Chambers
AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Litigation 2023

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Kenya: Law & Practice

Noella Lubano, Eva Mukami, Radhika Arora and Paul Kamara
Oraro & Company Advocates

practiceguides.chambers.com

KENYA

Law and Practice

Contributed by:
Noella Lubano, Eva Mukami, Radhika Arora and Paul Kamara
Oraro & Company Advocates see p.22



Contents

1. General p.4
1.1 General Characteristics of the Legal System p.4
1.2 Court System p.4
1.3 Court Filings and Proceedings p.4
1.4 Legal Representation in Court p.4

2. Litigation Funding p.5
2.1 Third-Party Litigation Funding p.5
2.2 Third-Party Funding: Lawsuits p.5
2.3 Third-Party Funding for Plaintiff and Defendant p.5
2.4 Minimum and Maximum Amounts of Third-Party Funding p.5
2.5 Types of Costs Considered Under Third-Party Funding p.5
2.6 Contingency Fees p.5
2.7 Time Limit for Obtaining Third-Party Funding p.5

3. Initiating a Lawsuit p.5
3.1 Rules on Pre-action Conduct p.5
3.2 Statutes of Limitations p.5
3.3 Jurisdictional Requirements for a Defendant p.5
3.4 Initial Complaint p.6
3.5 Rules of Service p.6
3.6 Failure to Respond p.6
3.7 Representative or Collective Actions p.7
3.8 Requirements for Cost Estimate p.7

4. Pre-trial Proceedings p.7
4.1 Interim Applications/Motions p.7
4.2 Early Judgment Applications p.7
4.3 Dispositive Motions p.7
4.4 Requirements for Interested Parties to Join a Lawsuit p.8
4.5 Applications for Security for Defendant's Costs p.8
4.6 Costs of Interim Applications/Motions p.8
4.7 Application/Motion Timeframe p.8

5. Discovery p.8
5.1 Discovery and Civil Cases p.8
5.2 Discovery and Third Parties p.9
5.3 Discovery in This Jurisdiction p.9
5.4 Alternatives to Discovery Mechanisms p.9
5.5 Legal Privilege p.9
5.6 Rules Disallowing Disclosure of a Document p.9

6. Injunctive Relief p.10
6.1 Circumstances of Injunctive Relief p.10
6.2 Arrangements for Obtaining Urgent Injunctive Relief p.10
6.3 Availability of Injunctive Relief on an Ex Parte Basis p.10
6.4 Liability for Damages for the Applicant p.10
6.5 Respondent's Worldwide Assets and Injunctive Relief p.11
6.6 Third Parties and Injunctive Relief p.11
6.7 Consequences of a Respondent's Non-compliance p.11

7. Trials and Hearings p.11
7.1 Trial Proceedings p.11
7.2 Case Management Hearings p.11
7.3 Jury Trials in Civil Cases p.12
7.4 Rules That Govern Admission of Evidence p.12
7.5 Expert Testimony p.12
7.6 Extent to Which Hearings Are Open to the Public p.12
7.7 Level of Intervention by a Judge p.12
7.8 General Timeframes for Proceedings p.12

8. Settlement p.13
8.1 Court Approval p.13
8.2 Settlement of Lawsuits and Confidentiality p.13
8.3 Enforcement of Settlement Agreements p.13
8.4 Setting Aside Settlement Agreements p.13

9. Damages and Judgment p.13
9.1 Awards Available to the Successful Litigant p.13
9.2 Rules Regarding Damages p.14
9.3 Pre- and Post-judgment Interest p.14
9.4 Enforcement Mechanisms of a Domestic Judgment p.15
9.5 Enforcement of a Judgment From a Foreign Country p.15

10. Appeal p.16
10.1 Levels of Appeal or Review to a Litigation p.16
10.2 Rules Concerning Appeals of Judgments p.16
10.3 Procedure for Taking an Appeal p.16
10.4 Issues Considered by the Appeal Court at an Appeal p.17
10.5 Court-Imposed Conditions on Granting an Appeal p.17
10.6 Powers of the Appellate Court After an Appeal Hearing p.17

11. Costs p.17
11.1 Responsibility for Paying the Costs of Litigation p.17
11.2 Factors Considered When Awarding Costs p.18
11.3 Interest Awarded on Costs p.18

12. Alternative Dispute Resolution (ADR) p.19
12.1 Views of ADR Within the Country p.19
12.2 ADR Within the Legal System p.19
12.3 ADR Institutions p.19

13. Arbitration p.20
13.1 Laws Regarding the Conduct of Arbitration p.20
13.2 Subject Matters Not Referred to Arbitration p.20
13.3 Circumstances to Challenge an Arbitral Award p.21
13.4 Procedure for Enforcing Domestic and Foreign Arbitration p.21

14. Outlook and COVID-19 p.21
14.1 Proposals for Dispute Resolution Reform p.21
14.2 Impact of COVID-19 p.21

Contributed by: Noella Lubano, Eva Mukami, Radhika Arora and Paul Kamara,
Oraro & Company Advocates

1. General

1.1 General Characteristics of the Legal System

In the pre-colonial period, Kenya's legal system was predominantly customary law, which developed from customs and practices of people. With the advent of colonialism, the customary legal system was replaced by common law that was based on legal precedents established by courts. Kenya therefore follows an adversarial model, in which cases are determined on the basis of pleadings, written submissions or oral arguments.

Generally, judges would allow litigants to prepare written submissions and make oral arguments on the same matter. However, there are instances when a judge may determine a dispute by way of written submissions only, especially if the dispute is not complex.

1.2 Court System

All courts in Kenya are national courts and are classified in the following manner.

Superior Courts

Superior courts comprise:

- the Supreme Court;
- the High Court;
- the courts of appeal; and
- specialised courts (namely, the Environment and Land Court and the Employment and Labour Relations Court).

The High Court is further categorised into various divisions, namely:

- the Anti-Corruption and Economic Crimes Division;
- the Commercial and Admiralty Division;
- the Civil Division;
- the Constitutional and Human Rights Division;
- the Criminal Division;
- the Family Division; and
- the Judicial Review Division.

Subordinate Courts

Subordinate courts comprise:

- magistrates' courts;
- Kadhi courts;
- courts martial;
- specialised tribunals; and
- small claims courts.

1.3 Court Filings and Proceedings

Court filings are not open to the public unless one is a party to the proceedings. There are procedures to protect the court filings from public disclosure, as a person must demonstrate to the court registry that they are either a party to the litigation or have express consent from a litigant to access court documents. With the introduction of the e-filing system portal, individuals can only access the portal with their portal account credentials.

Court proceedings are generally open to the public unless the court finds it necessary to conduct the proceedings in camera to protect:

- the privacy of the victim or a child; or
- the interests of national security.

1.4 Legal Representation in Court

Legal representatives must be admitted to the bar as an Advocate of the High Court of Kenya and must take out a valid practising certificate in order to appear in court. Foreign lawyers can conduct cases in Kenyan courts pursuant to the power invested in the Attorney General to admit foreign lawyers to practise in Kenya.

2. Litigation Funding

2.1 Third-Party Litigation Funding

The applicable rules do not permit champerty, which is an agreement to divide litigation proceeds between a litigant and a third party who is financially supporting the litigant.

2.2 Third-Party Funding: Lawsuits

See **2.1 Third-Party Litigation Funding**.

2.3 Third-Party Funding for Plaintiff and Defendant

See **2.1 Third-Party Litigation Funding**.

2.4 Minimum and Maximum Amounts of Third-Party Funding

See **2.1 Third-Party Litigation Funding**.

2.5 Types of Costs Considered Under Third-Party Funding

See **2.1 Third-Party Litigation Funding**.

2.6 Contingency Fees

Further to **2.1 Third-Party Litigation Funding**, contingent fee arrangements are also prohibited under Kenyan law (per Rule 78 of the Code of Standard of Professional Practice and Ethical Conduct 2016).

2.7 Time Limit for Obtaining Third-Party Funding

See **2.1 Third-Party Litigation Funding**.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

There are no court-imposed rules regarding pre-action conduct. Nonetheless, a party must serve the potential defendant with a demand letter prior to initiating proceedings against said defendant. Failure to serve a demand letter may affect costs only if the defendant admits the case without filing a defence. The defendant, however, does not need to respond to the demand letter.

3.2 Statutes of Limitations

Limitation periods in civil suits in Kenya are governed by Chapter 22 of the Limitation of Actions Act. The limitation periods are triggered by the type of claim being asserted and the time that the cause of action arose. Nonetheless, the court may extend the limitation period in cases of disability or fraud, mistake of law, and ignorance of material fact.

The following statutes of limitations apply to civil suits.

- Actions founded on contract must be brought within six years of the date of breach. An action founded on tort must not be brought more than three years after the date on which the cause of action accrued.
- An action for the recovery of land may not be brought by any person after the expiration of 12 years from the date that the cause of action arose.
- An action to recover a principal sum of money secured by a mortgage on land or movable property or recover the proceeds of the sale of land must be commenced within 12 months of the date that the right to receive the money accrued.
- An action by a beneficiary to recover trust property or in respect of breach of trust must be commenced within six years of the date on which the trust was breached.

3.3 Jurisdictional Requirements for a Defendant

For a defendant to be subject to a suit in Kenya, the court will first consider whether the suit

has been filed in a court in the area where the defendant resides or carries on business. Courts may assert jurisdiction if the suit is filed where the cause of action arises. However, if the subject matter relates to a property situated in Kenya, then the suit must be filed in a court local to the property.

Jurisdiction may differ between the courts in terms of pecuniary jurisdiction. Civil matters concerning amounts in excess of KES20 million should be considered by the High Court, whereas the following limits apply to matters handled by the subordinate courts:

- chief magistrate - subject matter does not exceed KES20 million;
- senior principal magistrate – subject matter does not exceed KES15 million;
- principal magistrate - subject matter does not exceed KES10 million;
- senior resident magistrate – subject matter does not exceed KES7 million; and
- resident magistrate – subject matter does not exceed KES5 million.

3.4 Initial Complaint

Suits in Kenya are initiated by way of a plaint unless the Civil Procedure Rules 2010 (the "Civil Procedure Rules") and the applicable laws instruct a party to commence a suit by other documents (eg, originating summons or petition). The plaint must be accompanied by a verifying affidavit and evidence in support thereof may be produced through a witness statement.

A party may amend its pleadings once before the pleadings are closed, which is 14 days after service of the reply or defence to counterclaim.

3.5 Rules of Service

The rules of service in Kenya are governed by the Civil Procedure Rules. When a suit is filed, summons shall be issued to the defendant to appear within the time specified. Every summons is prepared by the plaintiff and filed with the plaint.

The summons to enter appearance are signed by the judge and sealed with the seal of the court within 30 days of filing a suit. If the plaintiff acts in person, the summons shall be served by a process server appointed by the court. However, if the plaintiff is represented by an advocate, service of the summons will be effected through the plaintiff's advocate's chambers.

A party may be sued outside Kenya. Under Order 5 Rule 21 of the Civil Procedure Rules, service of summons outside Kenya may be allowed where any person outside Kenya is a necessary or proper party to a suit brought against some other person duly served in Kenya.

Where leave is given to serve notice of summons in a foreign country, the notice shall be sealed with the seal of the High Court for use outside Kenya and then forwarded by the registrar to the Foreign Affairs Cabinet Secretary, together with:

- a copy thereof translated into the language of the country in which service is to be effected; and
- with a request for the further transmission of said copy through diplomatic channels to the government of the country in which leave to serve the summons has been given.

3.6 Failure to Respond

Where the defendant fails to enter appearance and respond to the lawsuit, and the plaintiff still wishes to proceed with said lawsuit, the court

may enter a judgment in default of appearance against the defendant. The plaintiff is required to file an affidavit of service unless the summons were served by the process server appointed by the court.

3.7 Representative or Collective Actions

Representative suits are permitted in Kenya pursuant to Order 1 Rule 8(1) of the Civil Procedure Rules, which provides that where numerous persons have the same interest in any proceedings against the same defendant, the proceedings may be commenced by or against any one of them as representing all of them.

One must demonstrate a common interest in order to file a representative suit. Participation in representative suits is on an opt-in basis, in that any person on whose behalf the representative suit is prosecuted is encouraged to apply to court to be made a party.

3.8 Requirements for Cost Estimate

There is no mandatory requirement in Kenya to provide clients with a cost estimate of the potential litigation. However, as regards legal fees, Chapter 16 of the Advocate's Act sets the minimum fee chargeable to a client and allows the advocate and the client to agree on the amount of the advocate's instruction fee or their fees for appearing in court (or both).

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

Courts in Kenya have a wide range of powers to make interim orders upon an appropriate application being filed, including injunctive relief, conservatory orders, an order for accounts, and witness summons. These orders need not be limited to case management issues.

4.2 Early Judgment Applications

There are three primary ways in which a party can obtain early judgment in a matter:

- judgment in default of appearance (as discussed in **3.6 Failure to Respond**);
- summary judgment; and
- judgment on admission.

The summary judgment procedure is available for a liquidated demand with or without interest and where the defendant enters appearance but fails to file a defence. An application for summary judgment must be supported by an affidavit verifying the cause of action and any amount claimed.

Judgment on admission is available at any stage of a suit if an admission of facts has been made on the pleadings. Upon such admission, a party may apply to court for such judgment without waiting for the determination of other issues.

It is also possible to file an application for the other party's case to be struck out before trial or substantive hearing of the claim. This application must be supported by an affidavit setting out the facts in support of the application to strike out. However, where a party seeks to rely on pure points of law (eg, limitation of action and jurisdictional issues) then such a motion may also be made by way of a preliminary objection.

4.3 Dispositive Motions

The defendant/respondent can have a claim disposed of before trial by claiming:

- the court does not have jurisdiction to hear the claim;
- an abuse of the process of the court;

- lack of any cause of action against the defendant and/or no relief has been sought against the defendant; and
- the claim is premature, as a result of failing to comply with certain pre-conditions (eg, submitting the claim to a specialised tribunal before proceeding to court).

4.4 Requirements for Interested Parties to Join a Lawsuit

Parties not named as a plaintiff or defendant may be joined in a lawsuit as interested parties by the plaintiff/claimant at the time of drawing their claim or, subsequently, through a formal application that must be supported by an affidavit.

In the case of Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others, Supreme Court Petition (Application) No 12 of 2013, the Supreme Court set out the following applicable principles when determining an application to be joined as an interested party.

- The party must have a personal interest in the matter and this must be clearly identifiable.
- The prejudice to be suffered by the intended interested party in case of non-joinder.
- The applicant must set out the case it intends to make before the court, and the relevance thereof.

4.5 Applications for Security for Defendant's Costs

Under Order 26 Rule 1 of the Civil Procedure Rules, a defendant may apply for the costs they expect to incur in defending the claim and the court has discretionary power to order or refuse security for said costs.

4.6 Costs of Interim Applications/ Motions

Generally "costs follow the event", with the result that a successful party will be awarded the costs of prosecuting or defending the interim application. This is a discretionary power, however, and there are instances where judges may choose to subsume any decision on costs into their final judgment.

4.7 Application/Motion Timeframe

There are no pre-defined timelines for a court to deal with an application. This is ordinarily determined by:

- the complexity of the application;
- the number of pending applications at the time the application in question is filed;
- the number of parties responding to the application; and
- whether an oral hearing is needed to dispense with the application.

Parties can ask the court for an application to be dealt with on an urgent basis by filing a Certificate of Urgency.

5. Discovery

5.1 Discovery and Civil Cases

Discovery is available in Kenya. Under Section 22 of the Civil Procedure Act 2010 (the "Civil Procedure Act"), the court may – of its own accord or upon the application of a party – make an order relating to:

- the delivery and answering of interrogatories;
- the admission of documents and facts;
- the discovery, inspection and production of documents; or

- other material objects producible as evidence.

The court may also issue summonses requiring the attendance of a particular person to either give evidence or produce documents.

The documents sought to be discovered must be shown to be relevant. Relevance is determined based on the pleading, so as to avoid discovery being used as a fishing expedition.

The discovery process may be administered by either the litigant or the judge, as necessary.

5.2 Discovery and Third Parties

A party may obtain discovery from a third party not named as a plaintiff, defendant or witness. Courts have wide discretion to subpoena the attendance of a third party to appear in court with a view to elucidate the truth.

A party seeking the attendance of such a third party is required make an application to court seeking to summons the third party. The applicant must pay enough money into court to cover the expenses of the third party. The court may then issue summons specifying the time and place that the third party is required to attend and whether such attendance is for giving evidence or producing documents. The summons shall then be served upon the third party within a sufficient period of time (as specified in the summons).

5.3 Discovery in This Jurisdiction

A party to a suit must disclose and produce all the documents they intend to rely on, as per the manner in which the pleadings have been particularised. Although there is no set list or express provision of the documents that parties must disclose, courts have generally adopted the view that all relevant documents must be disclosed - irrespective of whether or not they are confidential - unless the defence of privilege applies.

5.4 Alternatives to Discovery Mechanisms

As outlined in **5.1 Discovery and Civil Cases**, the Kenyan legal system provides for discovery mechanisms.

5.5 Legal Privilege

Legal privilege is recognised in Kenya under Section 134 of Chapter 80 of the Evidence Act. precludes any advocate from disclosing any communication made to them, stating the contents or condition of any document to which they have been exposed, or disclosing any advice given by the advocate to the client during the course of their employment - unless the advocate has obtained express consent from the client.

Legal privilege is not absolute, however, as it does not apply to communication made in furtherance of any illegal purpose or where the advocate has offered himself as a witness.

There is no distinction between external and in-house counsel as far as legal privilege is concerned. Legal privilege belongs to the client and must be protected, provided the counsel is qualified as an advocate.

5.6 Rules Disallowing Disclosure of a Document

Apart from legal privilege, a party may be excused from disclosing a document on account of other forms of privileges (eg, privilege of court for judges or magistrates, marital communications privilege, privilege relating to official records and official communications). A party may also object to disclosure if the document is

confidential and disclosure of such would lead to violation of a third party's right to privacy and confidentiality.

The court will not order a party to disclose a document if said document is not in their possession and the party cannot produce it. Additionally, and as already set out in **5.1 Discovery and Civil Cases**, the court will not allow an application for disclosure if the document sought to be disclosed is irrelevant.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

Under the Kenyan legal system, there are two different types of injunctions:

- positive injunctions, which direct a party to do something; and
- negative injunctions, which restrain a party from doing something.

A positive injunction is a mandatory injunction (restorative injunction). It requires the party to whom it is directed to undo a certain act and restore the situation and the parties involved status quo ante.

There are numerous negative injunctions, including:

- prohibitory injunctions, which requires a party to refrain from doing a specified act;
- perpetual injunctions, which are ordered at the time of the final judgment, granted within the judgment that ultimately disposes of the underlying suit, and therefore must always be in the form of a final relief;
- interlocutory injunctions, which compel or prevent a party from doing certain acts pending the final determination of the case (eg, a freezing order); and
- quia timet injunctions, which are precautionary measures and acts intended to prevent a harm or wrong that is anticipated.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

Injunctive relief can be obtained quickly by filing the application for injunctive relief under a Certificate of Urgency. The various courts have an assigned duty judge who deals with the day's certificates (provided they are filed before noon). Where merited, the duty judge will certify an application as urgent and dispense with directions on the hearing and determination of the underlying claim. Directions for such certificates are accessible 24 hours a day via the Kenyan Judiciary's e-filing portal.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

Injunctive relief can be obtained on an ex parte basis and will ordinarily subsist pending the hearing and determination of the underlying application. However, in ex parte proceedings, the applicant is required to make full and frank disclosure to the court of all known facts and information.

6.4 Liability for Damages for the Applicant

Upon an appropriate application being made by the respondent, an applicant applying for injunctive relief may be required to provide the respondent with security for damages that may be suffered by the respondent if:

- the respondent eventually discharges the injunction; or

- the court finds that the ex parte injunctive relief granted to the applicant was not merited.

By the same token, a respondent who suffers damages owing to the subsistence of an injunction that is eventually discharged is entitled to seek damages.

6.5 Respondent's Worldwide Assets and Injunctive Relief

Kenyan courts will grant injunctive relief against assets of the respondent that are within Kenyan jurisdiction in order to prevent the respondent from dealing with such assets pending the hearing and determination of either the application for injunctive relief or the underlying claim. It is doubtful, however, that Kenyan courts have the jurisdiction to grant injunctive relief over any assets of the respondent that are situated in other countries.

6.6 Third Parties and Injunctive Relief

Although Kenyan courts are generally reluctant to grant injunctive relief against third parties, such relief can be obtained if:

- said third parties hold assets on behalf of the respondent against whom the freezing order is directed; or
- it would be necessary to ensure that the respondent does not dissipate assets through the conduit of third parties.

6.7 Consequences of a Respondent's Non-compliance

A party who fails to comply with the terms of an injunction is deemed to be in contempt of court and, upon an application being made, the court in question may impose appropriate sanctions (including a fine and jail time).

7. Trials and Hearings

7.1 Trial Proceedings

Depending on the nature and complexity of the matter, judges have discretion to decide the procedure for trial. However, most judges are receptive to a hybrid system that encompasses consideration of oral arguments, examination of witnesses/experts at hearing/trial, and preparation of written arguments. Nonetheless, it is common for judges to prefer to conduct the hearing of interlocutory applications entirely by written documents.

7.2 Case Management Hearings

As mentioned in **7.1 Trial Proceedings**, judges prefer to conduct the hearing of urgent interim motions or applications by way of written documents but in some limited cases allow parties to make oral arguments if necessary.

Any suit filed in Kenyan courts must undergo a case management conference with a view to:

- promoting expeditious disposal of cases;
- affording the parties an opportunity to settle the case; and
- dealing with pre-trial applications at first instance or formulating a timetable to deal with them as the court may deem fit.

Prior to the hearing of the suit and 14 days after the close of pleadings, the plaintiff must complete a case management checklist detailing – inter alia – all the pleadings that have been filed and the date on which each of the pleadings was filed. The plaintiff is thereafter required to serve the checklist upon the other party within 14 days of the filing it and invite said party to meet at the registry to prepare the matter for case management conference.

Any party intending to ask for an order at the case management conference (for instance, request to amend pleadings, request for particulars and request for interrogatories) or request that the matter be referred to ADR is required to serve the other party with said request no later than seven days before the scheduled case management conference.

At the case management conference, the judge shall complete a case management checklist and the parties will sign the completed case management checklist, which will be certified by the judge or deputy registrar. Thereafter, the judge or deputy registrar may give orders (including allocating time within which the orders are to be complied with) and fix a date on which the parties must appear before court to confirm compliance.

If the parties are able to resolve the suit through ADR, the judge shall adopt the resolution of the parties as an order of the court. However, should the parties fail to settle the matter, the judge may proceed to prepare the matter for hearing.

7.3 Jury Trials in Civil Cases

Jury trials are not available in Kenya. Please see **1.1 General Characteristics of the Legal System**.

7.4 Rules That Govern Admission of Evidence

Chapter 80 of the Evidence Act provides that all evidence is relevant, as long as it proves the existence or non-existence of a fact at issue, and can thus be produced at trial.

7.5 Expert Testimony

Expert testimony is permitted at trial and parties may introduce expert testimony that is needed in order to evaluate those aspects of the dispute that by their nature require specialised or scientific knowledge, as long as it is provided by someone specially skilled in the relevant field of science or art.

This is no rule restricting courts from seeking expert testimony. This, however, does not necessarily mean that the expert testimony will trump all other evidence and bind the court.

7.6 Extent to Which Hearings Are Open to the Public

Please refer to **1.3 Court Filings and Proceedings**. Evidence of witnesses is taken down in writing by the judge or electronically recorded and, when completed, signed by the judge. The transcript thereof is then made available to the parties to the suit upon request, normally by way of a letter addressed to the deputy registrar.

7.7 Level of Intervention by a Judge

During the course of a hearing, a judge may intervene to seek clarification or ensure fair hearing rules are upheld. It is common in Kenya for a judge to give a ruling at the hearing, especially following an oral application by a party. However, care must be taken to ensure that the ruling does not dispense with the merits of the main suit, which is reserved for trial and a judgment delivered at a later date.

7.8 General Timeframes for Proceedings

It is difficult to determine the applicable timeframe as several factors may influence the timelines, including the court's diary, the availability of the judge, and adjournment by parties for various reasons. Nonetheless, where a party has filed a plaint, the plaintiff is required to serve a copy of the plaint to all the defendants within 12 months, following which the defendant is required to enter appearance within 14 days

of service and file their defence or counterclaim within 14 days after entering appearance.

Thereafter, the plaintiff will then respond to the counterclaim or defence within 14 days of service after which pleadings will be deemed closed. Following the close of pleadings, parties are then required to complete and file a pre-trial questionnaire within 10 days and convene a case conference within 30 days. The court will then issue a hearing date dependent on the court's diary and availability of parties. However, once the trial has been concluded, the court will proceed to deliver its judgment within 60 days.

Nonetheless, the Civil Procedure Rules imply that it is possible for the court to resolve a matter within a given timeframe. The Rules provide that matters that can be concluded within 180 days of the pre-trial directions are categorised as fast track. On the other hand, matters that may be concluded within 240 days of the date of the pre-trial directions are classified as multi-track.

8. Settlement

8.1 Court Approval

Parties to a lawsuit are at liberty to settle the suit in the manner they deem fit and need not seek court approval prior to settling a matter.

8.2 Settlement of Lawsuits and Confidentiality

Settlement agreements can remain confidential, depending on the matter in which parties choose to settle the suit. If parties opt to record a consent judgment as an order of the court, then it is likely that the agreement will form part of the court record and thus a publicly accessible document. However, settlement agreements can be kept confidential by executing them outside the court and thereafter withdrawing the case.

8.3 Enforcement of Settlement Agreements

As stated in **8.1 Court Approval** and **8.2 Settlement of Lawsuits and Confidentiality**, most settlements are effected through either recording a consent judgment as an order of the court or through the execution of a settlement agreement. In such circumstances, the terms of the settlement will be binding and any breach thereof will amount to a breach of contract, thereby enabling the counterparty to bring an action for breach of contract.

8.4 Setting Aside Settlement Agreements

It is settled law that a consent judgment or order has contractual effect and can only be set side on grounds that would justify setting a contract aside or if certain conditions remain unfulfilled.

9. Damages and Judgment

9.1 Awards Available to the Successful Litigant

Depending on the nature of the claim and the prayers sought, various remedies may be awarded to a successful litigant. In constitutional claim, for instance, a successful litigant may be awarded:

- a declaration of rights;
- an injunction;
- a conservatory order;
- a declaration of invalidity of any law;
- compensation; and
- an order of judicial review.

In a contractual claim, a successful litigant may be awarded specific damages, specific performance, rescission and restitution.

In a judicial review claim, a successful litigant may be awarded:

- an order directing the authority to take a given decision;
- an order declaring the rights of the parties in relation to the taking of the decision;
- an order restraining the authority from acting or continuing to act in breach of duty imposed upon it;
- an order directing the authority to give reasons for its action or decision;
- an order prohibiting the authority from acting in a particular manner;
- an order setting aside the decision or action of the authority and remitting the matter for reconsideration by the authority;
- an order granting a temporary interdict or other temporary relief; or
- an order awarding costs or other monetary compensation in appropriate cases.

9.2 Rules Regarding Damages

The assessment of general damages is at the discretion of the judge. However, the judge will be guided by previous precedents in deciding the quantum of general damages to be awarded. An appellate court will refrain from disturbing the quantum of general damages awarded by the trial judge unless it is demonstrated by the appellant that the trial judge took irrelevant factors into account when assessing the damage or that the amount assessed is inordinately low.

General damages cannot be awarded for beach of contract. Breach of a contractual duty would lead to compensation for specific loss suffered and not general damages. As regards specific damages, they must be specifically pleaded and proved before they can be awarded.

Punitive damages will only be awarded in exceptional circumstances. In a claim challenging the action/conduct of the government, for example, the court will only award punitive damages if it is demonstrated that:

- the conduct/action complained of is oppressive, arbitrary or unconstitutional; or
- the defendant calculated that its conduct or action would result in a profit that may exceed the compensation payable to the successful claimant.

9.3 Pre- and Post-judgment Interest

It is possible for a party to be awarded pre-judgment interest in Kenya. Courts have observed that the parameters of awarding pre-judgment interest are twofold, namely:

- the plaintiff should be compensated for being deprived of their money from the time they incurred their loss; and
- the defendant wrongly withheld the plaintiff's money, therefore interest should run from the date the defendant ought reasonably to have settled the claim.

Nonetheless, the court will generally award interest on special damages for the period from the time of filing the suit to the date of the decree (as per Section 26 of the Civil Procedure Act).

A party may collect interest after the judgment has been entered. Quite apart from special damages, interest on general damages and punitive damages is ordinarily assessed from the date of the judgment as that is the date when the defendant's liability to pay damages begins.

(See Shariff Salim & Another vs Malundu Kikava (1989) eKLR).

The authors are not aware of any statutory limits to the award of pre- and post-judgment interest, apart from the express terms of Section 26 of the Civil Procedure Act and the various cases discussed earlier. Section 26 provides that the court must set the interest at such a rate as it deems reasonable on the aggregate sum and, should the decree be silent on the applicable interest, then the court is deemed to have ordered interest at 6% per annum.

9.4 Enforcement Mechanisms of a Domestic Judgment

A successful party - normally referred to as the decree holder – may pursue various mechanisms to enjoy the benefits of a domestic judgment, such as applying for:

- delivery of any property;
- attachment and sale;
- sale without attachment;
- garnishee order;
- arrest and detention; or
- appointment of a receiver.

9.5 Enforcement of a Judgment From a Foreign Country

The law and the procedure relating to the enforcement of foreign judgments is provided for in the Foreign Judgment (Reciprocal Enforcement) Act. The Act provides for the enforcement in Kenya of judgments delivered in countries that accord reciprocal treatment to judgments delivered in Kenya.

For a foreign judgment to be enforced in Kenya under the Act, said judgment must have been made by a designated court and must be a judgment to which the Act applies. The Act defines a designated court as a superior court of a reciprocating country that is either is a commonwealth country or a country declared by the Foreign Affairs Cabinet Secretary as such.

A party intending to enforce a foreign judgment is required to apply to the High Court, within six years of said judgment, to have the foreign judgment registered. The application must be accompanied by:

- a certificate issued from the foreign court under its seal and signed by the judge or registrar;
- a certified or duly authenticated copy of the foreign judgment, which - if not in English - must be certified by a notary public on the registrar of the foreign court; and
- an affidavit stating, inter alia, that the judgment:
  - (a) has not been satisfied;
  - (b) can be enforced by execution in the foreign country; and
  - (c) can be registered in its entirety or in respect of certain parts of its provisions.

If the application was made ex parte, the court may instruct a summons to be issued or, in the absence of such direction, notice of the registration of the judgment on the application will be served to the other party. If the court is satisfied with the evidence produced, it may order that the judgment be registered – with the effect that the registered judgment shall have the same force and effect as the judgment of the High Court entered at the date of registration.

10. Appeal

10.1 Levels of Appeal or Review to a Litigation

The various levels of appeal are determined by the hierarchy of Kenyan courts and tribunals as follows:

- the decisions of specialised tribunals, as well as the Chief Magistrate's Court, are appealable to the High Court;
- the decisions of the High Court are appealable to the Court of Appeal;
- the decisions of the Court of Appeal, if touching on a fundamental constitutional right, are appealable to the Supreme Court; and
- the decisions of the Supreme Court are appealable to the East African Court of Appeal.

Most courts have the power to review their own judgments and rulings. However, the scope of review is limited to:

- the discovery of new and important evidence that was not within the knowledge of the applicant at the time when the order was made;
- mistake or error apparent from the record;
- need for clarification; and
- any other sufficient reason analogous to the above-mentioned points.

10.2 Rules Concerning Appeals of Judgments

Parties do not require leave to lodge an appeal from the High Court to the Court of Appeal from a final judgment or decree, with such leave primarily being necessary where parties wish to lodge an appeal against an interim ruling. Order 43, Rule 1 of the Civil Procedure Rules lists the interim orders from which an appeal shall lie as of right, and this includes inter alia amendment of pleadings, setting aside judgments in default of appearance, security for costs, enlargement of time, and judicial review orders.

Not all judgments of the Court of Appeal are appealable to the Supreme Court. An appeal shall only lie as a matter of right to the Supreme Court where it is brought pursuant to Article 163(4)(a) of the Kenyan Constitution and it deals with the interpretation or application of the Constitution. However, in any other case, a matter is only appealable to the Supreme Court where either the Court of Appeal or the Supreme Court certifies that the matter is one of general public importance, the determination of which will affect and transcend the parties to the dispute.

Finally, it is also important to note that parties opting to review a decision cannot also exercise their right of appeal from the same decision.

10.3 Procedure for Taking an Appeal

Where a party requires leave to lodge an appeal against a ruling or judgment, such application may be made orally before the court that delivered the decision. Where the counterparty opposes the application, the court will ordinarily direct the applicant to lodge a formal written application, which can then be responded to and dispensed with by way of written submissions.

Where no leave to appeal is required, however, a party aggrieved with a decision of a lower court ordinarily has 14 days from the date of the decision to file a notice of appeal and 60 days from the date of the decision to lodge its appeal. If a party is unable to lodge its appeal within 60 days, it may apply for an extension of time.

10.4 Issues Considered by the Appeal Court at an Appeal

An appeal to the Court of Appeal from the trial court is by way of retrial and the principles upon which the Court of Appeal acts in such an appeal are well settled. The appellate court must reconsider the evidence and draw its own conclusions, although it may give itself leeway owing to the fact that it has neither seen nor heard the witnesses and should make due allowance in this regard.

Further, Kneller & Hancox Ag JJA stated in the Court of Appeal in Mkube v Nyamuro (1983) KLR, 403-415 that a court sitting on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence (or on a misapprehension of the evidence) or the judge is shown demonstrably to have acted on wrong principles in reaching their conclusion.

The appellate court does not generally allow the production of new evidence at appeal stage, although it has allowed the admission of new evidence that was not before the superior courts over the years. For this discretion to be exercised, however, there must be sufficient reason established for receipt of such further evidence and it must be especially shown that the new evidence:

- could not have been obtained with reasonable diligence for use at the trial; and
- was of such weight that it was likely to ultimately affect the court's decision.

10.5 Court-Imposed Conditions on Granting an Appeal

Subject to an application being made by either party, the court being appealed to may direct that the appeal be subject to certain conditions - for example, payment into court of security for costs by the appealing party or, in some cases, even security for the claimed sum.

10.6 Powers of the Appellate Court After an Appeal Hearing

Pursuant to Section 78(1) of the Civil Procedure Act, and subject to such conditions and limitations as may be prescribed by any other statute, an appellate court shall have the power to:

- determine a case finally;
- remand a case back to the lower court;
- frame issues and refer them back to the lower court for trial;
- take additional evidence, or require additional evidence to be taken by the lower court; and/or
- order a new trial.

In most cases, the appellate court has the same powers and performs nearly the same duties as those conferred and imposed on courts of original jurisdiction when it comes to suits instituted before said courts (as per Section 78(2) of the Civil Procedure Act).

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

Payment of filing fees is a prerequisite to the commencement of an action, with the onus being on the plaintiff. However, each party is responsible for paying their attorney's fees, which may be exclusive or inclusive of VAT and expenses/disbursement, depending on the agreement entered into between the client and the attorney.

The general rule is that costs ought to follow the event, unless there are reasons to justify court's departure (eg, public interest litigation). Although

the award of costs is at the discretion of courts, courts will generally award costs to the successful party – with the effect that the losing party shall pay the cost of litigation.

A successful party, if awarded costs of the suit, shall be compensated for all the expenses incurred while litigating the suit, including the instruction fees for their attorney, top-up fees, court attendances, disbursements and court filing fees. Generally, the successful party will have to draw a bill of costs, which is a document containing an itemised list of the costs incurred by the successful party during litigation. The bill must be drawn in accordance with the Advocates Remuneration Order 2014, which prescribes the amount to be charged in both contentious and non-contentious matters.

Various mechanisms exist for a party to challenge the amount of cost to be drawn. If an aggrieved party is dissatisfied with the award of costs by the court, they may apply for a review of the judgment by the court that awarded costs. Notably, the scope of review is limited to the following grounds:

- discovery of new evidence, which - despite exercise of due diligence - was not within the knowledge of the applicant;
- mistake or error apparent from the record; or
- for any other sufficient reasons.

Whatever the grounds, there is a requirement that the application is made without unreasonable delay.

An aggrieved party may also appeal the award of costs by the trial court to the superior courts. However, as the award of costs is a matter of discretion, the superior courts will be hesitant to interfere with the award unless it is demonstrated at the appeal that the discretion was exercised injudiciously or based on wrong principles.

Finally, where the parties are not aggrieved with the award of costs but rather the quantum payable as drawn by the successful party in the bill of costs, the aggrieved party may challenge the bill of costs by preparing and filing written submissions before the taxing officer who shall hear and decide the matter.

11.2 Factors Considered When Awarding Costs

In exercising the discretion to award costs, courts will generally consider the following factors:

- the conduct of the parties;
- the subject of litigation;
- the circumstances which led to the institution of the proceedings;
- the events that eventually led to their termination;
- the stage at which the proceedings were terminated;
- the manner in which they were terminated; and
- the relationship between the parties.

11.3 Interest Awarded on Costs

Pursuant to Section 27(2) of the Civil Procedure Act, courts have the power to award interest on costs. The proviso states that interest on costs is awarded at any rate but must not exceed 14% per annum and must be calculated on a simple interest and not on compounded basis.

Although courts have wide discretion to award interest on costs, it is not a rule of thumb that a successful party who has been awarded costs must also be awarded interest on those costs. However, where interest on costs is awarded,

the successful party will be entitled to such from the date of the judgment or order.

12. Alternative Dispute Resolution (ADR)

12.1 Views of ADR Within the Country

In Kenya, ADR mechanisms are recognised and encouraged through Article 159(2)(c) of the Constitution of Kenya 2010.

The most popular ADR methods in Kenya are mediation and arbitration, the use of which is highly encouraged in order to maintain existing commercial relationships between the parties (among other things).

Arbitral proceedings are governed by the Arbitration Act No 4 1995 (the "Arbitration Act"), although there is no Act of Parliament regulating mediation. Generally, however, mediation is regulated by rules created by institutions, such as:

- the Nairobi Centre for International Arbitration (Mediation) Rules 2015, which govern mediations conducted in that institution; and
- the Mediation (Pilot Project) Rules 2015, which govern court-annexed mediation.

12.2 ADR Within the Legal System

The Kenyan legal system, to a large extent, promotes ADR. As mentioned at **12.1 Views of ADR Within the Country**, Article 19(2)(c) of the Kenyan Constitution recognises ADR mechanisms as one of the principles guiding the exercise of judicial authority by courts and tribunals.

However, the referral of disputes to ADR mechanisms must be with the consent of the parties, owing to the consensual nature of the methods. Therefore, the said proviso does not make it mandatory for the court to refer parties to ADR. It is only under Order 46 of the Civil Procedure Rules that the court can by suo moto or on the application of parties to refer the matter to ADR. In all other instances, the parties must consent to such referral.

The only remedy available for parties when a court has unreasonably refused to refer their matter to ADR is to appeal against such a decision.

12.3 ADR Institutions

The institutions offering and promoting ADR in Kenya are well organised.

One of the institutions is the Chartered Institute of Arbitrators, which is a leading professional membership organisation representing the interests of ADR practitioners' worldwide. The Kenyan chapter of the institution is headed by a chairperson. It also has the committee and the secretariat to assist in dispensing its functions. The institution has different levels of membership (ie, student, associate, member, fellow and chartered arbitrator).

The other institution is the Nairobi Centre for International Arbitration, which was established by the Nairobi Centre for International Arbitration Act No 26 2013 (the "NCIA Act") mainly to promote international commercial arbitration. It is administered by a board of directors and a management secretariat.

The next institution is the Strathmore Dispute Resolution Centre, which was established in 2012 with the aim of promoting mediation as an efficient, sustainable and cost-effective dispute resolution mechanism in Kenya and East Africa.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitration

Arbitration in Kenya is regulated under Article 159(2)(c) of the Constitution of Kenya 2010 and the Arbitration Act, the Arbitration Rules and the NCIA Act.

The substantive law on arbitration in Kenya is the Arbitration Act, which governs both domestic and international arbitration, as well as providing for:

- the extent of court involvement in arbitration;
- the setting aside of arbitral awards; and
- the recognition and enforcement of arbitral awards.

The NCIA Act, on the other hand, simply established the Nairobi Centre for International Arbitration and an Arbitral Court - the bodies of which only have jurisdiction with regard to disputes referred to them by the parties involved in said dispute.

Section 36 of the Arbitration Act provides that a domestic arbitral award shall be recognised as binding upon application in writing to the High Court and notice thereof must be given to the losing party. The Act further provides that an international arbitral award shall be recognised as binding and enforceable in accordance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). Essentially, for an international arbitral award to be recognised, it must be awarded in a signatory state to the New York Convention.

Courts in Kenya will neither recognise nor enforce an arbitral award if it is proved that:

- a party to the arbitration agreement was incapacitated in some way;
- the arbitration agreement is not valid under the law to which the parties have subjected it or under the law of the state in which the arbitral award was made;
- the party against whom the award was invoked was not notified of the appointment of an arbitrator of the arbitral proceedings;
- the arbitral award concerns disputes not contemplated by the arbitration agreement or contains decisions on matters beyond the scope of reference to arbitration;
- the arbitral tribunal was not composed in accordance with the agreement of the parties or the law of the state where the arbitration took place;
- the award has not yet become binding;
- the award has been set aside;
- the award has been suspended by a court of the state in which or under the law of which it was made;
- the award was induced or affected by fraud, bribery, corruption or undue influence;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
- the recognition or enforcement of the award would be against public policy in Kenya.

13.2 Subject Matters Not Referred to Arbitration

There is no exhaustive list of matters that are not arbitrable in Kenya. However, Kenyan courts have considered some matters to be matters that may not be referred to arbitration – for example, the rights and liabilities arising from criminal offences and insolvency and winding-up proceedings.

13.3 Circumstances to Challenge an Arbitral Award

In the event that a party is dissatisfied with the arbitral award, said party may apply to set it aside on any of the grounds set out under Section 35 of the Arbitration Act (and as detailed in **13.1 Laws Regarding the Conduct of Arbitration**).

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

A party wishing to enforce a domestic award is required to apply to the High Court by way of chambers summons. The application shall be accompanied by an original arbitral award (or a duly certified copy thereof) and the original arbitration agreement (or a duly certified copy thereof). If the arbitral award or arbitration agreement is not in English, the party shall furnish a duly certified English-language translation thereof.

On the other hand, the enforcement of international arbitral awards is regulated under Section 36(2) of the Arbitration Act, as well as the New York Convention. Article III of the New York Convention states that an award issued by a contracting state can generally be enforced in any other contracting state. Both the Arbitration Act and the New York Convention provide that the application shall make an application to the High Court for enforcement, which must be accompanied by an original arbitral award (or a duly certified copy thereof) and the original arbitration agreement (or a duly certified copy thereof). If the arbitral award or arbitration agreement is not made in English, the party shall furnish a duly certified English-language translation thereof.

14. Outlook and COVID-19

14.1 Proposals for Dispute Resolution Reform

There are currently no proposed reforms in relation to dispute resolution.

14.2 Impact of COVID-19

The impact of the COVID-19 pandemic led the Judiciary of Kenya to embrace technology as a means of dispensing justice. The authors witnessed court activities being handled electronically, ranging from e-filing and videoconference hearings to the delivery of judgments via videoconferencing. However, no legislation has been passed nor orders issued suspending the operation of limitation periods.

Contributed by: Noella Lubano, Eva Mukami, Radhika Arora and Paul Kamara,
Oraro & Company Advocates

Oraro & Company Advocates is a full-service, market-leading African law firm established in 1977, with a strong focus on dispute resolution and corporate and commercial law. Thanks to a dedicated team of partners, associates and support staff, the firm has been consistently ranked by Chambers Global as a top-tier firm in Kenya and arguably has one of the largest dispute resolution teams in the country. Oraro & Company Advocates is involved in most of the headline and non-traditional areas of law, including construction disputes, insolvency and restructuring cases, tax disputes, and international arbitration (in which the team represented one of the biggest trade unions in Kenya). Oraro & Company Advocates is a full affiliate member of AB & David Africa (ABDA), a pan-African business law network committed to ensuring that businesses and projects succeed in Africa by helping clients minimise the risks associated with doing business on the continent.

Authors



Noella Lubano is a partner at Oraro & Company Advocates and a recognised dispute resolution and arbitration expert. With more than 14 years of experience, she specialises in the tracing and recovery of assets, commercial litigation, and shareholder disputes, yet is also well regarded for her international arbitration and insolvency and restructuring expertise. Noella contributes a wealth of leadership knowledge and experience. She spoke on various topics at the International Arbitration Conference in Nairobi in Kenya in 2019 and Kigali in Rwanda in 2022. She has shared her legal insights across the globe, including in the UK and Austria.



Eva Mukami is an associate in the litigation department at Oraro & Company Advocates, where she specialises in arbitration, restructuring and insolvency. With more than four years of experience, she has advised local and international clients from various target sectors in arbitration and mediation, constitutional law, commercial litigation, and insolvency. Eva recently advised a bank on the enforcement of third-party securities under the Insolvency Act 2015, in addition to advising an oil company on its prospective claim against the National Land Commission for denial of fair administrative action during the latter's compulsory acquisition of the oil company's land. Eva is a member of the Law Society of Kenya.

Contributed by: Noella Lubano, Eva Mukami, Radhika Arora and Paul Kamara,
Oraro & Company Advocates



Radhika Arora is an associate in the dispute resolution practice group at Oraro & Company Advocates. Her practice specialises in banking and commercial litigation and both domestic and international arbitration. She has been part of teams advising both local and international clients in various sectors, including construction, public procurement and financial services. In 2020, Radhika contributed to the Kenyan chapter on international arbitration in Chambers & Partners' Global Practice Guide. Radhika holds a Bachelor of Laws degree from the University of Kent, which included a year spent studying European Legal Studies at the University of Vienna. She is also a member of the Law Society of Kenya.



Paul Kamara is an associate in the dispute resolution department at Oraro & Company Advocates, where he specialises in arbitration, insolvency and dispute resolution. He has advised local and international clients in various target areas such as dispute resolution, commercial litigation, and insolvency. Paul is currently involved in three notable arbitration disputes arising from the construction and procurement sectors. He is also part of the legal team advising and defending several statutory regulators and a government corporation in suits commenced in the High Court, as well as the relevant tribunals challenging the decisions of said statutory bodies and corporation. Paul is a member of the Law Society of Kenya.

Oraro & Company Advocates

ACK Garden Annex
6th Floor
1st Ngong Avenue
PO Box 51236-00200
Nairobi
Kenya

Tel: +254 709 250 000
Email: legal@oraro.co.ke
Web: www.oraro.co.ke

ORARO & COMPANY
ADVOCATES

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com