

Is Law and Technology a Boon or Bane in Kenya?

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Abstract

Prior to the COVID-19 pandemic, Kenya's uptake and incorporation of technology into day-to-day Government services was slow. However, with the "COVID-19 era" that almost brought everything to a halt, there needed to be innovations to facilitate the administration of vital services. The Kenyan Judiciary was quick to identify technology as having the potential to provide a quantum leap in the administration of justice. Technology has proved to be a game changer in judicial service delivery. Adjudication of matters has become time efficient and cost-friendly not only to the Judiciary and legal practitioners but also to legal consumers. Technology has ushered in a new dawn of better management of court records and has transformed the most basic judicial services into electronic ones. All these have enhanced the efficiency and accountability of the Judiciary. Moreover, online dispute resolution mechanisms have been recognized. This has furthered the use of the Internet and technology in other social and economic environments.

However, the incorporation of technology into the legal system in Kenya has also brought about its fair share of challenges. Among these barriers include; the complexity of the Judiciary interface among the Self-Representing Litigants (hereinafter SRLs) and the lack of statutory regulation on the practice of Online Dispute Resolution (ODR). This article traces the introduction of technology in the Kenyan Judicial system, identifies the advancements that have since been made and discusses the barriers against access to justice occasioned by the use of technology. The article then provides practical solutions that can be employed to enhance access to justice by consumers and especially SRLs.

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1.0 Introduction

Access to justice remains an inherently ambiguous concept in Kenya and globally as was acknowledged by the courts in *KA v London Borough of Croydon*.³⁷⁰ International instruments such as the Universal Declaration of Human Rights codify access to justice.³⁷¹ In line with this, article 48 of the Constitution of Kenya 2010 provides that “the state shall ensure access to justice for all persons, and if any fee is required it shall be reasonable and shall not impede access to justice”.³⁷²

Legal technology (hereinafter legal-tech) means the technology used to enhance individual access to justice for consumers and make access to legal functions easier and faster.³⁷³ Traditionally, the formal justice system revolved around physical attendance of court proceedings. Technology sought to destabilize this arrangement by changing the legal practice landscape. For instance, the physical location of courts meant that many Kenyans had to travel long distances to access the judicial system, consequently causing a barrier for poor citizens.³⁷⁴ With the introduction of virtual courts, court users are relieved as they can access court services without having to present themselves physically in the courtrooms.

Consequently, the incorporation of legal tech promises to be a bridge between the majority in need of legal aid and justice. This has been demonstrated by the fact that prior to the introduction of legal tech, the courts were faced with enormous backlogs of cases.³⁷⁵ Among the factors identified for case backlogs included the inadequate number of courts and infrastructure and a weak case management system in the Judiciary.³⁷⁶ With the incorporation of technology,

³⁷⁰ R (KA & NBV) v. London Borough of Croydon (2017) EWHC 1723.

³⁷¹ Universal Declaration of Human Rights (UDHR) General Assembly Resolution 217 (III) A.

³⁷² Article 48 Constitution of Kenya 2010.

³⁷³ <https://legal.vision.com.au/lawtech-legaltech-newlaw/> (Accessed on 17/02/2023).

³⁷⁴ Maya Gainer; Transforming the courts: Judicial sector reforms in Kenya 2011-2015 https://successfultsocieties.princeton.edu/sites/g/files/toruqf5601/files/MG_OGP_Kenya.pdf <accessed on 30/07/2023>.

³⁷⁵ Final report of the taskforce on Judicial reforms; P33, July 2010 Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Final_Report_of_the_Task_Force_on_Judicial_Reforms.pdf <accessed on 30/07/2023>.

³⁷⁶ *ibid*, 33

overdue rulings, and judgments can be monitored and tracked through the Case Tracking System with a view of taking remedial action.³⁷⁷

However, technology alone is not a silver bullet.³⁷⁸ For technology to enhance access to justice, it has to be coupled with an innovation strategy including, *inter alia*; a personalized interface based on individual needs operated by practitioners to assist legal users in navigating the technological aids. It should be able to evaluate the performance and areas for future improvements. Conversely, its adoption has faced a lot of criticism due to its shortcomings like the lack of data privacy and loss of employment due to automation of legal services.

This article seeks to show the position that Kenya is at in the incorporation of legal tech. The article argues that, while the Kenyan judicial system has taken positive steps in ensuring maximum utilization of technology, more target-specific innovations are necessary to maximize access to justice. Furthermore, this article argues that despite the technology being touted as the future, it is in fact the present thus the judicial system has no option but to embrace it.

1.1 A Re-Evaluation of Technology, the Law and Access to Justice in Kenya

The following *obiter dictum* in Boaz Olao J's judgment³⁷⁹ highlights the turmoil faced by legal consumers in seeking access to justice prior to the introduction of the e-filing system.

In the book of LUKE (NIV)... For those members of staff in this court who caused the disappearance of BUNGOMA CHIEF MAGISTRATE'S COURT MISC APPLICATION FILE No 49 of 1999 and BUNGOMA HIGH COURT CIVIL MISC APPLICATION FILE No 155 of 1999, when you finally arrive in heaven you will find the gate closed and when

³⁷⁷ Willy Mutunga, Progress report on the transformation of the Judiciary, October 2011 Available at <http://kenyalaw.org/kenyalawblog/progress-report-on-the-transformation-of-the-judiciary/> <accessed on 30/07/2023>.

³⁷⁸ Technology, Access to Justice and Rule of Law; Is Technology the key to unlocking access to justice innovation? Available at <https://events.lawsociety.org.uk/uploads/files/2f5acdb0-4227-455d-9d55-ec3e6254a5da.pdf> <accessed on 17/02/2023>.

³⁷⁹ Peter Wafula Welimo – A legal representative of the estate of Welimo Mukati v Mukhwana Walucho Kituyi (2020) eKLR

you ask the angel “**sir open the door for us,**” he will reply “**sorry, the keys to the gate are lost like the two files you hid at Bungoma High Court.**”

Manual paperwork in filing court cases led to the loss of court documents and exhibits.³⁸⁰ This slowed down the expediency in serving justice which contravened the constitutional right of legal consumers to a fair and expedient trial.³⁸¹

1.2 Tracing the History of the Introduction of Technology into Judicial Functions in Kenya

The computer revolution was first sighted in Lexis’ 1973 invention of computerized legal searching. The red UBIQ terminal.³⁸² Its primary function was to allow access to case law online. This proved beneficial as it accelerated the practice pace hence enhancing efficiency and time-saving.

The Kenyan Judiciary has faced many challenges such as poor record management, inadequate research material, and poor ICT capacity. In curing these lacunae, the Judiciary identified technology and ICT as having the potential to enhance the administration of justice.³⁸³ Therefore, the Judiciary came up with a four-year strategic plan model that became the roll-out plan for technology in the Judiciary.³⁸⁴

³⁸⁰ Justice denied as number of missing files, exhibits jump 80pc Business Daily <available at> <https://www.businessdailyafrica.com/bd/data-hub/justice-denied-as-number-of-missing-files-exhibits-jump-80pc-2280648> <accessed on 17/02/2023>

³⁸¹ Article 50(2)(e) Constitution of Kenya 2010

³⁸² Rod Friedman Friedmann R.; Back to the future: A history of legal technology

³⁸³ Final report of the task force on Judicial reforms, p59; July 2010 Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Final_Report_of_the_Task_Force_on_Judicial_Reforms.pdf <accessed on 30/07/2023>

³⁸⁴ Leveraging on Digital Technology in Administration of Justice (KIPPRA, July 2021) available at <https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/> <accessed on 30/07/2023>.

1.2.1. The 2005-2008 Strategic Plan on Leveraging on Digital Technology in Administration of Justice

The 2005- 2008 Strategic Plan identified Court Records Management System (CRMS) and Digital Audio Recording (DAR) as key in enhancing service delivery.³⁸⁵ It further laid the ground for the infusion of digital technology in the Judiciary through plans to introduce appropriate ICT facilities within the Court system. This enabled the Judiciary to develop software that could monitor, collect and record judicial opinions delivered in the higher courts.³⁸⁶

Among the first to be positively impacted was the National Council for Law Reporting (NCLR) (Kenya Law), a semi-autonomous state corporation under the Judiciary that is mandated with providing public information. Kenya Law developed a software that monitors, collects and records judicial opinions delivered in the higher courts.³⁸⁷ Previously, the Council (Kenya Law) published reported cases and other related material in hard bound volumes and CD-ROM which was inefficient.³⁸⁸

1.2.2 The 2012-2016 Strategic Plan: The Judicial Transformation Framework

The Strategic Plan on the Judicial Transformation Framework 2012-2016³⁸⁹ identified technology as an enabler of justice and a pillar for the transformation of the Judiciary. Under this Plan, the Judiciary undertook to establish a Short Message Service (SMS) enquiry system to inform members of the public about the status of their cases. Furthermore, it provided for the installation of teleconferencing facilities in courtrooms. In addition, it undertook to ensure

³⁸⁵ Leveraging on Digital Technology in Administration of Justice (KIPPRA, July 2021)/ <https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/> <accessed 17/02/2023>.

³⁸⁶ NCLR Strategic Plan 2009-2012 (NCLR, 2009) http://kenyalaw.org/kl/fileadmin/pdfdownloads/NCLR_Strategic_Plan_2009_2012.pdf <accessed on 17/02/2023>.

³⁸⁷ *ibid* p27.

³⁸⁸ NCLR Strategic Plan 2009-2012 (NCLR, 2009) <available at> http://kenyalaw.org/kl/fileadmin/pdfdownloads/NCLR_Strategic_Plan_2009_2012.pdf <accessed on 30/07/2023>.

³⁸⁹ The 2012-2016 Strategic Plan; Judiciary Transformation Framework <http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryTransformationFramework.pdf> <accessed 17/02/2023>.

digital recording of proceedings and transcription and also establishing an Electronic Case Management System (ECMS).³⁹⁰

Herein, the Judiciary also undertook to establish a paperless Supreme Court. This has been implemented through the computerization of the Judiciary whereby proceedings are recorded electronically.³⁹¹

While the first two strategic plans had identified progressive ICT initiatives for the judicial system, most of these initiatives failed to proceed to implementation.³⁹² This is because there lacked sustainability of these initiatives.³⁹³ The second strategic plan was organized around the Judiciary Transformation Framework 2012-2016 which partly guided the development of several key ICT initiatives.³⁹⁴ Consequently, the first two strategic plans were not a complete success but nonetheless had a great impact in enhancing access to justice.

1.2.3 The 2017-2021 Strategic Plan: Sustaining the Judiciary Transformation

The Strategic Plan on Sustaining the Judiciary Transformation 2017-2021³⁹⁵ sought to ensure that all ICT projects and developments within the Judiciary are aligned with the priorities reached in the ICT Master Plan.³⁹⁶ The main objective of the ICT Master Plan was to develop an Integrated Court Management System

³⁹⁰ *ibid*

³⁹¹ Willy Mutunga, Progress report on the transformation of the Judiciary, October 2011, available at <http://kenyalaw.org/kenyalawblog/progress-report-on-the-transformation-of-the-judiciary/> <accessed on 30/07/2023>.

³⁹² ICT Master Plan 2018—2022: Enabling Justice through ICT <available at> <https://repository.kippra.or.ke/handle/123456789/557> <accessed on 17/02/2023>.

³⁹³ *ibid* at p24.

³⁹⁴ ICT Master Plan 2018—2022: Enabling Justice through ICT.

³⁹⁵ Sustaining the Judiciary Transformation, A service Delivery Agenda; the 2017-2021 Strategic plan <available at> http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf <accessed 17/02/2023>.

³⁹⁶ ICT Master Plan 2018—2022: Enabling Justice through ICT <available at> <https://repository.kippra.or.ke/handle/123456789/557> <accessed on 17/02/2023>.

(ICMS)³⁹⁷ as well as to integrate the e-court systems, the enterprise systems and the communication and collaboration systems.³⁹⁸

Furthermore, the Judiciary envisioned Internet connectivity to all courts by July 2017. Moreover, it resorted to a new and more secure email system for the Judiciary. Additionally, it commenced the pilot project of implementation of various technologies like the judiciary e-diary system and the financial management system.

2.0 Progressive Legislation Promoting Application of Technology in Kenya

The COVID-19 pandemic hastened the embrace of technological solutions in the dispensation of justice.³⁹⁹ It forced the partial abandonment of traditional dispute resolution mechanisms (TDR) due to the directives issued by the World Health Organization (WHO) such as social distancing which impeded physical attendance of court proceedings.⁴⁰⁰ In a bid to observe the strict prevention mechanisms put in place by the Government, the Chief Justice gazetted the Practice Directions on Electronic Case Management under the Civil Procedures Act (2010).⁴⁰¹

This mandated the adoption of relevant technology such as virtual court infrastructure, the e-filing platform, Electronic Case Management Systems and digitization of land services which enabled remote working hence promoting access to justice.⁴⁰² Their adoption has gone a long way to address some of the barriers. The barriers addressed include technical procedures, backlog of cases and furthermore geographical barriers to courts and judicial systems.

³⁹⁷ *ibid* p25

³⁹⁸ ICT Master Plan 2018—2022: Enabling Justice through ICT <available at> <https://repository.kippira.or.ke/handle/123456789/557> <accessed on 17/02/2023>

³⁹⁹ Kariuki Muigua; *Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession*

⁴⁰⁰ *ibid* ; see also Leveraging on Digital Technology in Administration of Justice (KIPPRA, July 2021)

⁴⁰¹ Electronic Case Management Practice Directions, 2020, Gazette Notice number 2357 of 2020, available at <http://kenyalaw.org/kl/index.php?id=10211> <accessed on 30/07/2023>

⁴⁰² Kariuki Muigua; *Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession*

In the land sector, the Land Registration Act (2012) provides for the maintenance of relevant documents in safe and accessible formats in electronic files.⁴⁰³ Section 10 requires that information be provided to the public by electronic means.⁴⁰⁴ Furthermore, the National Land Commission (NLC) and the Ministry of Lands and Physical Planning created the Ardhisasa platform that allows citizens to interact with land information held by the Government.⁴⁰⁵

The Judicial Service Act (2011) provides that “the Judiciary and the Judicial Service Commission should apply modern technology in their operations”.⁴⁰⁶ *The State of Judiciary and Administration of Justice Annual Report (SOJAR) 2021-2022* identifies ICT to have the potential to provide a quantum leap in the administration of justice. It sets a vision of creating an e-Judiciary where all key processes are automated and ICT deployed to promote the efficiency and effectiveness of administrative processes. Interestingly, the SOJAR 2021-2022 reports that 17,146 cases were filed through the e-filing system between 2021-2022 up from 10, 846 cases between 2020-2021. It further shows that 93% of all court stations have been connected to the Case Tracking System (CTS).

The Magistrates’ Courts Act (2015) provides that “the Chief Justice shall make rules such as; automation of Court records, case management, protection and sharing of Court information and the use of Information Communication Technology to enhance effective administration.”⁴⁰⁷

The Evidence Act has also been reviewed to allow for admissibility of evidence that is provided through electronic means.⁴⁰⁸ The Act admits oral evidence adduced through teleconferencing and videoconferencing.⁴⁰⁹ Consequently, witnesses do not need to present themselves in courts to adduce evidence. This has enhanced cost efficiency to litigants as they do not need to travel to the court.

⁴⁰³ Section 9(1) Land Registration Act, No.3 of 2012

⁴⁰⁴ Section 10, Land Registration Act No. 3 of 2012

⁴⁰⁵ What is Ardhisasa, available at <https://ardhisasa.lands.go.ke/home>

⁴⁰⁶ Section 3(1) Judicial Service Act No. 26 of 2011

⁴⁰⁷ Magistrate courts Act No. 26 of 2015

⁴⁰⁸ Sections 106(A-I), Section 78A the Evidence Act

⁴⁰⁹ Section 63A(1), Evidence Act

3.0 The Reaction of the Legal Profession towards Online Legal Services in Kenya

The emergence of online platforms such as M-sheria and uwakili.com has enabled businesses to create simple legal documents such as tenancy agreements and contracts.⁴¹⁰ This enables online provision of legal services making it cheaper and provides easily scalable systems.⁴¹¹ However, these online platforms pose a lot of challenges in the legal sector. Their adoption leaves a lot of questions unanswered. Who regulates these unlicensed legal services? Does the professional competence meet the required threshold? What about price regulation? The court of Missouri in *Janson v. Legalzoom.com, Inc.* held that, “those offering legal services on online platforms are not authorized to practice law and therefore there is a risk of being served in legal matters by incompetent and unreliable persons.”⁴¹²

In Kenya, the digitization of basic legal processes has faced criticism from the Law Society of Kenya (LSK).⁴¹³ Legal technology has threatened the monopoly of lawyers and advocates in the legal market.⁴¹⁴ The legal market is self-regulated through professional bodies and state regulated through instruments such as; the Advocates Act, the Advocates Remuneration Order (ARO) and the Law Society of Kenya Act. Lawyers, therefore, enjoy exclusivity in the provision of certain legal services to the exclusion of other unlicensed service providers.⁴¹⁵

⁴¹⁰ Lynet Igadwah, ‘Tech Innovations to Disrupt Legal Industry’

⁴¹¹ Lynet Igadwah, ‘Tech Innovations to Disrupt Legal Industry’

⁴¹² *Janson v Legalzoom.com, Inc* 802 F Supp 2d 1053(2011)

⁴¹³ Racheal Odhiambo ‘Kenyan lawyers file lawsuit to block the digitization of the Land Registry order’ <<https://bitcoinafrica.io/2018/05/08/kenyan-lawyers-file-lawsuit-to-block-digitisation-land-registry-order-kenya/>>accessed on 06 March 2023

⁴¹⁴ Vellah Kedogo Kigwiru ‘Emerging Technological Innovations In the Legal Profession And Its Impact On the Regulation Of Market Competition; Kenyan Perspective <available at <https://www.readcube.com/articles/10.2139%2Fssrn.3355861> > accessed on 30/07/2023>

⁴¹⁵ Vellah Kedogo Kigwiru ‘Emerging Technological Innovations In the Legal Profession And Its Impact On the Regulation Of Market Competition; Kenyan Perspective <available at <https://www.readcube.com/articles/10.2139%2Fssrn.3355861> > accessed on 05 March 2023

Technological innovations tend to offer services that are cheaper and more affordable to consumers.⁴¹⁶ Therefore, predictably, technological innovations in the legal sector have brought competition to the legal profession.⁴¹⁷

Lawyers' remuneration is regulated by the Advocates Remuneration Order which provides that no advocate is allowed to charge or accept legal fees which is less than what is provided in the Act⁴¹⁸. Nevertheless, remuneration rates for online legal technological innovations and applications lack any regulatory systems. The upshot of this is that the legal consumer is not protected either in terms of cost or the quality of the services provided. Online legal activities lack a firm legislative foothold in Kenya. Therefore, the Consumer Protection Act (2012) may be the closest legislation that regulates online legal activities.⁴¹⁹ Section 31(1) of the Act provides that before a consumer enters into an internet agreement, the supplier shall disclose all prescribed information to the consumers.⁴²⁰

In 2018, the Law Society of Kenya (LSK) condemned the threat posed to the monopoly of lawyers in certain transactions by automation of legal services.⁴²¹ The LSK filed a suit seeking suspension of the process of digitization of land processes by the Ministry of Lands.⁴²² LSK argued that the preparation of conveyancing documents is a preserve of lawyers further stating that the process of integration of the system had been done without consultation with the legal profession.⁴²³ However, the suit was later withdrawn after the Ministry of Lands

⁴¹⁶ Lynet Igwadah 'Tech Innovations to disrupt legal Industry' <available at <https://www.businessdailyafrica.com/corporate/Tech-innovations-to-disrupt-legal-industry/539550-4165426-7g0cqaz/index.html> > accessed on 05 March 2023

⁴¹⁷ *ibid* Vellah Kedogo

⁴¹⁸ Section 3 Advocates (Remuneration) Order, 1962

⁴¹⁹ Consumer Protection Act No 46 of 2012

⁴²⁰ Section 31(1) Consumer Protection Act No 46 of 2012

⁴²¹ Vellah Kedogo Kigwiru 'Emerging Technological Innovations In the Legal Profession And Its Impact On the Regulation Of Market Competition; Kenyan Perspective' <available at <https://www.readcube.com/articles/10.2139%2Fssrn.3355861> > accessed on 30/07/2023>

⁴²² Business Daily 'Lawyers reject the automation of Land deals in court suit' <available at <https://www.businessdailyafrica.com/bd/economy/lawyers-reject-automation-of-land-deals-in-court-suit-2198508> > accessed on 05 March 2023

⁴²³ *ibid*

agreed to have consultations with the LSK.⁴²⁴ This reaction by the LSK is evident that there needs to be clear regulations for the competition brought to the legal profession by online entrants.

4.0 Re-evaluating the Role of Technology and the Internet in Access to Justice in Kenya

Some states have embraced the establishment of legal aid and court websites to promote service delivery to consumers hence a challenge to Kenya. An example in the United States is the Illinois Legal Aid app that provides legal information steadily and fast.⁴²⁵ Likewise, the Contra Costa Superior Court established the My Court Case website⁴²⁶ which helps litigants track their cases virtually.

Furthermore, courts have also increasingly embraced the use of emails. Traditionally, legal communication entailed physical visits to law firms and courts which was time-consuming. Emails do the same job in seconds hence accelerating the process of access to justice. In Kenya, with e-filing, courts are continually allowing litigants to electronically file documents. The e-filing system consists of the following functions; e-case registration, automated fee assessment, e-payment and e-service notification whereby litigants are notified of the progress of their cases via Short Messages Service (SMS).⁴²⁷ The *State of the Judiciary and Administration of Justice Annual Report SOJAR 2021-2022*⁴²⁸ demonstrated that 93% of all court stations have been connected to the Case Tracking System (CTS). The case tracking system is a case management process that is aimed at helping court executives in identifying cases and delays, as well as bottlenecks in the system.⁴²⁹ Additionally, cameras, microphones and computers have been installed in courtrooms. This has not only enhanced transparency and accountability but also reduced the workload of typewriting all the court proceedings.

⁴²⁴ Daily Nation 'LSK, Ministry agree on online land transactions' <available at <https://nation.africa/kenya/news/lsk-ministry-agree-on-online-land-transactions--30008> > accessed on 05 March 2023

⁴²⁵ *Illinois Legal Aid App*, GOOGLE PLAY, <https://play.google.com/store/apps/details?id=org.ilao.LegalAidApp#>

⁴²⁶ *My Court Case*, CONTRA COSTA COUNTY SUPERIOR CT., <http://icms.cccourts.org/tellme>

⁴²⁷ The 2012-2016 Strategic Plan; Judiciary Transformation Framework

⁴²⁸ The State of the Judiciary and Administration of Justice Annual Report (SOJAR) 2021-2022

⁴²⁹ United States Agency for International Development(.gov)

The use of videoconferencing in hearing court cases in Kenya was launched by the former Chief Justice Evans Gicheru in an attempt to deliver swift justice.⁴³⁰ This has since encouraged remote proceedings and hearings which has enhanced access to justice. The most used platforms include; Microsoft Teams, Zoom and Skype. Furthermore, the Judiciary has established the Judicial Information Communication Technology which oversees all ICT matters of the Judiciary. Courtesy of this department, activities such as the digitization of court proceedings has been made possible.⁴³¹

Technological innovations in the judicial sector have also advanced interrogation of witnesses. Credibility and background checks are essential in determining the competence of witnesses. With the ever-changing information on witnesses, keeping track can prove to be a hard task. The use of hardcopy files and systems exacerbated this difficulty. Consequently, software developed in the 2010s such as ExpertiQ has made the process as simple as running the name through the system.⁴³² Furthermore, it is reliable as it is up to date and flexible.

4.1 Challenges arising from the social media presence of the judiciary in Kenya

On a number of occasions, the Judiciary has had to deal with the dissemination of fake news from pseudo-social media accounts purporting to be credible sources speaking on behalf of the Judiciary.⁴³³ This practice weakens the trust of the public towards the Judiciary. For instance, on June 4, 2021, an individual purporting to quote a judge took to twitter that Judge (Prof) Joel Ngugi had commented on judges' appointments. This was later declared by the Judiciary to be fake.⁴³⁴

⁴³⁰ Available at <http://uk.reuters.com/article/2010/10/14/oukin-uk-kenya-judiciary> accessed on 17/02/2023

⁴³¹ Managing Records as Reliable Evidence of ICT/e-Government and Freedom of Information, Kenya Court Case

Study, International Records Management Trust

⁴³² [Impact of Technology on Law: How New Tech Changed the Practice of Law](#)

⁴³³ <https://twitter.com/Kenyajudiciary/status/1400829731923279872> <accessed 17/02/2023> also see <https://twitter.com/Kenyajudiciary/status/1566476416161554435> <accessed 17/02/2023>

⁴³⁴ *Ibid*

One of the principal tenets of the rule of law is judicial independence and impartiality as an element of a fair trial. Several international instruments ratified by Kenya back this principle. These include; Article 10 of the Universal Declaration of Human Rights 1948, and Article 6 of the European Convention on Human Rights 1950. Consequently, judges ought to come to court with an open mind with regard to the matter being adjudicated.

Extrajudicial expression of the judge's opinion on the state of the law may lead the public to believe that their mind is already predisposed prior to the hearing. This undermines public trust. For instance, in *Kyprianou v Cyprus*⁴³⁵, the court held the opinion that a judge's conduct may not only prompt objectively held misgivings as impartiality may also affect her personal conviction. Interestingly, India has ratified the Bangalore Principles of Judicial Conduct where a judge ought to disqualify herself from a case if she has knowledge of evidentiary facts concerning the proceedings.⁴³⁶

4.2 Technology barriers to self-represented litigants

Although technology has ameliorated service delivery and access to justice in Kenya, it has been faced with its fair share of challenges and concerns that arise from its use. These include the following five (5): First, data privacy or information security concerns. Second, computer illiteracy/limited knowledge of the ever-changing technological advancements among the public and the legal players. Third, technological failure in some instances. Fourth credibility concerns in the examination of witnesses. Fifth, high costs occasioned in the maintenance of such technological structures.⁴³⁷

While these challenges may seem to be minor for litigants who are represented by well-trained advocates, it is in fact a huge challenge for *pro se* (self-representing) litigants who lack guidance from trained advocates. Expert legal advice in Kenya

⁴³⁵ Case of *Kyprianou v Cyprus* (Application no. 73979/01), 15 December 2005

⁴³⁶ Bangalore principles of judicial conduct 2002 value 2.1

⁴³⁷ Kariuki Muigua; *Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession*

is very expensive.⁴³⁸ Consequently, legal representation is almost inaccessible to a majority of court users.⁴³⁹ With limited legal knowledge among the people, legal representation therefore becomes crucial.⁴⁴⁰ Article 50(2) (g) of the Constitution provides that an accused person has the right to be represented by an advocate.⁴⁴¹ This right is further buttressed in the Legal Aid Act.⁴⁴²

Relatedly, the e-filing system can be argued to not have been built for the general public but rather intended for use by lawyers and court staff. Therefore, in most occasions, only represented litigants or those who have earlier interacted with such systems benefit from such developments. Self-Representing Litigants (SRLs) are therefore relegated to the traditional paper filing on-site at the court stations.⁴⁴³

SRLs are understandably unfamiliar with court practices. Therefore, they require additional support and attention in navigating through court processes. As stated earlier the Judiciary interface is mainly tailored for tech-savvy legal practitioners and court administrators. Technology should not serve to disadvantage SRLs but should instead be implemented in a way that benefits both litigants with legal representation and SRLs. This will enhance equal access to the courts and administration of justice.⁴⁴⁴

Developers should recognize that while some features may make an application faster and more efficient for those who use the application more frequently, the

⁴³⁸ Justus Nyangaya; *consider the poor in legal representation* / The Standard Feb. 8. 2016/ available at <https://www.standardmedia.co.ke/commentary/article/2000190879/consider-the-poor-in-legal-representation> <accessed on 17/02/2023>

⁴³⁹ Kariuki Muigua 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' P4 <available at <http://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf>> accessed on 05 March 2023

⁴⁴⁰ *Ibid*

⁴⁴¹ Article 50(2) (g) Constitution of Kenya 2010

⁴⁴² Legal Aid Act, 2016

⁴⁴³ Ronald W. Staudt; *All the Wild possibilities: Technology that attacks Barriers to access to Justice*

⁴⁴⁴ James E. Cabral et al; *Using Technology to access to justice/ Harvard Journal of law and Technology* Volume 26 Number 1 Fall 2012

same features may be unfriendly to an unsophisticated user.⁴⁴⁵ Unsophisticated users are best served by an interphase that leads them step-by-step.

Nevertheless the Judiciary has taken positive steps in cushioning SRLs from barriers to access to justice with regard to technological advancement. In ensuring that SRLs too can seamlessly access justice, the Judiciary in partnership with the State Department for ICT seeks to establish judicial service desks in all Huduma (service) Centers.⁴⁴⁶ This project is to be piloted in the financial year 2022/2023 as reported in the SOJAR 2021-2022 report.⁴⁴⁷ The Judiciary service desks are intended to bring digital access to the judiciary system closer to the public. This will not only enhance access to justice for SRLs but also for people lacking easy access to the internet.

5.0 Findings, Conclusions and Recommendations

Incorporation of technology in the legal sphere has positively impacted legal service delivery and administration of justice. There is no doubt that technology can only be improved but not abandoned in the future. Whereas the Judiciary has taken positive steps in improving technological advancements in service delivery, there still remains a lot to be done. Therefore this article provides practical steps that can be employed by the judiciary and the legal profession to enhance inclusivity in service delivery. These steps include the following five: user-friendliness of websites, traditional access, education and support, securing private information and regulating the market for online services.

5.1 Enhance user-friendliness in judicial websites and network interface

Applications, websites and interfaces used by the public and judicial players should be personalized to make them more user-friendly. The websites should not only be made to serve the tech-savvy and well-trained advocates and judicial officers. The larger public who lack ICT sophistication should also be catered for.

⁴⁴⁵ *Ibid*

⁴⁴⁶ The State of the Judiciary and the Administration of Justice Annual Report 2021-2022

⁴⁴⁷ The State of the Judiciary and the Administration of Justice Annual Report 2021-2022

This could be achieved through the creation of another user interface in the Judiciary e-filing system. The e-filing platform only offers two interfaces; one for the public and advocates and the other to cater for the access of these files by the court staff. Court staff and judges receive adequate training on using this interface. Advocates too receive training from their respective firms. On the other hand, Self-Representing Litigants (SRLs) receive very little or no civic training. This paper suggests that another interface be formed that serves the same function as the one used by advocates while filing. However, this new interface should take the litigant step by step through the e-filing process.

5.2 Preserving traditional access

Among the barriers facing full technology transition in courts is the lack of internet connectivity and penetration in all parts of Kenya. Therefore, there still exists a huge underserved population. Preserving the traditional physical paper-based court processes will thus ensure that such people lacking access to the Internet can still access justice. While technological advancements in courts should be encouraged, they should not be mandated. This will further enhance inclusivity in the administration of justice.

5.3 Providing education and support

Technology is always changing and upgrading. To keep up with the constant software updates occasioned by the maintenance of the system, regular civic education will play a crucial role. Such education should be conducted regularly. It should target the entire public just as much as it is conducted for judicial officers and advocates. To achieve this, the Judiciary may partner with legal aid providers and institutions such as the Law Society of Kenya (LSK). These institutions together with others offering pro bono legal services may educate the public on the use of legal technology. On the other hand, the LSK may include training in legal technology for advocates in its Continuing Professional Development (CPD) training to increase the technical capacity of lawyers in the use of technology.⁴⁴⁸

⁴⁴⁸ Kariuki Muigua; *Embracing Technology for enhanced efficiency and Access to Justice in the legal profession*

5.4 Securing litigants' and court users' private information

By facilitating easy access to information by the public, one may also be opening doors to the infringement of individual privacy. While technology has enhanced access to information, it has also exposed individuals to vices such as hacking and leaking of private information. This can be done by acquiring information related to public websites such as the e-filing platform. Furthermore, personal information risks being exposed which may pose a security risk.

However, Kenyan courts have been fast in responding to such risks to protect litigants' privacy. For instance, information regarding family suits are only shared with the individual parties and not included in the public cause lists. Moreover, while reporting, the actual names of the litigants are withheld and instead initials are used. In addition, exact details as pertains to real property are also withheld while reporting the case. This boosts the confidence of litigants when they know that their privacy is respected.

However, the judiciary can enhance the security of litigants' information by fool proofing their system to ensure that no unauthorized third party can access, edit or delete information keyed into the system. This will mitigate identity theft from the system. Most importantly, litigants must be informed about the existence of such risks and educated on ways of mitigating them.⁴⁴⁹

5.5 Regulation of the market for online legal service providers

So as to protect legal consumers and to regulate the market, the law should clearly stipulate which tasks are reserved and unreserved for lawyers.⁴⁵⁰ In view of the existing legal technological innovations, there is a need to narrow down the scope of reserved tasks for lawyers vis- a- vis online legal service providers in the market. Furthermore, remuneration of the online service providers should be regulated so as to enhance fair competition with lawyers and promote consumer protection. The Advocates Act should be amended to allow unqualified persons,

⁴⁴⁹ James E Cabral et al; *Using technology to enhance access to justice /Harvard journal of law and technology /Harvard journal of Law & Technology* Volume 26, Number 1 Fall 2012

⁴⁵⁰ Vellah Kedogo Kigwiru 'Emerging Technological Innovations In the Legal Profession And Its Impact On the Regulation Of Market Competition; Kenyan Perspective <available at <https://www.readcube.com/articles/10.2139%2Fssrn.3355861> > accessed on 05 March 2023

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who include online platforms, to perform certain functions that are prohibited under Section 34 of the Act.⁴⁵¹ This will help distinguish between reserved and unreserved tasks for lawyers.

⁴⁵¹ Section 34 Advocates Act CAP 16

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