

Impact assessment



KAM: the Commercial Law
Benchmark

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Impact assessment

KAM: The impact of introducing of the commercial law benchbook

1. Background

The Kenya Association of Manufacturers (KAM) is the representative organisation for manufacturing industries in Kenya.

We all believe that the courts must be open, impartial, efficient and effective to secure rights, reduce uncertainty and promote a conducive atmosphere for investment. Well-designed laws and regulations cannot, on their own, ensure business rights are actualised, without an institution that will, through dependable interpretation, enforce those rights and settle disputes. Access to justice is a basic principle of the rule of law and is a basic human right. It is also closely linked to poverty reduction since being poor and marginalised means being deprived of choices, opportunities, access to basic resources and a voice in decision-making. Lack of access to justice limits the effectiveness of poverty reduction and democratic governance programmes by limiting participation, transparency and accountability.

Quality, independence and efficiency are the key components for an effective justice system guided by international human rights standards and principles. If the Judiciary is strengthened, there would be meaningful access to justice which will impact positively on the protection of human rights in the country. Access to justice encompasses processes to ensure that the whole system is sensitive and responsive to the needs and realities of all parties involved and empowers them throughout the justice chain.

Over the recent past, topics that have featured prominently in the Kenya Magistrates' and Judges' Association (KMJA) and KAM sponsored annual conferences have generally been about challenges in trial processes including the impact of limited public knowledge of court processes, corruption, illicit trade, customs, taxation and tariffs, intellectual property and standards.

2. The problem

Kenya's development gains continue to be hampered by challenges such as illicit trade, corruption, tax evasion, trading with substandard goods, infringement of intellectual property rights and a host of other business malpractices. Judicial processes that are not well understood by the public, backlog of cases, lengthy trial processes and lack of technical skills by courts or tribunals in emerging business trends and commercial disputes also play a prominent role in eroding investor confidence in our country.

The Milimani Commercial Court was established in 1996 to tackle such issues in response to inadequacies experienced in the general set up of the court system. At the time, the other courts were congested and lacked adequate facilities, thereby adversely affecting the dispensation of justice despite the growing

demands of an increasingly fast-evolving economic environment in Kenya. However, years into its existence, the court continues to face numerous challenges that have, over the years, triggered new demands by the business community for further reforms.

Currently, courts have a backlog of commercial cases, which imposes additional compliance costs, time and lost business. This has led to a lack of confidence in the judicial process. It slows down the judicial system and makes it even difficult for new cases to be quickly heard and determined.

Since 2013, the Business Advocacy Fund (BAF) has been supporting KAM to engage the judiciary in a bid to improve the judicial processes that affect businesses. Starting with the initial support of KES 6.2 million in 2013, KAM partnered with the National Council on the Administration of Justice (NCAJ) to develop an Illicit Trade Manual to help improve the judicial processes in relation to such cases. In 2014, KAM received a further grant of KES 10 million to partner with the KMJA to host the Annual General Conference (AGC) for Judges and Magistrates, during which a presentation on illicit trade was made. A manual was successfully launched in March 2015. For the AGC, KAM developed the conference theme and agenda, researched and prepared conference papers to make specific proposals to the participating Judges.

The key issues discussed at the AGC included illicit trade, enforcement of contracts, taxation, land, labour and industrial disputes and administrative measures to reduce case backlog. While this work and support have offered great value to the management of commercial disputes, it was concluded at the AGC that more needed to be done. The issues KAM sought to tackle related to the quality of judgements made on commercial cases. In addition, KAM members perceived that decisions in similar cases were subjective and inconsistent. There were inconsistencies in interpretation of the law by the Judges and Magistrates and there were inconsistent judgements in cases regarding taxes, trademark disputes and product standards¹.

It was therefore resolved that a commercial law guide book, known as a benchbook, would be beneficial in providing essential information. It was intended that the guide would include:

- Local and international best practice (based on the number of referrals by other Judges/Magistrates);
- Landmark cases that should inform judgments (that is, case law);
- A list of universal commercial laws utilised in commercial decisions; and
- Relevant commercial case procedures for the priority issues of illicit trade, customs, taxation and tariffs, intellectual property (copyright and trademark), employment and administrative procedures for commercial cases².

In April 2015, KAM, in partnership with the KMJA, sought BAF support for KES 9.1 million to develop the Commercial Bench Book.

1 Preliminary Research on the Development of the Commercial Bench Book for Kenya via a KAM-KMJA Partnership. A KAM report, 2015.

2 Preliminary Research on the Judiciary of Kenya Commercial Courts' Bench Book. Desk Research Report by Daniel M.

3. Outcome

In July 2015, KAM's relationship with the KMJA led to the signing of an agreement initiating a partnership between the two associations towards the development of such a Bench Book. It was intended to restore the business community's confidence in the Kenyan Courts by providing a simplified one-stop reference point not only for the public on commercial cases but also for Judges, Magistrates, Lawyers and corporates.

Based on the KAM, KMJA planning meeting report³ of September 2015, sections of the guidebook were developed as well as the determination of future relevant business stakeholders (e.g. manufacturers/producers, traders, agents, service industry professionals, and the general public). The Business Court Users' Committee (BCUC) would be a forum where the Judiciary and the private sector could engage in matters of administration of justice across the country. This inter-agency collaboration was a historic milestone in Kenya's judicial system. November 2015 saw the launch of the country's first-ever BCUC, meant to push for better service delivery by the Commercial Division of the Milimani Court that was formed to handle business disputes. Stakeholders who would form the Nairobi BCUC included all Judges and Magistrates in the Commercial & Admiralty Division (CAD) of the High Court and Milimani Commercial Court, business sector associations, the Bar and other NCAJ agencies.

The BCUC was set up under the umbrella of the NCAJ to ensure an accountable, coordinated, efficient, effective and consultative approach in the administration of justice, and improve access to justice and the quality of service delivery by all actors in the justice system among other functions. KAM served as the secretariat to the Milimani BCUC by organising meetings and offering administrative support. The development of the Commercial Bench Book became a deliverable of the BCUC intended to bring about strengthened relationships with the judiciary. KAM leveraged this forum to address their issues. It also strengthened KAM's work to bring out issues within the BCUC forum meetings.

Based on this collaboration and relationship, there was a resolution that there should be a BCUC comprising various heads of leading business associations in the country mostly from manufacturers and producers. KAM identified and brought together these BMO representatives as well as judicial stakeholders to form a partnership and then set up a clear roadmap with a project plan. Through KAM's efforts, a Technical Committee was formed comprising Judges, Magistrates and experts from organisations such as the Kenya Revenue Authority (KRA), Kenya Bureau of Standards (KEBS), Kenya Industrial Property Institute (KIPI) and the Anti-Counterfeit Agency (ACA).

The Technical Committee was responsible for developing the initial structure of the guidebook. There were several meetings with clear deliverables on their progress to ensure proper feedback from all the stakeholders. From January to March 2016, they held three focus group discussions in Naivasha, Nyeri, and Nairobi to collect and review sections of the book, e.g. on automation of commercial division cases and setting up of alternative dispute resolution

³ KMJA and KAM Planning Meeting Report on the Development of the Commercial Bench Book, September 2015. Report by Julie Matheka.

mechanisms (ADR) within the Commercial Division. From April to June 2016, there were another three focus group discussions in Eldoret, Nyeri, and Nakuru where they explored the sections on how to improve the quality of decisions as well as employment and labour relations court rules. The comprehensive reports prepared from the focus group discussions fed into a draft of the guide book. From July to September 2016, core group expert validation workshops compiled the views from all the focus group discussions and followed with a stakeholder validation workshop with members of the business sector.

KAM's main contribution to the development of the guidebook was hosting the different fora and contributing to the industry perspective to commercial law in Kenya. There were six focus group meetings for the committee. With each meeting, KAM ensured that all parties agreed with clear deliverables on the next step. After feedback from the stakeholders, the final draft was released and published in December 2016. KMJA had the Chief Justice, David Maraga, launched the Commercial Law Bench Book⁴ in January 2017.

The Commercial Law Bench Book

The Commercial Law Bench Book (CBB) provides a simplified understanding of the judicial process governing commercial disputes. It is a platform where the needs of law practitioners, the business community and the general public are addressed and is meant to be an introductory guide to anyone who wants to know the court process in commercial matters. The 135-page book contains an explanation of the Kenyan legal system, the life cycle of a case, taxes, Intellectual property, relevant law, and case law. It includes best practices in handling commercial disputes such as illicit trade, customs, standards, and intellectual properties. It is meant to be easily understood by any person regardless of their training or background to have a basic understanding of the laws, judicial practices as well as alternative dispute mechanisms of dealing with commercial disputes in Kenya without losing the meaning in the process. On the other hand, it has also employed footnotes to appeal to Judges, Magistrates, and law practitioners.

The CBB tries to answer all frequently asked questions that generally arise during commercial court proceedings. The bench book is divided into parts as follows:

- Structure of the courts and a summary of court processes from initiation of a suit to execution;
- Relevant information about the trial process including costs, funding, legal privilege and alternative dispute resolution; and
- Stakeholder dispute resolution processes including disputes in tax, intellectual property and disputes with the standards board.
 - KAM supported the training for Judges and Magistrates on the tax sections covered in the CBB. This was done in collaboration with Association of Kenya Insurers (AKI), Kaplan and Stratton Advocates and the KRA. The training workshop in July 2017 for the Judges in the Commercial & Tax Division was jointly organised by KAM, the AKI and Price Waterhouse Coopers (PwC). Milimani Law Courts also joined the

⁴ A publication of the Kenya Magistrates and Judges Association, 2016. Accessed from www.judiciary.go.ke

Commercial Judges for the training, especially in the application of the law and development of jurisprudence. The Judiciary Tax training for the Judges in the Commercial & Tax Division followed. The sessions were very interactive, and the Judges were able to engage the presenters on different aspects of the training. After that KAM had training in August 2017 to sensitise all the Judges and Magistrates in charge of commercial courts on the CBB. The first round of Judges and Magistrates were trained in Nairobi, and the second round came in from different environments.

- The Judiciary Training Institute (JTI) conducted a training workshop for the Court of Appeal Judges in October 2017. The main agenda was discussions around revenue and taxation issues that are related to law in accordance with the tax dispute process covered in the third section of the CBB. KAM has requested and is continuing to push for the CBB to be incorporated in the official Judges and Magistrates' curriculum by the JTI.

The guide also contributes towards achieving the objectives under which the Commercial and Admiralty division (CAD) are set up. This division adjudicates commercial disputes and reduces the transaction costs of justice for the private sector. The Practice Directions relating to case management in the CAD at the High Court are listed.

The judges then adopted the CBB, and it was distributed between the different courts in Kenya. This led to the inclusion of the manufacturers' proposals to the Judiciary for the next annual state of judiciary report⁵.

In early 2018, the International Development Law Organization (IDLO) sponsored KAM together with the NCAJ to recruit a one-year contractual full-time dedicated employee in the judiciary to carry out the duties of the BCUC secretariat. The purpose was to streamline the development of more BCUCs across the country and to oversee the functions of the BCUC Secretariat, including handling logistics, writing reports, and organising meetings. The aim was to have the judiciary own the role and budget going forward. After that, the Commercial and Tax Division was able to establish its Secretariat, which relieved KAM.

KAM participated in an ADR Stakeholder forum which took place on April 2018, organised by the Judiciary ADR Taskforce and the Nairobi Centre for International Arbitration (NCIA). The forum was geared towards sustained economic growth and access to justice. KAM also attended a BCUC forum in October 2018 that provided an avenue for Judges and Magistrates of the Commercial Division to discuss the application of Copyright Law as part of the CBB.

4. Impact

As a result of KAM's advocacy, the Judiciary values their position on issues due to the success of the CBB. Encouragingly, other countries want to emulate Kenya's Commercial law Bench Book. Nigeria and Malawi, for example, heard about the guidebook and requested a copy to share with their judicial officers. The KMJA has been able to influence the judicial officers in Africa. From a BCUC forum early in the year, Judges from Nigeria came to Kenya and were impressed. Their Chief

⁵ The State of the Judiciary and the Administration of Justice Annual Report 2017 - 2018. Accessed from www.judiciary.go.ke

Justice and judicial officers took away copies and stated their intention to replicate it. Indeed, the guide book could be used as a benchmark across the continent. The Malawian Judges' Association also requested for a copy.

On the regional front, KAM plans to start a similar process at the East African Community (EAC) forum level via the East African Magistrates' and Judges' Association (EAMJA) where they plan to share the CBB as a best practice and see how they can also influence the EAC bench force.

Justice Fred Ochieng' was the Presiding Judge of the Commercial Division and also the Head of the core team during the development of the CBB. He explained that he did not have significant data like the judgments that have been passed using the guidebook, whether or not there is improved case-flow management or if there is an increase of the speed at which cases are solved. This was because there was no obligation to keep a record when the Judges or Magistrates made references to the CBB. However, he did acknowledge that the general response from most Judges and Magistrates is that they are deciding cases faster. This may not be wholly attributable to the guide book, as other factors could also make a difference including mediation and automation of court processes but he did think that the guide was a major contributory factor. Moreover, judicial officers, Judges, and Magistrates mention that they are relying more on the guide book.

An independent study on the use of the CBB would explore how it has helped the Judges and Magistrates make better decisions. Keeping metrics and performance indicators such as whether the time taken to resolve cases has been reduced and whether there is greater consistency in judgements would illuminate the guides' impact.

It is assumed that the constant implementation of the Commercial Law Guide Book via training of the judicial officers will lead to timely resolution of disputes, predictability of the application of the law, uniformity in the interpretation of the law to make well-informed decisions. All are factors in building confidence in the judicial system and to increase efficiency and enhance access to justice.

Although the intention of the CBB was to be able to deal with cases more quickly, according to Hon. Elizabeth Tanui, the Deputy Registrar of the Commercial and Tax Division, there is no direct relationship between the CBB and the ADR mechanisms. A secondary detailed assessment of the use of the CBB with regards to the application of ADR mechanisms would be necessary in order to accurately assess whether the use of the CBB by the judicial officers has resulted in reduced pending case backlog. Therefore, it is difficult to ascertain whether access to the benchbook has resulted in more commercial cases being resolved. An in-depth study would be required to determine the attribution of the CBB to reduced time and cost for resolving commercial disputes.

With the CBB, investors now have an understanding of the court process works in Kenya, which could lead to more investment. It also promotes voluntary compliance of parties with resolutions, restores pre-dispute relationships, and builds confidence in speedy resolution of commercial disputes thereby improving the country's attractiveness as an ideal place for foreign direct investments (FDI). Additionally, when innovation and timeliness come together in the justice system, it will foster the confidence of the business community in the legal

system. Moreover, when there is confidence that disputes which may arise will be resolved impartially and efficiently, that will promote investment.

KAM believes that this will lead to fewer delays in judgements and make it possible to influence change in the judicial processes and in the administration of justice for their members, which will lead to reduced losses in commercial cases.

5. Lessons

KAM explained that the reason for their success was due to the project plan that they had prepared jointly with KMJA at the beginning of the project. This ensured that they kept on track of all their milestones when having multiple stakeholder input. They had a clear road map and did not get side-tracked.

KAM mentioned that going forward they will be using pre-baseline surveys from their members and other stakeholders at the beginning of the advocacy journey. This would be followed by post-survey after they have achieved a policy win to determine the impact and also monitor progress in behaviour change during enforcement. This compliance culture would be instilled in current and future advocacy projects.

6. Further work

KAM explained that the biggest challenge during the awareness sessions of the project was that the Judges and Magistrates were relocated every two years. This was mainly due to demand surges in case resolution, together with gaps in terms of judicial officers. This meant that they are continuously training new Judges and Magistrates. Also, Judges and Magistrates do not specialize only in commercial law due to the varying caseload needs in the regional courts. For example, Justice Ochieng', who was leading the Technical Committee, was moved from Nairobi to Kisumu. However, while there, he has already established a Kisumu BCUC and KAM - Kisumu Chapter is a member of the Quarterly Working Group.

The Judges and Magistrates confirmed that they would like to have their Judicial Training Institute (JTI) incorporate the commercial issues into their training curriculum. KAM continues to lobby for the enforcement of the CBB manual into the formal JTI training and is still awaiting a formal copy of their revised curriculum on the same. The JTI has requested KAM to help them figure out which commercial issues to include. KAM is providing support for training on commercial matters and ensure institutionalizing of the same by the JTI. The subsequent training of all Judges and Magistrates (including new Judges) via an updated curriculum will ensure sustainability even as the judiciary keeps on changing Judges' roles and locations.

KAM aims to provide support to develop a guide book on other critical issues for the Judiciary. For example, the Commercial Division Judges have requested another guidebook on the Companies Act⁶ and the Insolvency Act⁷. KAM recently received BAF funding for this ongoing advocacy project and is working alongside

⁶ The Companies Act, 2015. Special Issue Kenya Gazette Supplement No 158 (Act No. 17, September 15 2015). Accessed from www.kenyalaw.org

⁷ The Insolvency Act, 2015. Special Issue Kenya Gazette Supplement No 159 (Act No. 18, September 15 2015). Accessed from www.kenyalaw.org

the Kenya Magistrates' and Judges' Association (KMJA) in the development of a Judicial Guide Book on Companies and Insolvency Law.

KAM also plans to work with PwC to tackle the CBB inclusion, especially for the tax-related cases. They would like to see a framework established to act as a training guide for general trade issues at a national level and hopefully in the EAC.