

**CORRUPTION, COURT RECORDS AND JUSTICE
ADMINISTRATION IN KENYA**

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CORRUPTION, COURT RECORDS AND JUSTICE ADMINISTRATION IN KENYA

Ms Emily Wairimu Ngugi's search for justice may take longer than expected due to a file that has gone missing from the High Court registry in Nairobi.

Determined to know what caused her son's death, the 60-year old woman lodged a suit under a certificate of urgency against her former husband, Mr Ernest Ngugi Waithaka, in April.

But yesterday, Mr Justice Paul Kihara Kariuki told lawyers for the two parties that the file "had walked away" from the registry.

According to the judge, the file went missing last week and could not be traced (The Daily Nation 29th May 2007)

Keywords:

Corruption, Administration of Justice, Court Records

Abstract

This paper outlines some of the challenges facing the management of court records in Kenya. It argues that frequent cases of lost or misplaced case files in the Kenyan courts systems impacts negatively on the administration of justice in the country. Using a few cases that have been highlighted in the local media, this paper seeks to demonstrate that poor records keeping practices at the Kenyan courts have contributed to corruption in the judiciary, and as a result of this impacted negatively the administration of justice.. The paper shows that some of the cases relating to loss of files may be linked to corrupt practices. The paper further argues that although efforts are being made by the Government to address problems associated with loss or misplacement of court files, these do not go far enough, and that there is a need for a concerted effort if this vice is to be eradicated in the courts. This paper concludes by making suggestions on how best corruption can be dealt with through better records management practices and increased access to government held information.

Introduction

Kenya is a vast territory with diverse resources and opportunities. The country is endowed with a variety of resources such as tourist attractions, agricultural products such as tea, coffee and horticultural products, and a large population drawn from different cultures and backgrounds. Some authors have argued that Kenya has the potential of becoming an economic tiger in Africa (The East African Standard 2007a) Despite these resources, Kenya has remained a relatively poor nation partly due to corruption and partly due to other reasons. Five years ago when Hon. Mwai Kibaki was elected President of the country, it was on the understanding that there would be zero tolerance on corruption. Five years down the line, the economy of the country has shown signs of improvement, revenue collection has increased tremendously, and improvements in the delivery of government services have also been noted (Kenya Country Profile 2005). Despite these gains, corruption has once more emerged as one of the challenges facing the nation. Several cases (such as the Goldenberg Scandal and Anglo-Leasing Scandal, those involving use of National Social Security Funds etc) have been laid before the Attorney General, but prosecutions for many of them have not taken place due to lack of sufficient evidence or other reasons. In some instances, corruption cases have not been prosecuted due to lack of sufficient evidence to proceed with the cases or the cases were brought far too late beyond the time in which criminal proceedings can be instituted. Yet in some other cases hearings have been delayed due to injunctions placed on the cases pending determination of cases placed before the constitutional courts. But the greatest hindrance has been that records which could have assisted in the determination of these cases have either not been available or in some cases they have been lost or destroyed to conceal the evidence. The judiciary itself has been accused of being corrupt while records keeping practices at the courts have left much to be desired.

Court System in Kenya

Any discussion into record keeping practices at the Kenyan courts must commence with a description of its legal system. The Kenyan Judiciary is divided into two divisions. The courts and the administrative unit which consists of the various departments of the judiciary such as Administration, Personnel, Accounts, Procurement, Planning and Library Services, Information and Communication Technology and the National Council for Law Reporting (NCLR). Besides this, there is the Judicial Service Commission, which is responsible for the Terms and Conditions of Service for the Judiciary. Since the focus of this paper is Corruption, Court Records and Administration of Justice in Kenya, the section that follow describes in detail the set up of the court systems in Kenya.

According to Wahiu (2000) of Kituo Cha Katiba Kenya, the Judiciary comprises of the High Court and the Court of Appeal established under the Constitution and subordinate courts established under statute. The Court of Appeal is the highest court in the land and is established under section 64 of the Constitution. It's function is to hear appeals from the High court. The Court of Appeal is located in Nairobi, but periodically it holds some of its sessions in Mombasa, Kisumu, Nakuru, Nyeri and Eldoret. This court has 11 judges together with the Chief Justice Evans Gicheru who is an ad hoc appeal judge and a Judge of the High Court of Kenya.

The High Court is the second Court in the hierarchy. It is a superior court of record with unlimited original jurisdiction by virtue of Section 60 of the Constitution. The High Court may hear both criminal and civil cases. The High Court in Nairobi is divided into the following specialised divisions:

- (i) Family Division
- (ii) Criminal Division

- (iii) Civil Division
- (iv) Commercial Division
- (v) Constitutional and Judicial Review Division

In total there are 15 High Court stations in Kenya, namely Nairobi, Milimani, Kisumu, Kisii, Bungoma, Kakamega, Nakuru, Eldoret, Kitale, Embu, Nyeri, Mombasa, Malindi, Meru, Machakos and with sub registries in Kericho and Busia.

The number of High Court judges in the country is normally set by Parliament. Currently, there are about 50 puisne judges in post. A puisne judge is any judge who is lower in rank to the Chief Justice. A civil or criminal case heard by the High Court in its original jurisdiction is heard by one judge. A criminal appeal is heard by two judges, and if no decision is agreed, by three judges. Constitutional cases are heard by an uneven number comprising not less than three judges. By virtue of the constitution, the High Court also has a special jurisdiction as an Election Court which hears all election petitions. Finally, it has a general supervisory power over all subordinate courts and a power of judicial review over ministerial, administrative and quasi-judicial bodies.

Magistrate Courts are established under the Magistrates Act, Chapter 10 of the Laws of Kenya. Magistrate courts deal with criminal and civil matters depending on the rank of the magistrate. Normally the senior the rank, the bigger the case he can deal with. Currently, the hierarchy of magistrates is in the following descending order.

- (i) Chief Magistrate
- (ii) Senior Principal Magistrate
- (iii) Principal Magistrate
- (iv) Senior Resident Magistrate
- (v) Resident Magistrate

(vi) District Magistrate

Today, there are about 105 Magistrate Courts scattered all over the country.

Although there are no formal tribal courts bound into the core system, customary law within ethnic groups may be used for guidance by the courts where there is no conflict with Statute. Kadhis courts which are established under Section 66 of the Constitution have the authority to deal with personal matters, marriage, divorce, inheritance etc where both parties are Muslims. Kadhi's courts are regulated under Kadhi's Act Chapter 11 of the Laws of Kenya.

In addition to the above courts, there exists Children's Courts which deal with matters pertaining to children and Court Martials which are purely military courts with jurisdiction over individuals who fall under the armed forces. Staffed by military cadres, appeals from the court martial lie with the High Court. For obvious reasons, this paper will not address the problem of managing records created by the Court Martials.

Apart from the Courts described above, there exists in Kenya several tribunals created under separate laws as provided for by Parliament. Although there are over 50 separate tribunals in the country, the well know tribunals include:

- (i) The Industrial Court which was created in 1964 by statute. This court deals with industrial disputes.
- (ii) The Land disputes Tribunal which deals with land matters.
- (iii) Rent Restrictions Tribunal which hears disputes between landlords and tenants.
- (iv) The Business Premises Tribunal which deals with disputes between landlords and business tenants.

In the process of determining cases, vast quantities of records are created, some as evidence presented before the judges or on judgments passed on each case. It is the management of these court records which is the subject of this paper is.

As it will be seen later in this paper, the management of these records has been a subject of discussion by various committees of the judiciary as well as litigants and members of the public. They feel these records are not adequately managed or in some cases have deliberately been mismanaged in order to evade or to delay justice. The section that follows explores corruption and how it relates to the management of court records in Kenya.

Corruption in Kenya

There is no universally accepted definition of corruption. Different authors have defined corruption differently. Transparency International (2006) defines corruption as “an abuse of entrusted power for personal gain.” The Anti-Corruption and Economic Crimes Act, No. 3 of 2003 defines corruption as:

Bribery

Fraud

Embezzlement or misappropriation of public funds

Abuse of office

Breach of trust

An offence involving dishonesty

Secret inducement for advice Bribing agents

Deceiving the principal through false material

Failure to disclose a conflict of interest to ones principal

Receiving or soliciting improper benefits to trustees for appointments

Bid rigging

Dealing with suspect property

According to the Kenya section of the International Commission of Jurists (2004) corruption includes, demanding and accepting cash bribes, sexual favours; free transport, hospitality and other gifts in return for partisan judgments; fraud through not accounting for money received, fiddling official receipts and stealing exhibits and abuse of office by doctoring evidence and giving promotions through patronage rather than merit.

The Kenyan Section of the International Commission of Jurists (2004) argues that “corruption has not only been cited as a serious societal problem, but it has also contributed to a greater extent to the crippling of the administration of justice in Kenya.” They further state that “corruption, especially in the Judiciary has a devastating effect as it breeds ground for injustice.”

According to The Global Corruption Report 2007 recently published by International Transparency, Kenya’s judiciary is ranked sixth among the country’s 10 most corrupt institutions. The report goes further to indicate that “many Kenyans had embraced the notion, “why hire a lawyer when you can pay a judge” (The Standard 2007b).

The effect that corruption has on the society can not be under-estimated. Ndung’u Wainaina (2007) argues that corruption, drains vital resources meant for socio-economic development. Likewise, “corruption is at the heart of human rights violations, torture, weakening of democratic institutions, impunity and undermining the rule of Law.” Wainaina goes on to say that “Corruption undermines public confidence in governance institutions and governments, leading to conflicts and propagates inequality, thus disenfranchising the largest section of the society by denying it access to justice and human dignity. Corruption is anti-social justice and it is the hindrance to fairness in access to resources and means of production. Wainaina (2007) concludes by stating that it is absolutely necessary to connect human rights, poverty and access to information and the fight against corruption.

The Thames Valley Police (2004) defines Justice as ‘fairness’, and that it is the idea behind how laws are put into force. The definition goes further to state that justice means that one has the right to be protected and treated fairly by the law.

If somebody does something wrong to you or the people around you, it is fair that that person should be stopped, and that they should have to pay a price for what they did. 'Justice' also means deciding carefully and fairly whether someone actually did something they are accused of. If there is proof that somebody broke the law, it is fair that they should pay a price for it. Thames Valley Police (2004).

Measures to combat Corruption in Kenya

Since the new NARC government came to power in 2002, it was realized that the war against corruption could not be won without effective institutions to develop appropriate policies, conduct investigations, undertake prosecution, determine cases and create awareness against the vice. Various reports regarding corruption in Kenya have been compiled by Transparency International, Kenya Chapter. This organization has repeatedly highlighted cases of corruption in the government including the judiciary. The Auditor-General too has consistently reported cases of corruption in his reports to Parliament. As a result of renewed efforts to fight corruption, several measures have been put in place to deal with the vice. Some of these measures include developing anti-corruption policies and providing legal environment for a sustained war against corruption. The following measures have so far been put into place:

- 1 The creation of the Ministry of Justice and Constitutional Affairs with the mandate to anti-corruption strategies, co-ordinate and facilitate the fight against corruption.
- 2 The formation of the Cabinet Committee on Anti-Corruption chaired by the Minister for Justice and Constitutional Affairs. The members of the committee include Minister of State for Provincial Administration and National Security, Minister for Finance, Minister for Planning and National Development, Minister for Roads and Public Works. and the Minister for Local Government. The Committee's mandate is to oversee the

implementation of government policies on corruption and review the progress in the fight against corruption.

- 3 The Enactment of Anti- Corruption and Economic Crimes Act, in April 2003. This law expands the definition of corruption and economic crime to cover various forms of abuse of office, conflict of interest, misappropriation, theft and plunder of public resources. It also establishes a powerful anti-corruption commission with investigative, prevention, public education and asset recovery functions.
- 4 The enactment of the Public Officer Ethics Act of 2003, resulted into the development of Codes of Conduct for all public officers, as well as members of Parliament, the Judiciary, Civil Service, Cooperative societies, Local Government and the public Sector corporations. These codes of Conduct which are legally enforceable prohibit dishonesty, conflict of interest, tribalism, and nepotism in the public service. The Act also makes it mandatory for all public officers to declare their assets and liabilities at the end of every financial year.
- 5 The Establishment of the Kenya Anti-Corruption Commission, as a strong, independent and professional statutory body with powers and authority to investigate all corrupt cases. The Kenya Anti-Corruption Commission has no powers to prosecute, but forwards its recommendations to the Attorney General who is the only officer given prosecution powers by the state.
- 6 The strengthening of Public Accounts Committee which a parliamentary watchdog committee with authority to scrutinize government expenditure.

- 7 The involvement of Efficiency Monitoring Unit in the evaluation of the public officers' wealth declaration exercise by public servants, members of Parliament and the Judiciary.
- 8 The introduction of reforms in State Law Office/Department of Public Prosecutions.
- 9 The Creation of Anti-Corruption, Serious Fraud and Asset Forfeiture Unit as a specialized prosecution unit to deal with corruption, serious crime, fraud and asset forfeiture.
- 10 The Formation of Judiciary/Special Anti-Corruption Courts. These have been established under the Anti-Corruption and Economic Crimes Act, 2003. Special efforts are being made to build the capacity of the Judicial officers in these courts to better handle Anti-corruption cases.
- 11 The appointment of the National Anti-Corruption Campaign Steering committee, which is a programme in the Ministry of Justice and Constitutional Affairs that spearheads the campaign against corruption. It is essentially a civil society - led public awareness body that endeavours to reach the anti-corruption crusade into the street, to the common man. It draws its members from among the various stakeholders including religious organizations, civil society, think-tanks and other interested parties.

Despite the efforts that Narc government is taking to contain corruption, there is evidence of emerging new and emerging corruption through the "Anglo-Leasing Affair." The main player in the saga is a foreign company, Anglo-Leasing and Finance Company Ltd, which had been contracted by the Government to supply new tamperproof passports from France. The other project involved the procurement of the Forensic Sciences Laboratories equipment from Britain.

When it was discovered that the tenders had been awarded irregularly and payments had already been made, money was secretly wired back to the treasury without disclosing the identity of the individuals involved in the transactions. These cases are now the subject of investigations by the Kenya Anti-Corruption Commission.

Prior to these two cases there was what is commonly known as the Goldenberg Scandal in which the Kenyan government was found to have subsidized exports of gold far beyond standard arrangements during the 1990's by paying the company Goldenberg International 5% more in Kenyan shillings than their foreign currency earnings. In as much as it was made to appear as if the company was earning foreign currency on behalf of the country, in actual fact it is estimated that the whole scheme cost the nation more than 10% of the country's annual Gross Product. It is not quite evident if the country did export any gold or not as the records relating to this case are not readily available. This particular case has been running for over ten years, is likely to continue for a very long time.

Management of Court Records in Kenya

It has been observed that corruption exists in the Kenyan judicial system. An Ethics and Integrity Committee that was established to look into the extent of corruption in the Judiciary presented its report to the Chief Justice in September, 2003. This led to a historic, far reaching "radical surgery" of the Judiciary, in which, 6 out of 11 judges of the Court of Appeal, 17 out of 36 High Court judges and 82 out of 252 magistrates were suspended on allegations of corruption. Most of the suspended judges subsequently retired. Other cases are yet to be determined by the courts, while tribunals were established to deal with others implicated in corruption related cases.

Section 60. (1) of the Constitution of Kenya stipulates that "there shall be a High Court, which shall be a superior court of record, and which shall have unlimited

original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.” Due to this requirement, judges and magistrates record every word and occurrence during court proceedings they preside over. Similarly, Section 64. (1) of the same constitution states that “there shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.”

In Kenya the management of court records falls under Court Registries. Court Registries are responsible for a variety of tasks some of which raise conflicts with the basic tasks of records managers. In Kenya, Court registries are responsible for:

- Documentation, storage and retrieval of files, exhibits and other documents;
- Registration and processing of cases at every stage till they are disposed of;
- Assessment and collection of court fees, deposits and fines;
- Processing of typed proceedings;
- Processing of bonds/bail documents;
- Dispatch and handling of correspondence;
- The preparation and execution of warrants and summons for signature by judicial officers;
- Preparation of case lists;
- Preparation of appeal records;
- Provide a link between the courts and litigants;
- Keeping of court diaries, and allocation of mention and hearing dates;
- Receiving and stamping of documents;
- Keeping exhibits and verifying the same;
- Verifying documents before they are accepted for filing of case;
- Housing of court registers;

Housing of Court Seals;
Preparation of files in orderly manner and sequence;
Assisting litigants with information about cases and dates of cases;
Receiving affidavit and other documents; and
Safe Keeping and custody of court files.

As can be seen from the above list, the varied functions of court registries provide an ideal environment for corruption, especially where court clerks are also charged with the custody of court cases and exhibits..

Despite the fact that the legal system in Kenya is highly dependent of records, reports of lost, misplaced or disappearance of court files have been common in the past. As early as 1984, the then Chief Justice Mr Simpson (1984) wrote to all the High Court Judges in Nairobi informing them that “An advocate may after the expiration of one month from the date on which he is informed by the registry that a file is missing produce to the Registrar copies of the relevant documents supported by an affidavit sworn by the advocate and duly served on all other parties or their advocates. The Registrar on being satisfied that copies of all necessary documents have been produced may reconstitute the file without an order of the Court.” This is a clear indication that the problem of missing files in Kenyan courts is not a new phenomenon, but one that has persisted over the years but of late appears to be increasing in magnitude.

The East African Standard (2001) reported that: “It is a matter of gross injustice that files can go missing from the law courts, the one place where Kenyans go for justice. Yet, according to the Chief Justice, Mr. Bernard Chunga, Nairobi law courts have reported a total of 500 missing files this year alone. Many more are missing across the country, he admitted. We can only guess how many other files have been missing over the years in the country's court registries.”

The Attorney General Amos Wako is also on record having said that institutions such as his office, the judiciary, the Law Society of Kenya, police, lands registry and the prisons department have all underperformed or failed to perform at all. Registry functions have been criticized as being archaic, slow in response to public inquiries or at worst corrupt. The registry system at the courts is seen as inefficient with common cases of missing files from the Companies Registry.

A Sub-Committee on Ethics and Governance (2005:24) appointed by the Chief Justice Mr Evans Gicheru to investigate among other things cases of alleged corruption, unethical behaviors and other lack of integrity made the following comment with regard to missing court files:

The sub-committee received several complaints regarding instances of missing files leading to the delay in the disposal of matters. The highest incidence of missing files was reported to be taking place at the hearing stage, during the execution process or when litigants request for proceedings. Missing of files has been perennial problem of the judiciary and its attributable to the manual recording and filing systems of the Courts or lack of the due diligence on the part of certain officers, one cannot discount the fact that it may sometimes be a deliberate effort to frustrate the course of justice.

The sub-Committee on Ethics and Governance (2005:94) also observed that there were indeed problems in the way the courts were managing records country wide. The Committee (2005:94) reported that:

The sub-committee received submissions that there some registries were poorly managed and controlled. This has led to instances of missing files, mistreatment of litigants and creating opportunity for corruption. While no specific and direct allegation of corruption and lack of integrity of registry staff was made, we concluded that there is inadequate supervision of the registry staff consequently

leading to poor service to litigants. This was particularly so in Bungoma and in Muranga Registries.

Not only do Kenyan courts experience cases of lost or misplaced files. Instances of cases where files have been lost through fires have also been reported. Again the Sub-Committee on Ethics and Governance (2005:94) received evidence to the “difficulties experienced by litigants whose files were destroyed or otherwise misplaced after judgment and who would like to appeal against the judgment or orders. This is particularly so of files destroyed in fire incidents in registries in Kerugoya, Nakuru, Nyahururu and Sotik”.

Towards the end of last year, Kenya was expelled from FIFA matches. This led to disputes in Kenya as to who was to blame for the woes afflicting the sport. As this war was raging on, it was reported by the Kenya Times (2006) that, “KPL Clubs have gone to court seeking orders to force the registrar of companies to produce the Kenyan Premier League Company secretarial file in court within the next three days. The file has since gone missing at the Sheria House Registry after several searches were conducted by KPL officials”

As indicated above, Section 60 and 64 of the Constitution of Kenya established the High Court of Kenya as a court of records, where in theory all court records must be preserved. But what exactly constitutes a court record? The Freedom of Information Act of Scotland (2002) defines a court record as: indictments (documents setting out charges in criminal cases), written pleadings outlining the arguments to be put before the court, citations, specifications of documents, skeleton arguments and affidavits.” In Kenya the loss or misplacement of court files has been a problem which the judicial system seems to have been unable to deal with adequately.

Over the years, there has been a general feeling that the judiciary and its judicial personnel - judges, magistrates and court staff – is corrupt, and that judicial

corruption is a serious problem affecting judicial independence from the executive and litigants. Recently the Justice Minister Ms Martha Karua was quoted in the local dailies as having stated that corruption cartels are the biggest threat to the judiciary and leads to delays in justice administration. She is not the only one to have observed that things were not right in the judiciary.

Justice Nicolas Ombija too had problems with missing court records relating to three suspects charged with the murder of the son of slain drug baron Ibrahim Akasha. His frustrations were reported by Ms Judy Ogutu an Editor with the East Africa Standard Newspaper (2006) when she wrote:

On the missing documents, Ombija said when he was posted to Bungoma, he surrendered the file to the High Court registry. However, on returning in Nairobi to handle pending matters, his court clerk informed him that a postmortem report, a list of witnesses and exhibits had gone missing.

"I went through the file and confirmed the same," he said. Ombija said the court clerk had informed him that he handed over the file to the High Court's criminal registry. "This is not usual. It appears there is an axis of evil hell-bent on scuttling the trial," he quipped.

Ombija warned those involved in the disappearance that the long arm of the law would catch up with them.

"I have since put in motion machinery to try and locate the missing documents," he said.

The new development created a hitch in the trial, prompting Ombija to ask both defence lawyers and the State counsel to decide how to proceed with the matter.

"Without these documents, I cannot be able to write a ruling. What will I rely on?"

Musembi (2005) argues that there is a direct relationship between good record keeping and administration of Justice. He is of the opinion that "as everybody knows, efficient court services provide one of the strongest foundations for good governance. In turn, an efficient court system must of necessity be based on effective record keeping systems and services. Many Kenyans will recall the frustrations they have experienced as a result of poor record keeping systems in the courts. Cases of missing and lost files have been regularly reported in the print media. There is no doubt that this has undermined the administration of justice." Musembi further goes on to say that:

"In this country, the reports of the Controller and Audit General have often stated his inability to successfully carry out the audit function in certain cases as a result of inadequate and poorly kept records. This is not surprising. Corrupt and

inefficient public officers will rarely keep comprehensive and accurate records. They know very well that they ought to keep such records but it is to their advantage not to do so.”

In a separate interview with Transparency International, Musembi (2003) observed that *“poor record keeping cause serious inefficiency and its cost is enormous in terms of delayed, poor or wrong decisions and frustration on the part of civilians.”*

Kenya National Archives and Documentation Services and the Management of Court Records

Schedule 2 of the Public Archives and Documentation Service Act (Chapter 19) of the Laws of Kenya defines public records to include.” the records of the High Court and of any other court or tribunal.” Moreover, Section 4(i) of the same Act authorizes the Director of the Kenya National Archives and Documentation Service to “examine any public records, and advise on the care, preservation, custody and control thereof. For this reason, the blame for any shortcomings or misgivings on the manner in which court records are being management must shared with the Kenya national Archives and Documentation Service.

In April 1999. a circular was issued by the PS to the Cabinet and Head of Public Service to all Permanent Secretaries, the Solicitor-General, and the Controller and Auditor-General on Cases of Missing and Lost Files and Documents in the Public Service and read in part:

Cases of missing and lost records are a common experience in public offices. This has been caused by laxity and poor records management practices in Government Ministries, Department and Parastatal Organisations. But in other cases, the incidence of missing and lost records is a direct result of corruption among a few public servants. This has adverse effects on the efficiency and effectiveness in the public Service and obviously undermines the integrity of public servants in general. It is for these reasons that Permanent Secretaries, Heads of Departments and Chief Executives of Parastatals Organisations must take immediate and firm measures to correct the situation. You should, therefore, take action as follows:

You should ensure that public records are properly managed in order to avoid the incidence of missing and lost files and records.

Firm and immediate administrative or legal action should be taken against officers who intentionally hide, misplace public records or cause them to be lost/destroyed.” Office of the President. (1999).

The 1999 Circular was followed by another circular and a press release issued by the then Permanent Secretary in the Ministry of Home Affairs and National Heritage, Mr. Joshua Terer. in May 2000 which stated as follows:

“The problem of missing and lost files and documents in the Public Service has often been reported by the media. There must be many other cases which are never reported. Missing and lost files and documents can lead, and actually do result into delayed service to the citizens; as well as poor image on the part of the Public Service. This is costly to the Government. Furthermore, this vice has the potential of distorting or destroying part of the “Nation’s Memory”, i.e. Kenya’s documentary heritage. It has, therefore, been decided to firmly deal with this problem as follows:

Members of the public, including public servants themselves are invited to make formal complaints in writing to the Director, Kenya National Archives and Documentation Service whenever the service they require is unduly delayed as a result of missing and lost files or documents. Whenever possible, the letter of complaint should give such details as the full name of the person handling the matter, building in which the public office in question is located, and the office number etc. The Director of the Kenya National Archives and Documentation will then take up the matter with the concerned public office.

The Director will submit quarterly reports to the Head of the Public Service on all reports of missing and lost files and documents for further necessary action. Terer, (2000).

Despite these efforts by the Kenya National archives, cases of missing files continued to be reported in the dailies, an indication that the root cause of the problem had not been addressed and that more radical measures were needed to deal with the situation.

Disposal of Court records

In Kenya the disposal of court records is governed by Chapter 14 - Records Disposal Act cap. 14 of the Laws of Kenya. Section 2 of the Records Disposal act states that:

There is no evidence that there are problems in implementing the Records Disposal Act. From time to time, one sees in the local dailies and the Kenya Gazette notices from the courts notifying the public of records to be destroyed as per the requirements of the Records Disposal Act. Moreover, the Act requires that before the records can be destroyed, the court must liaise with the National Archives to ensure that valuable historical records are not destroyed.

Conclusion

There is no evidence to suggest that the requirements of the Court records Disposal Act are not being complied with. What seems to be happening is deliberate destruction or misplacement of records in order to impair the administration of justice. Despite the various circulars that the government has issued since 1985, the ghost of missing and misplaced files has continued to haunt the corridors of the judiciary. The Recommendations of the Committee on the Administration of Justice commonly known as the Richard Kwach Committee of 1998 cited in the Sub-Committee on Ethics and Governance (2005:151) recommended that the following measures be put in place in order to address records keeping problem at the courts.

- (i) Filing cabinets and lockable racks should be purchased and installed in all registries
- (ii) Computers be introduced immediately in major registries throughout the country in order to minimize the mischief of loss of files, monitor file movements and measure output. Every court document should be microfilmed as a back up measure.
- (iii) All high court registries should be headed by legally qualified deputy registrars who will hear interlocutory applications and be in charge of staff in the registries.

- (iv) Those in charge of registries and the staff under them should undergo training to enable them to cope more effectively with the demands of their jobs.
- (v) Access to registries should be limited to staff only. Members of the public including lawyers and litigants should be served across the counter.

Although many of the above recommendations have been implemented, still the underlying problem of lost, misplaced and missing files has not been fully eliminated fully in the Kenyan courts. The Sub-Committee on Ethics and Governance (2005:94) made several recommendations including computerization of court registries and automation of proceedings in order to make court registries more efficient. It must, however, be pointed out that computerization alone without addressing the underlying factors affecting records keeping at the courts will not achieve the desired results. The Sub-committee further recommended that the operations at the court registries country-wide needed streamlining to make them more responsible and efficient. The Members of the Sub-committee on Ethics and Governance concurred with the recommendations of the previous committees on the need for court records to be managed by qualified staff. The committee was also in agreement that registry personnel needed to be supervised closely in order to curb corruption. (Report of the Sub-Committee on Ethics and Governance 2005:88). The sub-committee (2005:88-89) concluded by “recommending the development of a records management policy for the judiciary which will clearly state the duties and responsibilities of the registry and registry officials in relation to judicial records. The policy should provide details on what records are to be kept, and by whom, the process of accessing those records and the long term preservation of the records. The policy should also be clear on who should be responsible for court records and the hierarchy of reporting in the management process.” A holistic approach to records management needs to be adopted.

In seeking to address the problem of files lost through fires, the Sub-Committee on Ethics and Governance (2005:94) recommended that “the office of the Chief Justice gives guidance with a view to reconstruction of civil files and with the collaboration with the police, criminal files be reconstructed. Further concerning the civil cases involved, where it may be necessary to file the matter afresh, and the filing fee should be waived.”

From a records management perspective, many of the suggested solutions to record keeping practices at the Kenyan courts provides are excellent. What is lacking is the will to carry them through. In addition to the recommendations made by the various committees, it is suggested that the courts should undertake the following activities:

- (i) Harmonization of policies in all records centres and registries
- (ii) Standardization of training of all registry personnel
- (iii) Standardization of qualification to regulate entry level for all registry personnel
- (iv) Establishment of professional societies and associations for records management personnel
- (v) Provision of short courses for those working in registries
- (vi) Introduction of access policies to enable citizens greater access to information

A study conducted by Nandain (2006) suggests that these elements are often lacking in many Kenyan registries (including the courts)

In conclusion, it can be argued that, for a long time the courts in Kenya have attempted to address record keeping problems from a legal perspective. The court system has failed to realize that record keeping is a very specialized administrative and professional work which must be supported by well formulated policies and procedures, well equipped and secure storage facilities and a team of well trained and highly motivated records management staff. One may even ask: Kenya National Archives and Documentation Services where are you?

Perhaps it is time the Kenya National Archives and documentation Service needs to intensify its supervisory role and get more involved in the management of court records. If the above measures are put in place and the recommendations of the various committees are implemented, records management practices at the Kenyan courts will be raised to a different level.

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