

**“AFRICAS BAR & BENCH AND ITS ROLE IN ECONOMIC TRANSFORMATION”**

**A PRESENTATION BY HON. MR. JUSTICE WILLIAM OUKO,**

**PRESIDENT OF THE COURT OF APPEAL, KENYA,**

**DURING THE ICPAK 35<sup>TH</sup> ANNUAL SEMINAR HELD BETWEEN 21<sup>ST</sup> AND 24<sup>TH</sup> MAY 2019 AT THE SAROVA WHITESANDS BEACH RESORT MOMBASA.**

**The Chairman –ICPAK Council FCPA Julius Mwatu;**

**Your Excellency Olusegun Obasanjo, former President of the Federal Republic of Nigeria**

**ICPAK Council members present;**

**Delegates;**

**Invited guests;**

**Distinguished Ladies and gentlemen.**

I bring you warm greetings and best wishes from Hon. Mr. Justice David Maraga, the Chief Justice of the Republic of Kenya and the President of the Supreme Court on whose behalf I am honoured and humbled to stand before you this morning at the tail end of your 35th Annual Seminar, 2019. The Chief Justice is unable to join you today as he is involved in another official engagement out of the country

that coincides with this event. For that he sends, through me his apologies.

I congratulate you for maintaining the tradition of holding this annual event consistently in the month of May for the last 35 years.

May I also most sincerely thank the organizers of this event for giving the Judiciary a slot to participate on this last day when the sub theme for discussion is **“The Role of Professionals in Society”**.

A part from that, I observe from the content of the programme a rich and balanced blend of topics on contemporary and topical issues, which I believe will equip the participants with the requisite skills to navigate today's ever changing business and technological environment.

I am informed, and verily believe that information to be true that, in contrast with other professional bodies meetings in Kenya, yours is comparable only to the meeting of teachers in terms of numbers.

Other than mathematics taught in school, I first encountered real accounts in my Law School where Trust Accounts and Commercial Accounts were compulsory subjects. It was a nightmare to the whole class. Our lecturer for Commercial Accounts, Mr. Mwarania (RIP) was the first terrorist I encountered in my early life. He called us all manner of names, “ngoats”, porcupines etc. To this day I do not know how I passed Commercial Accounts.

From this experience you can now understand why I respect you; the analytical skills that you possess to solving problems is amazing.

I have been asked to talk on the role of Africa's Bar & Bench in Economic Transformation. **(Bar & Bench)**

You definitely know this better but I understand economic transformation, not in a technical language but simply as the continuous process of advances in technology, inflow of useful innovations, accumulated practical knowledge and experience that increase the efficiency and in the economy.

Although the forecasts made at the beginning of the year for the global economy predicted slower growth in 2019 and the <sup>1</sup>World Bank pegged it at 2.9%, if the African Union's Agenda 2063 goals is the yardstick then there is light at the end of the tunnel. It envisages, inter alia, a high standard of living, good quality of life, wellbeing for all citizens and transformed economies that are Science, Technology and Innovation driven, manufacturing as well as industrialization and value addition in 2063. This focus appears to be the answer to the prediction by Cheikh Anta Diop, Senegalese historian and politician in the concept of ***African Renaissance*** which postulated that African people and nations shall overcome the current challenges confronting the continent and achieve cultural, scientific,

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<sup>1</sup> The World Bank Global Economic Prospects: Darkening Skies, <http://www.worldbank.org/en/publication/global-economic-prospects>

and economic renewal. With this renewed focus on economic growth, driven by transnational trade and investment one may therefore ask; what is the role of professionals generally and specifically for my topic today, the role of the Bar and Bench in the economic and social transformation of the continent?

The legislative, executive and judicial arms of Government have distinct roles to play in transforming society. The Legislature exercises its legislative authority by passing laws which must progressively advance transformation of the State and society; the Executive is responsible for the implementation of laws and the development of policies geared towards the transformation of society; the courts exercise judicial authority by interpreting the laws passed by the legislature in accordance with the values of the Constitution. The national goals, which are key to the transformation of the state and society, include the following:

- patriotism
- national unity,
- sharing and devolution of power,
- the rule of law, democracy and
- participation of the people;
- human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

- good governance, integrity, transparency and accountability; and
- sustainable development. ( some of which are contained in some Constitutions).

The net effect of these constitutional edict is to ensure that in the society poverty and underdevelopment are eradicated, adequate safety and security measures for all are provided, a strong and democratic state that truly serves the interests of all people and promotes social justice is assured; all of which will contributing to the achievement of the African renaissance and a better world.

Judicial system in Africa must be transformed into systems that serve the new democratic order underpinned by the values of the Constitution. They must lay the foundations for the development of a society that is based on human dignity, equality and the fair administration of justice.

The concept of justice is a complex philosophical matter, for which there are continuous improvements on its conception and articulation by jurists and other professionals. Many judiciaries in Africa have shown a profound understanding of the constitutional imperatives and set out to defend the basic law of the land by their progressive interpretation of the Constitution and social rights in particular that continues to make an indelible mark in the transformation of society. Decisions coming from South Africa, Uganda and even Kenya testify to this.

This has been made possible the courts assisted by members of the bar. The <sup>2</sup>African Bar Association, for example, has amongst its objectives the creation of a forum for the inter-exchange of information between the Bar and Bench within Africa through its African sub-regional branches, that is, East Africa, West Africa, Central Africa, South Africa and North Africa. This is an ideal platform for conversations, around how to improve the rule of law and administration of justice in the continent.

In the last 15 or so years, the World Bank has been publishing an annual report on “**Doing Business**” which is the result of rigorous research, identifying challenges and suggesting solutions on areas of business regulation in order to assist governments in reforming and streamlining administrative procedures for economic development. This has resulted in the ease of doing business ranking index. This is important as it influences investor confidence. Investors are particularly interested in knowing the modalities of starting a business in a given country, acquisition of various permits and licenses, getting electricity, acquisition and registration of property, existing credit facilities, protection of investors, enforcement of contracts, processes of resolving insolvency and most importantly the processes of expeditious resolution of disputes when they occur.

## **The Role of Courts in Access to Justice for Economic Growth**

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<sup>2</sup> <https://www.afribar.org/home/administration/afba-structure>

The <sup>3</sup>United Nations Sustainable Development Goals (SDG's) envisages as key (at Goal 16), peace, justice and strong effective and accountable institutions that promote inclusive societies for sustainable development. At the core of accountability in Judiciaries is the concept of access to justice.

**“Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”** See: **Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd,** High Court Petition No. 328 of 2011.

Access to justice involves the provision of dispute resolution mechanisms which are affordable, proximate, ensure speedy justice and whose process and procedure are user friendly. It includes issues to do with accessibility to courts, language used in court proceedings, court and advocates fees.

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<sup>3</sup> Sustainable Development Goals: <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>

But the Judiciaries the world over have been regarded as **“the third arm of the state”**. Its inferior position is normally reflected the resource allocation and how it's orders are treated by the other two branches. Because of the manner the Judiciaries are treated, the result of that treatment led the Hon Dr. Willy Mutunga, Chief Justice (retired) in October 2011 to summarize the state of the Judiciary in Kenya in the following depressing words;

**“We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a judiciary that was designed to fail.”**

The three branches, instead ought to embrace synergy between them to realise the country's goals of developmental states and the ideal of achieving a better life for all. Some of the critical areas where the Judiciary must play a meaningful role in supporting African states to also play their roles as global players and leaders include the following:

- (a) Institutionalizing international human rights.
- (b) Providing world-class judicial services that take into account globalization
- (c) Contributing to the evolving constitutional jurisprudence.



Apart from there impediments many courts in Africa are known for inefficiency, corruption, and political bias. Most of them are defined by the enormous backlogs, and delays. Cumbersome procedures dragged out the process of getting to trial. Judges, magistrates and lawyers have perfected the art of adjournment of hearings. Records often disappeared—typically because of haphazard procedures but sometimes because of deliberate efforts to delay cases.

In Africa, perhaps with a few exceptions, Judge: citizen ratio is below international standards. For example in Kenya with over 600,000 pending cases, there are only 127 Judges, 494 Magistrates and 53 Kadhis against a population of approximately 52 million. The same can be said of Malawi, Zimbabwe and the countries in our region. How can we compete, say, with similarly sized Argentina and Colombia with 2,019 and 4,805 judicial officers, respectively?

Capital development and the entire infrastructure has been ignored.

The budgets of the Judiciaries is another area of frustration. In 2010–11, for instance Kenya's courts received 3.9 billion shillings, representing about 0.5% of the national budget compared with an international benchmark of 2.5%, cited as a goal by the Kenyan judiciary. Although the 2010 constitution and 2011 Judicial Service Act removed the judiciary's budget from control by the Executive, its allocation is still subject to parliamentary approval.

In the Financial year 2015/16, our national budget was Kshs 1.5 trillion. The Judiciary received Kshs 14.7 billion which was 0.96 of the national budget, In the subsequent year 2016/2017, the national budget increased to Kshs 1.7 trillion out of which the Judiciary received 17 Billion, which was 0.99% of the national budget. The year 2017/2018 the national budget increased to 2.0 trillion. One would have expected the Judiciary budget to be commensurate but sadly it was allocated only 14.2 billion which 0.69% of the national budget. In the current financial year with a national budget of 3 trillion, the Judiciary's budget continues to drop and stands at 12.9 billion standing at 0.43%. To add salt to injury the Treasury introduces budget cuts unilaterally.

I have said these things because they should concern all of us; the citizenry, stakeholders and the other two branches of Government. How can the courts, in those circumstances be expected to transform the economies of African states. Short of retooling and providing political support to the judiciaries, I am afraid the judiciaries will remain weak.

So as not to paint a bleak picture ....the situation is not hopeless. Weak as they are the courts introduced various forms of interventions to make them more efficient and

accessible. Many, like Rwanda, South Africa and Ethiopia are leading examples of jurisdictions that have embraced ICT, while Ghana, Ethiopia, and Nigeria are among others leading in the area of alternative disputes resolution systems. In the last few years, even with shoe string budget, the Kenya Judiciary has constructed courts in several counties, with the help of the World Bank, a programme that comes to an end in December, 2019.

### ***Specialized Commercial Courts***

Studies conducted on judicial reform initiatives in Africa reveal a steady increase in the introduction of specialized courts. Specialized commercial, anti-corruption, family, industrial relations and environment and land courts have been introduced in the last decade in several jurisdictions in Africa. The introduction of commercial courts has been driven by the need to facilitate expeditious resolution of commercial disputes in an efficient and effective manner in order to spur economic growth.

The International Finance Corporation (IFC) during a conference organized together with the Financial Times on developing business and infrastructure in Africa singled out Tanzania and Uganda, as examples in the region where judicial dispute resolution has been streamlined recently and is more efficient after they introduced specialized commercial courts.

In Kenya, the International Development Law Organization (IDLO) in supporting the Commercial Justice Sector reforms through support to the Judiciary's Commercial and Tax Division of the High Court seeks to further strengthen Kenya's business climate by providing court structures and processes; strong case management including electronic case management systems; court automation, alternative dispute resolution methods for commercial cases.

## **Alternative Dispute Resolution (ADR)**

### **1. Court Annexed Mediation**

Colleagues,,

Alternative Dispute Resolution is at the very core of traditional African justice systems, the main feature of which is the reconciliatory nature of dispute resolution.

As a formal mode of dispute resolution, ADR is a recent phenomenon. Ghana held the first mediation week in the year 2003 in which 300 cases that had been pending in the courts were mediated in five (5) days. Given the high success rate of this initial attempt at mediation and following very positive reviews from parties involved, another mediation session was carried out in 2007, this time specifically targeting commercial and family cases from courts around Accra. This initiative was to be replicated in 2008, with the result that approximately 2500 cases were mediated.

In the case of Ethiopia, the inaugural ADR project was held in August 2008 and has registered great success in

acceptance and disposal rates. A similar story is told of Nigeria.

The Constitution of Kenya specifically enjoins courts and tribunals to be guided by several principles; among them, the promotion of alternative forms of dispute resolution mechanisms including, reconciliation, mediation, arbitration and traditional dispute resolution mechanism.

The Kenya Judiciary operationalized the **Court Annexed Mediation Project** (CAMP) initially as a Pilot Project on the 4<sup>th</sup> of April, 2016 in both Commercial & Tax and Family Divisions of the High Court for one year at the end of which a total of 629 cases were referred to mediation. Of significance is that a total amount of **Kenya Shillings 2,196,624,714** was released into the economy as a result of cases resolved through mediation.

## **2. Small Claims Courts**

Small claims Courts are instrumental in resolving business and contract disputes targeting small and medium enterprises, which are important drivers of growth in economies across Sub Saharan Africa, accounting for approximately to 90% of all businesses according to <sup>4</sup> the International Finance Corporation of the World Bank Group.

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<sup>4</sup> The International Finance Corporation, creating markets, Creating Opportunities

It is in recognition of the role of this court and the need for expeditious resolution of small claims dispute that in 2016 Kenya enacted the **Small Claims Court Act**.

Unfortunately it has not been operationalized. When operationalized it will decongest the civil division of the Magistrate's Courts.

Similar modelled courts are to be found in many countries in Africa, including South Africa, Zambia and Nigeria.

## **2. Corruption as a Threat to Africa's Economic Transformation**

Colleagues,

Corruption, is complex and multifaceted with adverse effects on the economic and social fabric of our countries, and does not respect boundaries. Economies of countries that are plagued by high levels of corruption cannot prosper as the vice distorts resource collection and allocation leading to uneven distribution of wealth.

The World Bank, postulates that on average the income in countries with high levels of corruption is about a third of that of countries with a low levels of corruption. Further, infant mortality rate in these countries is about three times higher and the populations literacy rate is 25% lower.

If not checked corruption will gobble every coin and render the continental and regional integration and economic agenda a pipe dream. It will kill hopes and aspirations of our people.

Today there is no allegation of corruption without a professional being mentioned. Think of any corruption allegation, current or past; lawyers, Engineers, doctors, and lately goldsmiths.

### **The Role of the Bar**

Professional organizations, lawyers, are involved in politics and other economic activities that add to building blocks of nations. Lawyers as a profession function in society as keepers of the law, through courts or through drawing contracts and partnership agreements as well as incorporating companies.

Not anymore but in the past lawyers played prominent roles in Africa's history of struggle for liberation, in revolutions. Nelson Mandela etc. Today many Parliamentarians, even here in Kenya are lawyers.

The greatest contribution of the legal profession in the economic growth is participation in creating a fair market economy by reducing the costs of transactions (through correct contracts, available legal services, etc.). Another major professional contribution is the promotion of the rule of law and other democratic values in their professional work. Once the professions are strong and economically independent and/or the state is rich enough to support independent, society-oriented activities of the profession, the role of lawyers will increase in solving contemporary social problems.

On the flip side lawyers are blamed for perfecting the art of adjournment and in some instances being involved in corrupt practices.

In conclusion, Colleagues, many success stories in dispute resolution endeavours in our continent can be told. It is now accepted that mediation and other forms of ADR have helped courts reduce delay and backlog.

Economic Transformation of Africa will depend to the extent I have stated on an effective judicial and legal system. The adoption of the various legal and judicial reforms initiatives is instrumental in fast tracking dispute resolution and freeing up money held in litigation, which will in turn grow the economy. With proper planning and cooperation of states, there is hope for Africa, as the Chinese Premier, Li Keqiang envisioned during the 2014 World Economic Forum on Africa when he said;

**“Africa's rise will make the world more stable, more democratic, more robust”.**

A reiterate the squint words of an African leader who said of the economic growth of his country. He announced on a live television address to his countrymen and women;

**“The bright is very future”.**

Indeed, with all the natural resources, the human resource, Africa is reach and the future is indeed bright.



**William Ouko**

**Justice /President Court of Appeal**

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