

Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice

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Abstract

The paper critically discusses the role of Information Technology in the legal profession in Kenya. It presents a case for the adoption of IT in the legal profession as a tool of access to justice. In the wake of the challenges caused by the COVID-19 pandemic, the paper argues that the legal profession which has hitherto been conservative in nature can longer continue to shun technology. Technology is increasingly taking centre stage in our social, political and economic lives and the legal profession risks being overtaken by events unless it embraces change. The paper discusses some of the successes and challenges faced in adopting IT in the legal profession in Kenya. It then suggests solutions aimed at enhanced adoption of IT in the legal profession in Kenya as a tool of access to justice.

1. Introduction

The legal profession is being fundamentally transformed by forces at work in the world.¹ This transformation is being driven by a riptide of 21st century social and economic trends, the ascendancy of information technology, the globalization of economic activity, the blurring of differences between professions and sectors and the increasing integration of knowledge.² At the centre of this transformation has been the adoption of Information and Communication technology.

Information and communication technology (ICT) is an umbrella term that covers all advanced technologies in manipulating and communicating

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¹ Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer*, May 2011 available at <https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm> (accessed on 23/04/2021)

² Ibid

information.³ The term is sometimes used in preference to information technology (IT), particularly in education and government. ICT and IT encompass all media, to record information (magnetic disk/tape, optical disks (CD/DVD), flash memory; technology for broadcasting information - radio, television; and technology for communicating through voice and sound or images - microphone, camera, loudspeaker, and telephone to cellular phones. It includes the wide varieties of computing hardware (PCs, servers, mainframes, networked storage).⁴ ICT has been hailed as having the capability of promoting equality, empowering marginalised groups by providing accessible and affordable information and facilitating development.

Adoption of IT in the legal profession has often been faced by a myriad of challenges. Advocates have, often, lagged behind in adopting new technology due to the conservative nature of the legal profession. However, this is no longer tenable in this era of Information Technology. Emerging technologies bring with them substantial changes that threaten current social, political and economic orders and the often conservative legal profession is not immune. To this effect, it has been argued that:

...lawyers who are unwilling to change their working practices and extend their range of services will in the coming years struggle to survive. Meanwhile those who embrace new technologies and novel ways of sourcing legal work are likely to trade successfully for many years yet, even when they are not occupied with the law jobs that most law schools currently anticipate for their graduates.⁵

The demand by corporate clients that lawyers update their systems to run equally and be compatible with the client's in-house system for ease in communication have seen increased interest among lawyers in the potential of

³ Lubbe. S & Singh.S., From Conception to Demise: Implications for Users of Information Systems in Changing a Local Parastatal Educational Institution in KwaZulu-Natal, South Africa, available at <https://www.igi-global.com/chapter/conception-demise-implications-users-information/21495> (accessed on 21/04/2021)

⁴ Ibid

⁵ Susskind. R., The End of Lawyers? Rethinking the Nature of Legal Services (Oxford University 2008)

ICT as a management tool in law firms especially among big law firms.⁶ This has necessitated the adoption of information and communication technology (ICT) in handling legal matters and management of client affairs.⁷

The outbreak of the Coronavirus disease (COVID-19) pandemic has unsettled not only the global economy but also many professions and radically transformed their organization culture.⁸ The legal practice in many parts of the world including Kenya has majorly been by way of physical attendance in courtrooms by judges and magistrates, advocates and witnesses for in person hearing of cases.⁹ However, this is no longer tenable in the prevailing circumstances due to COVID 19 containment measures such as lockdowns and physical distancing. The need for adoption of IT in the legal profession has never been more urgent.

The paper thus seeks to critically discuss the adoption of legal technology in Kenya. Legal Technology (Legal Tech) has been defined as the use of technology and software to aid in the provision of legal services.¹⁰ It discusses the progress made towards adoption of legal technology in Kenya and suggests reforms towards effective embracing of IT in the legal profession in Kenya.

2. Legal Framework on Legal Technology in Kenya

The Constitution of Kenya, 2010 enshrines the right of access to justice and mandates the state to ensure that this right is enjoyed by all persons.¹¹ Use of IT can enhance the right of access to justice by ensuring that citizens have

⁶ Susskind, R. E. (1996), *The Future of Law: Facing the challenges of Information Technology*, 2nd ed., Oxford, Oxford University Press.

⁷ Ibid

⁸ Muigua, K., *Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice*, available at <http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf> (accessed on 21/04/2021)

⁹ Ibid

¹⁰ What Is Legal Technology And How Is It Changing Our Industry?' (*The Lawyer Portal*, 29 January 2019) available at <https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry> (accessed on 21/04/2021)

¹¹ Constitution of Kenya, 2010, Article 48, Government Printer, Nairobi.

increased access to information necessary for effective and efficient decision making on legal issues.¹²

The Judicial Service Act requires the Judiciary and the Judiciary Service Commission to apply modern technology in their operations.¹³ The Act further requires the Judiciary in exercise of the powers or the performance of the functions conferred by the Act to have the technical competence to ensure that the requirements of the judicial process are fulfilled.¹⁴

The Magistrates' Courts Act allows the Chief Justice to make rules for the effective organization and administration of the Magistrates' Court.¹⁵ Such rules may provide for *automation of Court records, case management, protection and sharing of Court information and the use of information communication technology*.¹⁶

3. Progress Made towards Adoption of it in the Legal Profession in Kenya

3.1 Virtual Court Sessions

The disruptive impact of the COVID 19 pandemic has forced the judiciary to enhance the uptake of IT to ensure that the wheels of justice continue rolling. On 15th March 2020, the Chief Justice of the Republic of Kenya announced a scale down of court activities throughout the country due to the concerns created by the outbreak of the pandemic.¹⁷ Courts were seen possible hotspots for the spread of the pandemic owing to the large crowds of persons including advocates, court staff and litigants who are normally part of the day to day court operations.¹⁸ The ensuing period has seen digital upscaling of court operations through measures such virtual hearings and video conferencing .

¹² International Development Law Organisation: IDLO in Kenya: Access to Justice, available at <https://www.idlo.int/idlo-kenya-access-justice> (accessed on 21/04/2021)

¹³ Judicial Service Act, No. 1 of 2011, S 3 (I), Government Printer, Nairobi.

¹⁴ Ibid, S 4 (a)

¹⁵ Magistrates' Courts Act, No. 26 of 2015, S 20 (1), Government Printer, Nairobi.

¹⁶ Ibid

¹⁷ Judiciary, 'Press Statement: Administrative and Contingency Management Plan to Mitigate COVID-19 in Kenya's Justice Sector' available at <https://www.judiciary.go.ke/press-statement-administrative-and-contingency-management-plan-to-mitigate-covid-19-in-kenyas-justice-sector> (accessed on 22/04/2021)

¹⁸ Ibid

The judiciary has also enhanced its electronic case management system through systems and processes including electronic case filing (e-filing); e-service of documents and electronic delivery of rulings and judgments.¹⁹ Whereas these technologies have majorly been adopted as a result of COVID-19 pandemic, there is need for their continued use post COVID-19 in order to ensure efficient access to justice.

3.2 Access to Legal Information Through E-Systems

The legal profession has made progress towards ensuring access to legal information through electronic systems. The National Council for Law Reporting Act establishes the National Council for Law Reporting whose functions include inter alia preparation and publication of the reports to be known as the Kenya Law Reports, which shall contain judgments, rulings and opinions of the superior courts of record.²⁰ Pursuant to this mandate, the Council has developed a website known as Kenya Law through which it continuously provides legal information including judgments and rulings of superior courts under the theme ‘where legal information is public knowledge.’²¹ The website also provides a full catalogue of the Laws of Kenya including Acts of Parliament, Treaties, Legal Notices, Practice Notes and Bills. The website further provides updates on day-to-day operations of courts and Tribunals in Kenya through cause lists posted daily. This has been a major step in enhancing access to legal information in Kenya through the use of technology.

Further, there has been emergence of online platforms providing consumers with legal information that was traditionally the preserve of lawyers in their physical law firms. These include the Uwakili.com which provides online legal services to businesses by enabling them create simple legal documents including wills, contracts and tenancy agreements.²² Further, there are

¹⁹Kenya Law: Electronic Case Management Practice Directions, available at 2020*<http://kenyalaw.org/kl/index.php?id=10211> (accessed on 22/04/2021)

²⁰ National Council For Law Reporting Act, No. 11 of 1994, S 3 (a)

²¹ Kenya Law, <http://kenyalaw.org/kl/>, (accessed on 22/04/2021)

²² Igadwah. L., ‘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 22/04/2021)

computer applications such as M-Sheria which offer legal services by SMS to clients thus enhancing access to justice.²³

Law firms in Kenya have also made significant strides towards ensuring an online presence. Most firms have websites which provide basic information about them and the services they offer. Further, law firms have adopted electronic means of communication such as emails through which they communicate with each other and provide regular updates to clients.

3.3 Digitization and Automation of Legal Services

There has been progress towards digitization and automation of legal services in Kenya. The e-Citizen platform has resulted in automation of legal services that were once done exclusively by lawyers.²⁴ The platform provides access to services such as registration of businesses and companies which can be accessed by any person.²⁵

Further, the Ministry of Lands has made attempts towards land registries across the country. In its report the Ministry pointed out to poor land records management and observed that it had accumulated massive land information records dating back to over 100 years and further that the current system is beset with inadequate storage which hampers cross-referencing of records and constrains the orderly and timely updating of the databases in use.²⁶ The Ministry thus proposed an e-conveyancing system that entails land conveyance workflow automation through online platforms/portals and online payments.²⁷ However, this move towards automation of land services was

²³ HiiL, 'M-Sheria; Mobile law in Kenya', available at <http://www.hiil.org/project/M-Sheria-Mobile-law-in-Kenya> (accessed on 22/04/2021)

²⁴ Kigwiru, V., 'Emerging Technological Innovations in the Legal Profession and its Impact on the Regulation of Market Competition: Kenyan Perspective' available at <https://poseidon01.ssrn.com/delivery.php?ID=584095096086108097087112070005001127032069023053024057123008000026070121029098124025037027038012044049023030011123090115015123119094030029067023094004115087094029110038038064024111102065087071085089009126097030079021096094064093070004094092084004002021&EXT=pdf&INDEX=TRUE> (accessed on 22/04/2021)

²⁵ e Citizen, <https://www.ecitizen.go.ke/> (accessed on 22/04/2021)

²⁶ Ministry of Lands and Physical Planning, Report on Electronic Land Transactions, Registration, Conveyancing and Other Related Activities under the Land Registration Act, 2012, the Land Act, 2012 and the Community Land Act, 2016, available at <https://lands.go.ke/wp-content/uploads/2020/03/Final-Report-Signed.pdf> (accessed on 22/04/2021)

²⁷ Ibid

opposed by the Law Society of Kenya which argued that there were no consultations and further that the move undermined the integrity of the land registry. This reaction by the Law Society of Kenya highlights the challenges likely to be faced towards adoption of legal technology in Kenya due to the monopoly enjoyed by lawyers in the provision of these services.

Law firms are also increasingly adopting ICT infrastructure to streamline their activities through the use of computers. This has in turn facilitated information and data storage, file retrieval and case management.

4. Challenges Facing The Adoption of Legal Technology in Kenya

4.1 Information Security Concerns

One of the greatest challenges associated with technology is the issue of data privacy.²⁸ IT systems are subject to malpractices such as hacking and malware attacks that can compromise the integrity of information or even delete such information. This challenge is especially great when it comes to legal processes or documents that require extraordinary care in order to prevent breach of data.²⁹ In case of hearings conducted by videoconferencing, the log-in details may be accessed by third parties who can gain unauthorised accesses to the proceedings thus raising security concerns especially in cases where privacy is paramount.³⁰

4.2 Credibility Concerns

Adoption of IT processes in the legal profession can raise credibility concerns especially in relation to virtual hearings. One of the advantages of physical hearings is that the court may be able to discern the credibility of a witness by

²⁸ Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (*Law.com*) <https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521> (accessed on 22/04/2021)

²⁹ Muigua. K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' available at <http://kmco.co.ke/wp-content/uploads/2021/04/Embracing-Science-and-Technology-in-legal-education-for-Efficiency-and-Enhanced-Access-to-Justice-Kariuki-Muigua-April-2021.pdf> (accessed on 23/04/2021)

³⁰ Muigua. K., 'Virtual Arbitration Amidst COVID-19: Efficacy and Checklist for Best Practices' available at <http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf> (accessed on 23/04/2021)

observing his/her demeanour, body language, facial expression and tone. However, virtual hearings raise the concern that the loss of in-person observation will impair the court's ability to assess the credibility and strength of the evidence during witness examination.³¹ There are also concerns that a witness may be coached off camera during the examination process thus hindering the credibility of evidence presented before the court.

4.3 Inadequate Capacity to acquire and maintain IT infrastructure

The availability and uptake of IT infrastructure in the legal profession is determined by the ability of various players to acquire these tools. In relation to law firms, it may not be possible for small law firms to effectively acquire IT systems such as computer hardware, software, networks and even personnel to offer the necessary technical assistance. The costs associated with IT systems may result in some parties or advocates being locked away from the process³². Adoption of IT would normally require strong internet connection and electronic gadgets such as laptops that may not be within the reach of everyone especially small law firms and organizations.

Adoption of IT means that an organization should be highly committed to meet costs such as installation and regular service such as formatting of computer systems, re-configuration, replacement and other technical operations. The cost of acquiring and maintenance is therefore a limiting factor in adoption of IT by players in the legal profession such as small law firms.

4.4 Inadequate Training

Training is a critical element in the uptake of IT by the legal profession in Kenya. Training is any process by which the attitudes, skills and abilities of employees to perform specific objectives other than education which is wider

³¹ Walker.J., Virtual Hearings: An Arbitrator's Perspective, available at <https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf> (accessed on 23/04/2021)

³² Muigua. K., & Ombati. J., Achieving Expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings, available at <http://kmco.co.ke/wp-content/uploads/2018/12/Achieving-expeditious-Justice-Harnessing-Technology-for-Cost-Effective-Arbitral-Proceedings-17th-December-2018.pdf> (accessed on 23/04/2021)

in scope and more general in purpose.³³ Training increases the technical know-how required for efficient performance of a particular job or task.³⁴

Use of IT infrastructure requires technical knowhow that may not be within the reach of most advocates. This creates a knowledge and skills gap that hinders effective use of IT systems in the legal profession. An example can be seen from the virtual court sessions that were adopted as a result of the outbreak of the COVID-19 pandemic where some advocates have had challenges to log in to the sessions or even address the court as a result of limited technological know-how.

5. Way Forward: Enhancing The Adoption of it in the Legal Profession in Kenya

5.1 Adoption of IT Infrastructure

While progress has been made towards adoption of IT infrastructure, there is need for more concerted efforts in order to ensure optimal use of IT in the legal profession. Adoption of IT depends on availability of computer hardware, software as well as personnel. Players in the legal profession especially advocates should ensure that law firms have adequate computer hardware, software, networks and even configuration platforms to ensure adoption of IT systems.

The uncertainties created by the COVID-19 pandemic should be a wake up call and accelerate efforts towards adoption of IT in the legal profession in Kenya. The pandemic has not only changed the way lawyers view their approach to legal work but has also created an opportunity for them to weigh and reconsider how law firms will operate in the near future.³⁵ Law firms should consider improving their operations through effective networking and virtual offices in order to bridge physical boundaries. Lawyers can utilise IT

³³ Susskind, R. E. (1996), *The Future of Law: Facing the challenges of Information Technology*, 2nd ed., Oxford, Oxford University Press, Op Cit

³⁴ Ibid

³⁵ Muigua, K., *Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice*, available at <http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf> (accessed on 21/04/2021)

to render legal services from the comfort of their homes or offices regardless of the geographical location or distance.

5.2 Training

E-literacy training imparts knowledge and technical skills to operate computer systems. Players in the legal profession including advocates, judges and magistrates should partner with the system designers and developers to offer end user support which also encompasses training on system aspects in order to enhance their technical know-how. These training sessions can be facilitated by the respective bodies such as the Law Society of Kenya and the Judiciary Training Institute in order to ensure that their members are well equipped with technical skills in IT.

The judiciary should also facilitate training sessions on the e-filing system adopted in the wake of the COVID-19 pandemic to ensure smooth utilisation of the platform by lawyers in filing court documents and pleadings. This will in turn translate into efficient access to justice through the application of these skills.

5.3 Information Security Protection

One of the key challenges arising from the adoption IT in the legal profession is information security. There is need to enhance information protection and ensure data protection. There is need for players such as law firms to invest in data protection infrastructure to guarantee the safety and integrity of their data and prevent malicious attacks and data breaches.³⁶

6.0 Conclusion

It is evident that emerging technologies will continue to compete with legal professions in delivering legal services that were once done exclusively by lawyers. While the profession has hitherto been associated with conservatism characterized with its slow pace in adopting change, this position is no longer tenable. The COVID-19 pandemic has demonstrated the increasing role that technology will play in our lives in the wake of reduced human interaction. The legal profession risks being overtaken by technology unless concerted

³⁶ International Chamber of Commerce (ICC), 'ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' available at <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/> (accessed on 23/04/2021)

efforts are taken to embrace change. There is need for enhanced adoption of Information Technology in the legal profession in Kenya as a tool of access to justice.

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