be abolished. The continued existence of the price monopoly of the legal profession is the main obstacle to a sustainable system of affordable quality legal aid.

At present there are two opposing developments. On the one hand, a system of free legal aid for the indigent is developed, mainly with the financial support of the donors and technical assistance of international consultants. Whereas on the other hand, legal services are unreachable for most Kenyans due to the existence of 2 sections in the Advocates' Act.

Abolishing the minimum fees would just take eliminating section 35 and 36 of the Advocates' Act, which would lead to the repeal of the Advocates' Remuneration Order.

The liberalization of the legal profession would allow for a system of sustainable legal empowerment services, taking the obstacles out of the way for paralegals to charge accessible fees for their services. Thus, making legal services accessible, affordable and reliable for the majority of Kenyans instead of the minority.