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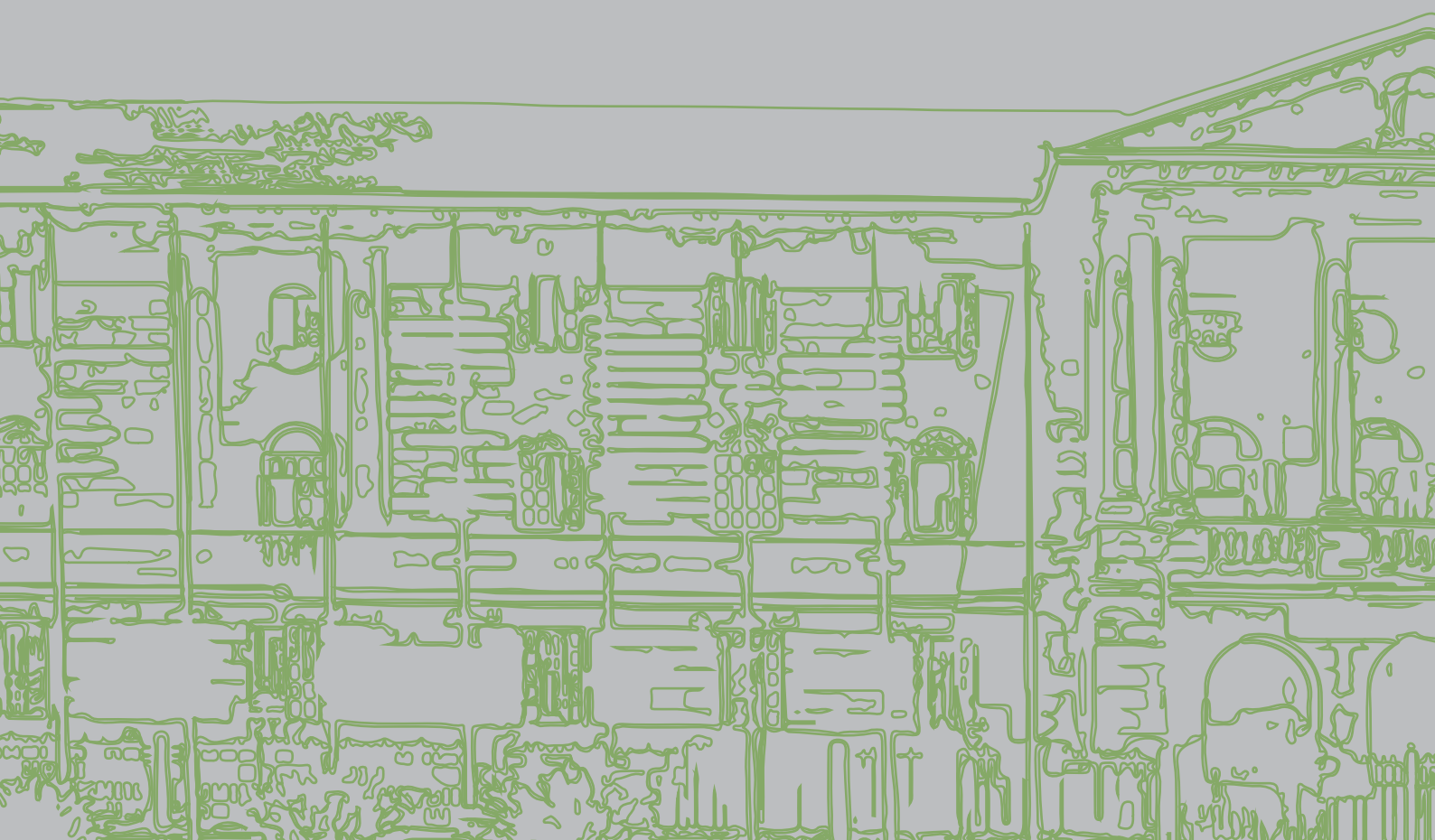
Public Interest Litigation in Kenya

Trends and Prospects



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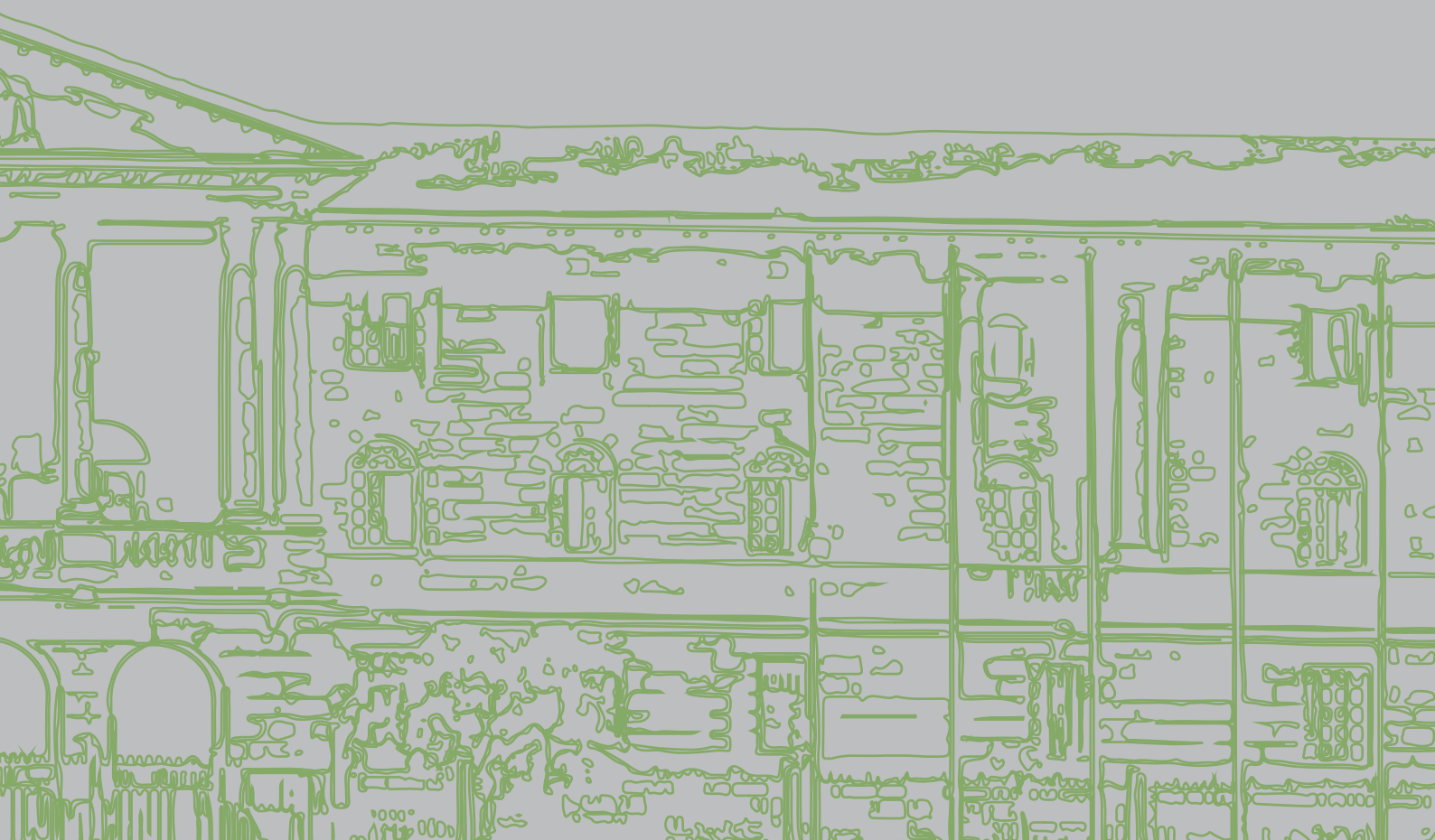

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Abbreviations/Acronyms

AG	Attorney General
CDF	County Development Fund
CIC	Commission for the Implementation of the Constitution
CKRC	Constitution of Kenya Review Commission
CORD	Coalition for Reforms and Democracy
CPD	Continuous Professional Development
CSOs	Civil Society Organizations
DPP	Director of Public Prosecutions
ICPC	International Centre for Policy and Conflict
ICTAK	Information Communication Technology Association *
LGBT	Lesbian, gay, bisexual, and transgender
LSK	Law Society Kenya
NGO	Non-governmental organization
NLAS	National Legal Aid Service
NLC	The National Land Commission
NPSC	The National Police Service Commission
PIL	Public Interest Litigation
TSC	Teachers Service Commission
UN	United Nations

Introduction

This report discusses themes and trends in Public Interest Litigation (PIL) cases in Kenya following the promulgation of the Constitution of Kenya 2010. It is based on a comprehensive review of leading PIL cases in Kenya since 2010 that address the constitutional themes of citizenship, rights guaranteed under the Bill of Rights, land and environment, leadership and integrity, representation of the people, devolved government, public finance, national security, and independent commissions. A compendium of the cases analysed, along with a brief factual and legal analysis, accompanies this report.

The rationale of the report is threefold. Firstly, to determine whether Kenyans have taken advantage of the opportunities for enforcement, through litigation, of rights, duties, values and principles granted by the Constitution. Secondly, to address whether the decisions of the courts and their implementation by public authorities has translated to a culture of constitutionalism in Kenya. Thirdly, to draw lessons on how effective PIL has been applied in Kenya as a strategy for constitutional implementation and protection. The findings of the study will be useful to citizens, human rights activists, and civil society organisations (CSOs) that are interested in human rights protection and observance of the rule of law in Kenya.

A brief history of the 2010 Constitution

On 4 August 2010, Kenyans adopted a new Constitution, which was promulgated on 27 August 2010. This marked the end of a long struggle by Kenyans to radically re-form the political, social, and economic cornerstones of the country. According to the Constitution of Kenya Review Commission (CKRC), the old constitutional regime was characterised by the:

> *…organisation of administration and politics on the basis of ethnici-ty, distracting attention from social and economic policies, discouraging full and direct people's participation in government, bureaucratic control of resources, absence of independence of security forces, lack of accountability by the state and, most significantly, lack of commitment to any fundamental constitutional principles.1*

Reflecting on people's expectations of a new Constitution during the review process, the report noted that:

> *…the primary expectation, therefore, was that the new Constitution would… create a new political dispensation. It would also create a new legislature and a new judiciary, and that it would enhance transparency and accountability, natural justice, respect for human rights, and democracy. Further, it would create full participation in governance.*[2]

It is clear from the above that the 2010 Constitution was to be a transformative constitution that 'recognis[es] the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law'.[3] The Supreme Court in *Speaker of the Senate v AG* noted that the Constitution 'is a transformative charter'.[4] Unlike previous constitutions that sought to justify and define the parameters of state power, the 2010 Constitution seeks to reform society on the basis of cardinal rules of governance under Article 10, human rights protection under an expanded Bill of Rights (Articles 19-59) and a devolved system of governance (Articles 174-200). Mutunga CJ, in his concurring opinion, in *Speaker of the Senate v AG* noted that:

> *…the success of this [transformative] initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions.*[5]

To promote 'large-scale social change'[6] the 2010 Constitution adopted broad principles and values of governance and equipped people with many powers and duties. Article 10(2), for instance,

1 Constitution of Kenya Review Commission, 'The Final Report of the Constitution of Kenya Review Commission' (2005) 34.
2 ibid 62.
3 'The Constitution of Kenya 2010' Preamble.
4 Speaker of the Senate v AG [2013] Supreme Court Advisory Opinion Reference 2 of 2013, eKLR [51–52].
5 ibid 160.
6 Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 S. Afr. J. on Hum. Rts. 146, 147.

establishes the benchmark for governance by providing values and principles that bind the state, state actors, and all people. Article 3(1) provides that 'every person has an obligation to respect, uphold and defend this Constitution.' Article 20(1) states that 'the Bill of Rights applies to all law and binds all State organs and all persons'. The Constitution also provides for public participation in national and county government administration,[7] environmental management, [8] law-making, and public finance.[9]

One way to ensure that these duties are honoured is through litigation. Articles 22 and 258 (below) provide broad *locus standi* requirements that give nearly all people access to the courts to enforce their rights.[10]

Article 258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

Article 22 is nearly identical to Article 258. However, it specifically establishes the right to institute proceedings for violations of a 'fundamental freedom in the Bill of Rights'.

Given that the Constitution is structured to ensure that people use the judiciary to enforce their rights, it also takes care to protect the independence of the judiciary. History has shown that the very bodies and officials that the courts were supposed to keep in line – the executive, public servants, and legislature, for example – had exerted improper influence over the judiciary and hindered the courts from enforcing those rights that should have been protected under the former constitution. To keep history from repeating itself, the 2010 Constitution imposed stronger safeguards to make the courts the people's forum for enforcing the 2010 Constitution. The issue that falls for determination through this study is whether the people and residents of Kenya have used this forum to pursue PIL litigation that upholds and defends the Constitution.

7 'The Constitution of Kenya 2010' (n 3) Arts 118, 196.

8 ibid art 69.

9 ibid art 201.

10 Access to the courts is different from access to justice, and the most independent courts in the world are of no use if people do not have access to them. The Constitution says little about the cost of litigation. Though it does say that court fees must be reasonable (Art. 48) and no fee may be charged for actions to enforce human rights (Art. 22(3)(c)). The most significant expense in going to court is lawyers' fees, and there is as yet no legal aid scheme (other than for capital cases). The Legal Aid Act, introduces legal aid (based on requirements of Article 48), including possibly to support public interest litigation, has recently been passed by the National Assembly. Nevertheless, it has yet to be fully implemented. The issue of whether people can access the courts as a practical matter is different from the question of whether the Constitution gives them standing to raise the claims within the judicial system and is beyond the scope of this study.

Methodology

The authors identified the cases used for the report and in the compendium by speak-ing with legal experts who had been practising public interest litigation and asking them to identify the cases they deemed most important in their respective fields. Those interviewed included government representatives, human rights organisations, the Kenya Law Reports, experts on devolution, economic and social rights, the rights of women and children, and LGBT (lesbian, gay, bisexual and transgender) advocacy. The cases that were collected then formed the basis for further research. First, the authors reviewed these cases and identified significant case law, legislation, constitu-tional provisions, and other sources of law that these cases relied upon. This larger group of legal materials was reviewed, and the cases deemed to fit within the working definition of PIL (explained below) were included in the compendium and relied on for this report. Next, the authors conducted searches on Kenya Law Reports for any citations to the legal materials – including case law, articles of the Constitution, legislation, and key words and phrases relating to PIL – that had already been collected. Any unique cases that appeared during these searches were reviewed and, when deemed to substantively contribute to the rationale of the report, were included in the compendium and relied on for this report. For data relating to court caseloads and other information regarding the operation of the courts, the authors reviewed direct sources from the respective government agencies as well as reports from other, non-governmental organisations. Finally, the authors conducted media searches regarding specific issues relevant to PIL in Kenya to determine what cases may have been of interest to the media and the public, but which had not been identified by the experts interviewed.

The cases included are primarily from the Kenyan High Court where most PIL cases are initiated and, unless appealed, where most substantive decisions are made. The report, however, does include those Court of Appeals and Supreme Court cases that set a precedent on issues relating to PIL.

Although this report is thorough, it is not exhaustive. The authors believe they have sufficiently gathered all the information necessary to provide a comprehensive review of PIL and its trends and possibilities in Kenya. Because it relies on the expertise of the authors and those interviewed, however, it is necessarily subjective. Similarly, because Kenya Law Reports relies on the courts to submit cases to it for publication, there is a possibility, although remote, that some significant public interest cases are not available through the Kenya Law Reports' electronic database. Finally, case law continually evolves, and it should be assumed that important cases will arise following the publication of the report and compendium. We recommend that researchers use this report and compendium as the starting point for their research, but then conduct their own review using their own methodology. As with all research, we welcome ad-ditional discussion that expands the understanding of PIL in Kenya.

What Is Public Interest and Public Interest Litigation?

A brief history of PIL in Kenya

In his article 'Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View',[11] Joe Oloka Onyango notes that post-independence East African governments were preoccupied with public order and national security, and the dominant view was that the government was the only institution that could define and protect the public interest. This context gave rise to abuse of the state's police power through arrests and detentions without trial, the enactment of an unconstitutional law, and a judiciary unwilling to check the excesses of the state. Onyango has noted that in some instances jurisdiction to hear cases was taken away from the courts.[12] As a result of unfavourable laws and an enabling political environment, PIL cases were sporadic, and the few that went before the court were dismissed on technicalities, especially on restrictive *locus standi* provisions, without addressing the fate of those oppressed by the system. He described, in particular, the case of *Wangari Maathai v. Kenya Times Media Trust Ltd* (1989) KLR 267, in which the plaintiff sought to stop the construction of a multi-story building in Uhuru Park in Nairobi. As Oloka Onyango explains, the *Maathai* court ruled that 'matters of public interest could only be litigated by the Attorney General, effectively ensuring that cases challenging the status quo would be stillborn'.[13] He noted that in such matters the courts subordinated themselves to the executive.[14]

Reflecting on the same situation, the Court of Appeal in *Randu Nzai Ruwa v. The Secretary, Independent Electoral & Boundaries Commission* High Court Mombasa, Civil Appeal No. 9 of 2013 said the following:

> *Taken together with article 22 and 258 these articles are a stark departure from the narrow scope of section 84 of the former constitution in so far as the concept of locus standi is concerned. The former constitution and the cases decided during its reign provided and held in no uncertain terms that only a party aggrieved and whose interests were directly affected could institute proceedings for protection, under the Bill of Rights. In the case of Alfred Njau & 5 Ors v. City Council of Nairobi (1982-88) 1 KAR 229, this Court explained the thinking behind the concept as follows: The requirement of sufficient interest is an important safeguard to prevent ... people running to the courts to challenge the actions of local authorities all over the country. Its purpose is to avoid the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the*

11 Joe Oloka-Onyango, 'Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View' (2015) 47 Geo. Wash. Int'l L. Rev. 763, p. 775.

12 He gave the example of George Anyona v Zachary Onyonka and Anr, Nairobi, Kenya High Court Civil Case No. 3346/79 (unreported).

13 Oloka-Onyango (n 11) p. 775

14 ibid.

> *uncertainty in which public officers and authorities might be left, whether they could safely proceed with administrative action while judicial review proceedings were actually pending, even though misconceived. If the requirement were not there the courts would be flooded and public bodies harassed by irresponsible applications.*[15]

This conservative requirement had the effect of limiting access to justice as it treated litigants, other than those directly affected, as meddlesome busybodies. It ignored the fact that every judicial system has its own procedures that protect its processes from abuse by disingenuous or misguided litigants. Decisions like *Maathai v. Kenya Times Media Trust* (1989) KLR 267 and *El Bussaidy v. Commissioner of Land & Ors* [2002] 1KLR 508 have been rendered moot by the broad standing provisions of the 2010 Constitution and have no relevance to contemporary determinations on who can bring claims in the public interest.

A working definition of PIL

Although there is no uniform definition of public interest litigation,[16] the handbook, *A Guide to Public Interest Litigation in Kenya*, has observed that '…the term public interest litigation (PIL) relates to litigation whose focus is on issues of importance to the public at large'.[17] PIL, whether brought by individuals or groups, aims 'to have a broader impact on the pressing, sometimes polarising, contemporary social issues'.[18] This broader impact may not be the only reason a suit is filed, but it is one of the specific objectives of a PIL suit.

This description of PIL seems to be the most widely accepted among CSOs and public institutions interviewed,[19] and will be the one used in this report. Regardless of why they were filed, many cases – indeed likely all cases – will have a broader impact on the public, even if that impact was not intended when the suit was filed; that is the nature of litigation and legal jurisprudence in general. PIL, however, is different in that the broader public good – not just the good of an individual litigant – is one of the reasons the suit is filed, and not just a consequence of having filed it. The cases analysed, in turn, are those that were brought with the intention of having a broader impact on the public good. That broader public good could be any of the following:

- Set legal precedent
- Enforce existing legal protections
- Implement new rights or safeguards

15 Randu Nzai Ruwa & 2 Ors v Secretary, Independent Electoral and Boundaries Commission & 9 Ors [2012] High Court Constitutional Application 6 of 2012, eKLR.

16 Public interest litigation is also sometimes referred to as strategic litigation, impact litigation, test case litigation, social justice litigation, or social action litigation. Columbia University School of Law, Public Interest Law Initiative in Transitional Societies, E Rekosh, K Buchko and V Terzieva (eds), Pursuing the Public Interest: A Handbook for Legal Professionals and Activists (Columbia Law School 2001) 1.

17 Kenyans for Peace with Truth and Justice, African Center for Open Governance and The Katiba Insti-tute, 'A Guide to Public Interest Litigation in Kenya' (2014) 1.

18 ibid.

19 Other descriptions of PIL were that it: involves identification of a societal wrong which is remedied through the courts; uses the courts to create and enforce law and policy; and that it uses litigation to benefit and protect the poor, minorities, and the marginalised.

- Precipitate policy and statutory changes
- Promote access to justice
- Foster government accountability
- Document historical injustices
- Correct historical injustices
- Raise community consciousness on the issues/civic education
- Protect the environment
- Strengthen the judiciary.

PIL as distinguished from public interest

With that understanding of PIL in mind, it is worthwhile to distinguish it from 'public interest' as that term is broadly used in the 2010 Constitution and in Kenyan case law. Although not specifically defined, the Constitution uses the term 'public interest' as a value that informs good governance: it is a reason to justify the deprivation of public property; a guiding principle of leadership and integrity;[20] a value that the Attorney General (AG) must uphold and defend;[21] and a factor that the office of the Director of Public Prosecutions must consider when exercising its powers.[22] In addition to these value-laden references, 'public interest' is also used in a procedural context. For example, the Constitution uses 'public interest' as a basis, or locus standi, for instituting court proceedings to enforce the Bill of Rights or any other provision of the Constitution.[23] Under case law, the term is used as a basis for considering whether to award fees for the cost of litigation to a prevailing litigant.[24] Similarly, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Rule 2 (commonly referred to as the Mutunga Rules)[25] in describing the content of a petition under rule 10, particularly the nature of the injury, notes that in a public interest case, the injury to be specified is that of the public, class of persons, or community.

Although the public interest values and procedures identified under Kenyan law overlap with PIL, it is essential to distinguish them. Public interest values are similar, but not coextensive with the values that may motivate PIL. Also, public interest need not necessarily be the basis for filing a suit under Articles 22 and 258. Similarly, PIL often seeks redress to an injury suffered by an individual litigant while having a broader goal – such as setting legal precedent – that is a consequence of redressing the individual litigant's injury.

20 The Constitution of Kenya 2010' (n 3) art 73(2)(c).
21 ibid art 156(6).
22 ibid art 157(11).
23 ibid arts 22(2)(c), 258(2)(c).
24 See eg Jasbir Singh Rai v Tarlochan Singh Rai [2014] Supreme Court Petition 4 of 2012, eKLR [18].
25 The Mutunga Rules were published under Arts 22(3), 23, and 165(3)(b) of the Constitution. They are practice and procedure rules meant to facilitate access to justice for enforcement of fundamental rights. The rules are intended to: ensure the rights of standing… are fully facilitated; formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; no fee may be charged for commencing the proceedings; the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

The Research Findings

The trends mapped are from the 112 cases that were analysed and collected in the accompanying compendium. The cases were identified through online research from the Kenya law database, discussions with legal practitioners and interviews with CSOs.

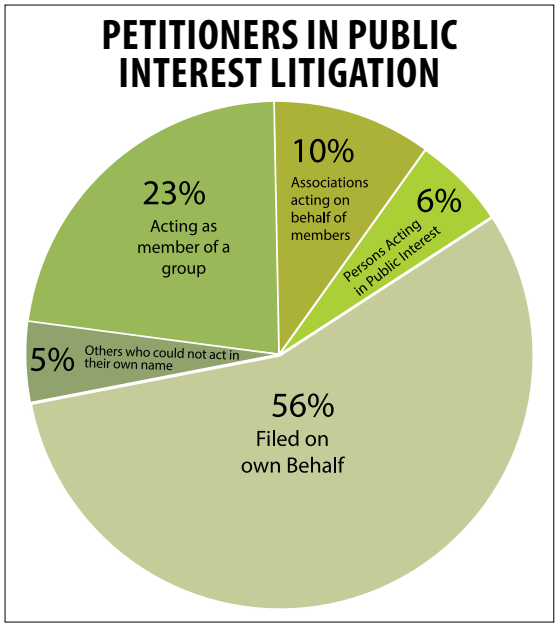
The cases are analysed from several perspectives. First, the report looks at who were the parties to the litigation. Second, the report identifies which courts are most likely to hear and decide PIL cases. Third, the cases are analysed based on which social issues tended to be raised and which articles of the Constitution were most likely to be addressed. Fourth, the report looks at legal representation, advocacy, and strategy, discussions on what relief is sought in PIL cases, PIL success rates, the enforcement of remedies and the use of media. Fifth, the report discusses the duration of litigation and the extent that the appeals process hinders the utility of public interest litigation. Finally, the report draws conclusions from the information and makes recommendations to ensure future success in PIL cases.

Who are the petitioners in public interest cases?

As noted above, Articles 22(2) and 258(2) of the Constitution authorise people to file suit as an individual protecting in their own interests; as an interlocutor on behalf of another person who cannot file in their own name; as a member of, or in the interests of, a group or class of persons; or as an association acting in the interests of its members.

Of the 110 cases analysed, fifty-six percent of the petitioners filed suit on their own behalf to redress harms done directly to them. Although instituted by individuals on their own behalf, these cases are considered to be PIL because of the subject matter of the suits. In each of these cases, the petitioner(s) asserted that their rights were violated under the Constitution. The cases identified were deemed especially relevant because they addressed violations of the Constitution that were novel, or not the subject of previous litigation. Examples of these cases, which are analysed in more detail in the compendium accompanying this report, on the area of right to citizenship are:

- *Mwawasi v AG* [2014] Court of Appeal Civil Appeal 280 of 2013, eKLR. The appellant, who was a Kenyan citizen by birth but subsequently obtained US citizenship, was nominated to run for the Taita Taveta senate seat by Agano political party. The IEBC, however, ruled that candidates who held dual citizenship were not qualified for the position of an MP. The appellant sought a declaration that this requirement was unconstitutional and the High Court concurred.
- *Hersi Hassan Gutale v AG* [2013] High Court Petition 50 of 2011, eKLR. The applicants, who claimed to be Kenyan citizens of Somali descent, held old generation national identity



cards and passports. They were denied new generation identity cards on the basis of a Gazette Notice that required every per-son of Somali descent to be vetted by a committee that would confirm the veracity of their citizenship. The committee determined after vetting that the applicants were not citizens of Kenya. The issue before the court was whether the failure to issue the new identification cards following the vetting process was unconstitutional. The Court held that respondents had not demonstrated a reasonable basis for denying the applicants' requests and ordered that the application be considered within 45 days of the judgment.

- *Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons* [2014] High Court Petition 586 of 2012, eKLR. The issue, in this case, was whether the director of immigration denied the petitioner the right to citizenship by refusing to issue him a Kenyan passport. The petitioner was born in Kenya in 1952 and acquired both Kenyan and British citizenship. In 2011, he applied for a Kenyan passport but was denied on the basis that he had not renounced his British citizenship under Section 97 of the former Constitution. The court did not find a violation of the right to citizenship but, instead, held that the petitioner must pursue remedies available under Kenya's immigration act.[26]

Five percent of the petitioners filed suits under Articles 22(2)(b) and 258(2)(b) on behalf of other persons who could not act in their own name. These petitioners were typically parents or guardians suing on behalf of their children or wards. As with the cases in which petitioners filed on their own behalf, these cases sought to remedy constitutional harms imposed on a specific person. These contribute to a culture of rule of law and hence have a public interest dynamic because they attempted to force specific action by a public officer or payment for injury.

For instance, in *Gabriel Nyabola v AG & 2 Ors*,[27] the petitioner filed suit on his own behalf and on behalf of his children. One of the issues for determination was whether the government policy of funding public secondary schools to the exclusion of private ones is discriminatory and violates a child's constitutional right to education. The court held that the different treatment between public and private schools served a legitimate government purpose of giving priority to the most vulnerable and marginalised in society. While funding for children in private schools is progressively realisable, its immediate application would have undermined affirmative action. The court, therefore, held that the failure by the state to provide financial and material assistance to private schools was not discriminatory.[28]

Twenty-three percent of the suits were filed under Articles 22(2)(b) and 258(2)(b) by people who were 'acting as a member of, or in the interest of, a group or class of persons'. These cases were often filed by persons belonging to a group or class of persons whose interests were threatened or violated by a public authority, such as traders, homeowners in locations threatened with evictions, survivors of sexual abuse, civil debtors and county residents. Examples are:

26 Other cases on the right to citizenship are Jisvin Chandra Narottam Hemraj Premji Pattni v Director of Immigration [2015] High Court Petition 251 of 2014, eKLR, Khatija Ramtula Nur Mohamed v Minister for Citizen-ship and Immigration [9/2/13] High Court Constitutional Petition 38 of 2012, eKLR, Republic v Cabinet Secretary for Ministry of Interior [2013] High Court Misc Civil App 324 of 2013, eKLR.

27 [2014] High Court Petition 72 of 2012, eKLR.

28 Other examples, which are summarised in the compendium, are the cases of PKM v Senior Principal Magis-trate Children's Court [2014] High Court Petition 138 of 2012, eKLR, JL v SL High Court Petition 8 of 2014, 15 Sep 2014 eKLR, and WJ v Amkoah [2015] High Court Petition 331 of 2011, eKLR.

- *William Musembi v Moi Education Centre Co* High Court Petition 264 & 274 of 2013 (Consolidated), 14 Oct 2014 eKLR. The petitioners challenged their forced eviction and that of 326 other residents of City Cotton and Upendo villages. In finding a violation of rights, Mumbi J noted that 'the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'.[29]
- *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security* [2011] High Court Constitutional Petition 2 of 2011, eKLR. The peti-tioner sued on his own behalf and on behalf of 1122 evictees of Medina Location, Garissa. The court found a violation of, among other things, the right to housing, and directed that the evictees be provided with alternative housing.
- *C K (a child) v Commissioner of Police* [2013] High Court Petition 8 of 2012, eKLR. The petitioners, minors, alleged that they had been defiled and that, after the police took no action on their cases, they had to seek refuge in a children's home away from their families. The court found, among other things, that the child petitioners' rights to special protection as members of a vulnerable group, to equal protection and benefit of the law, to dignity and to access to justice, had been violated.
- *Beatrice Wanjiku v AG* [2012] High Court Petition 190 of 2011, eKLR. The petitioners sued on their own behalf and on behalf of other civil debtors challenging the constitutionality of civil procedure laws relating to civil jail, arguing that the laws violated the right to freedom of movement. The court found the laws unconstitutional.
- *Moses Kiarie Kairuri v AG* [2014] High Court Petition 280 of 2013, eKLR. The petitioners sued on their own behalf and on behalf of all persons trading in flowers, plants and pots on a plot of land in Westlands who had been served with notice to vacate the property by the County Government of Nairobi. The court quashed the notice because it was not sufficient to safeguard the traders' commercial interests.

Ten percent of the cases were filed under Articles 22(2)(d) and 258(2)(d) by associations, companies, welfare groups or societies acting in the interest of one or more of its members. Examples of these groups or residents' associations, land-owning companies, society for persons with mental disabilities, private school associations and land-owning welfare groups. The cases include:

- *Githunguri Residents Association v Cabinet Secretary of the Ministry of Education* [2015] High Court Petition 464 of 2013, eKLR. The petitioner sued on behalf of parents and students in Githunguri District, Kiambu, alleging, among others, that the public schools within the district had been charging fees despite the government's policy on free primary education. The court found the respondents violated the right to education because they failed to ensure access to free and compulsory basic education to the children attending public schools within the district.
- *June Seventeenth Enterprises Ltd v Kenya Airports Authority* [2014] High Court Petition 356 of 2013, eKLR. The court held that a corporation may file a suit on behalf of persons agitating for their rights or filing a suit in public interest. The petitioners were owners of land situated

29 William Musembi v Moi Education Centre Co [2014] High Court Petition 264 & 274 of 2013 (Consolidat-ed), eKLR [81].

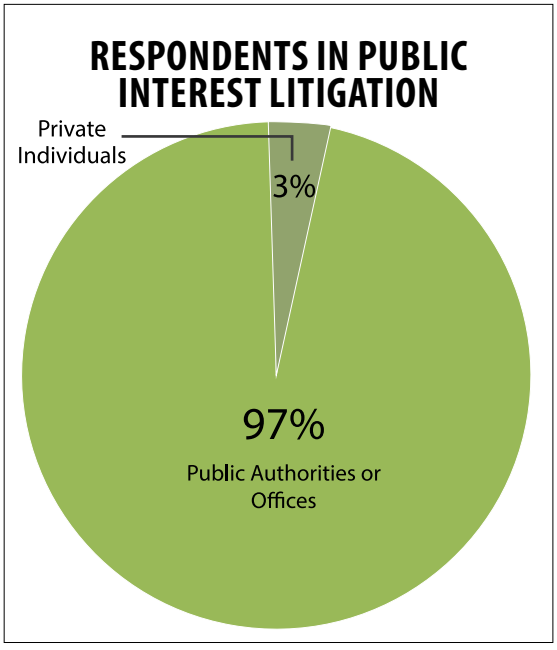
near the Jomo Kenyatta International Airport. The Kenya Ports Authority, the City Council of Nairobi, and the police used bulldozers to demolish all residential and commercial structures and evicted the occupants from the area. The Court found that the petitioners' constitutional rights had been violated and awarded monetary compensation.

- *Kenya Society for the Mentally Handicapped v AG* [2012] High Court Petition 155A of 2011, eKLR. The petitioner, a society for persons with mental disabilities, alleged, among others, that the state had failed to develop policies to achieve equal opportunities in education and employment for persons with mental disability. The court recognised that persons with mental disabilities face many challenges but held that the court's purpose was not to prescribe policies but to ensure that policies meet constitutional standards. The petitioner had, therefore, failed to present the court with a specific procedure for assessment. The petition was dismissed.[30]

Six percent of the cases analysed were filed under Articles 22(2)(c) or 258(2)(c) as 'a person acting in the public interest.' Many cases that relied on the public interest provision included other bases for *locus standi*, suggesting that a primary motivation for the suit was to protect a private or group interest, and a specific class of persons rather than pursuing strict public interest goals. There are a few cases of those analysed that focus on the public as a whole. Most of those cases dealt with the constitutionality of statutes and actions by public authorities or officers. In other words, they sought to enforce the rule of law, separation of powers, good governance and devolution. Examples are:

- *Kenya Council of Employment and Migration Agencies v AG* [2015] Industrial Court Petition 327 of 2015, eKLR. The petitioners sought to enforce proper procedure for appointment of persons to the board of a state-owned company. An initial challenge to the standing of the petitioners was denied by the Court.

- *Institute of Social Accountability v National Assembly* [2015] High Court Petition 71 of 2013, eKLR (the CDF case). This case, commonly referred to as the CDF case, challenged the constitutionality of the Constituencies Development Fund Act, which had been used to disburse funds to the constituencies to fi-nance development projects. The Act established a national board and, at the constituency level, committees on which the respective members of parliament sat as committee patrons. The petitioners successfully sought to have the Act declared unconstitutional because it violated the principle of separation of powers, failed to involve the Senate in its enactment, and did not provide for sufficient public participation before its enactment.



30 Other cases filed by associations, companies, welfare groups or societies acting in the interest of one or more of its members and included in the Compendium are: Mitu-Bell Welfare Society v AG [2013] High Court Petition 164 of 2011, eKLR (overturned by the Court of Appeal in Civil Appeal No. 218 of 2014); Micro and Small Enterprises Association of Kenya, Mombasa Branch v Mombasa County Government [2014] High Court Constitution Petition 3 of 2014, eKLR; Centre for Rights Education and Awareness v AG [2011] High Court Petition 16 of 201, eKLR; John Kabui Mwai v Kenya National Examination Council [2011] High Court Petition 15 of 2011, eKLR.

- *Law Society of Kenya v Transition Authority* [2013] High Court Petition 190 of 2013, eKLR. The petitioner sought a declaration that the restructuring of the former provincial administration into county commissioner, assistant county commissioner, chief, and assistant chief as offices under the national government was inconsistent with the provisions on the system of devolved government under the Constitution. The petitioner argued that, instead, the appointees should be accountable to the governor and County Assembly. The court found the suit to be premature as the dispute resolution mechanism provided under the National Government Co-ordination Act had not been utilised before suit was filed.
- *Speaker of the Senate v AG* [2013] Supreme Court Advisory Opinion Reference 2 of 2013, eKLR. The National Assembly debated and passed the Division of Revenue Bill that was meant to facilitate the division of revenue between the national and county governments in Kenya. Once the National Assembly passed the Bill, it was sent to the Senate, which amended the Bill by increasing the amount of money that had been allocated to it. The Speaker of the National Assembly rescinded the decision to send the Bill on to the Senate and, instead, sent it to the President for assent. The Senate sought an advisory opinion from the Supreme Court on whether the President should have as-sented to the law. The Supreme Court found the Senate had a right and man-date to debate the Division of Revenue Bill.
- *Okiya Omtatah Okoiti v AG* [2014] High Court Petition 593 of 2013, eKLR. The Transition Authority, the body charged with the management of the transfer of functions to the county governments, gazetted some functions that were to be transferred to counties. Among them were 'county health services' which included the transfer of services and facilities that initially belonged to the national government. The petitioner sought an interpretation of Section 23, Part 1 and Section 2, Part 2 of the Fourth Schedule to the Constitution on the meaning of the words 'national referral health facilities' and 'county health facilities'. The court declined to make a finding on which specific health facilities or functions belong to the respective levels of government and stated that it was a matter of policy and not for the courts to rule.
- *Coalition for Reform and Democracy v Republic (the CORD case)* [2015] High Court Petition 628, 630 of 2014 & 12 of 2015 (Consolidated), eKLR. Following ter-rorist attacks in Kenya in late 2014, the state enacted the Security Laws (Amendment) Act (SLAA). The Act amended the provisions of 22 statutes concerned with national security. The petitioners challenged the constitution-ality of the SLAA because it violated the Bill of Rights and was passed without sufficient public participation. The High Court found eight sections of the SLAA unconstitutional, primarily for violations of provisions of the Bill of Rights.
- *Benson Riitho Mureithi v J W Wakhungu* [2014] High Court Petition 19 of 2014, eKLR. The petitioner challenged the fitness to hold public office of Ferdinand Waititu who had been appointed as the chairman of the Athi Water Services Board. The court found that the cabinet secretary (Ministry of Environment) is under a duty under the Constitution to consider the personal integrity, character, competence and suitability when making the appointment of the chairman of the Athi Water Services Board.

Who are the respondents in public interest cases?

Ninety-seven percent of the cases analysed were filed against public authorities or officers. In these cases, the AG was always enjoined as a respondent; as expected, because article 156(4) provides that the AG represents the national government in court. Other public authorities that had been sued include ministries, state corporations, independent commissions, Inspector General of Police, commissioner of prisons, Director of Public Prosecutions (DPP), registrar of

persons, director of immigration, and county governments. The high percentage of suits against the government is not surprising as the primary duty to protect human rights falls on the state.

However, the Constitution also vests a duty on individuals to respect human rights. About three percent of the cases were filed against private companies for alleged violations of rights. Examples are:

- *Rose Wangui Mambo v Limuru Country Club* [2014] High Court Constitutional Pe-tition 160 of 2013, eKLR. The petitioners challenged a resolution by the Board of Directors of the Limuru Country Club amending part of the Club's by-laws, which they alleged discriminated against the female membership contrary to article 27 of the Constitution. The court found the actions of the Board were contrary to articles 27 and 33.
- *COM v Standard Group Limited* [2013] High Court Petition 192 of 2011, eKLR. Lenaola J held that the unwarranted disclosure of personal details (in this case the petitioner's HIV status by the Standard Newspaper) was a violation of the petitioner's 'psychological integrity' and right to privacy.
- *JWI v Standard Group Limited* [2013] High Court Pet 466 & 416 of 2012, eKLR. The case canvased the right to dignity, privacy and the best interest of children. The petitioner filed suit on behalf of two minors, children of SM. The Standard Media Group ran a story on the killing of SM, who the police had described as a most wanted criminal. The article included images of his minor children. The petitioner claimed that the published stories, narrations, and pictures were offensive and embarrassing to the minors as they prejudiced their innocence and psychological integrity. The court denied the claims, holding that the children had not been identified in the articles and that, in some instances, the parents had consented to the publications. What role did *amici curiae* and interested parties play in the litigation? *Amici curiae* participated in 15 percent of the cases analysed, and interested parties participated in 23 percent. In *Trusted Society of Human Rights Alliance v Mumo Matemo,* the Supreme Court stated that *amicus participation* is a 'is a matter of privilege, rather than of right'.[31] *Amici* must be non-partisan, only interested in fidelity to the law, and limited to addressing points of law that had not been raised by petitioners and respondents.[32] As explained in *Friend of The Court & The 2010 Constitution: The Kenyan Experience and Comparative State Practice on Amicus Curiae,* '[a]n amicus is an advisor to, but not extension of the court; it neither advances a party's case nor is bound by the decision of the court, except as to its precedent'.[33]

To determine whether an *amicus* applicant is non-partisan, the Supreme Court will adopt the perspective 'of the ordinary litigant, rather than of a legal expert examining the dichotomy between factual matter and legal matter'.[34] It is not clear, however, what the 'ordinary litigant' test entails, and there is no precedent cited, nor any known, on what defines an 'ordinary' litigant. Similarly, there is a risk that the 'ordinary litigant' test may supplant the independence of the judiciary. After all, distinguishing between matters that are purely factual and ones that are purely legal is often difficult. Most matters exist in a grey area, in which both the facts and the law inform the positions of the parties and, ultimately, the decision of the court. The court, itself, should have

31 Muruatetu v Republic [2016] Supreme Court Petition 16 of 2015 (Consolidated), eKLR [54].
32 Trusted Society of Human Rights Alliance v Matemu [2014] Supreme Court Petition 12 of 2013, eKLR [49].
33 Christopher Kerkering, 'Friend of the Court: An Assessment of Its Role in Kenya's Judicial Process', Friend of the Court & the 2010 Constitution: The Kenyan Experience and Comparative State Practice on Amicus Curiae (Judiciary Training Institute Kenya, International Development Law Organization 2017) 13 <https://tinyurl.com/y8x48wwr>.
34 Trusted Society of Human Rights Alliance v Matemu (n 32) [5].

sufficient expertise to determine what side of the factual/legal dichotomy a particular matter falls. There is reason to question the wisdom of having the court abandon its unique perspective and adopt the perspective of the 'ordinary litigant,' who will necessarily have a partisan position.

It is not clear what the 'ordinary litigant' test entails or the extent to which the court will rely on it. Ultimately, the court should not consider an *amicus* to be partisan

> *merely because its expert analysis disfavours the outcome sought by one of the litigants. After all, an expert's analysis will often favour one argument over another. The critical question is whether the conclusion is sufficiently supported by the expert analysis as to merit consideration by court. If the analysis is nakedly partisan and not supported by expertise, the court is free to deny admission. If, however, the analysis is sufficiently supported, the amicus should be admitted, and it will be up to the court to determine what weight, if any, to give to the submissions.*[35]

In its most recent rulings on *amicus* participation, the Supreme Court did not appear to adopt the perspective of the 'ordinary litigant.' In *Raila Amolo Odinga & Anr v Independent Electoral and Boundaries Commission & 2 Ors & Information Communication Technology Association (ICTAK) (as Amicus Curiae)* [2017] eKLR, the Supreme Court identified three 'guiding principles' it will consider when determining whether to admit an *amicus*:

(i) An amicus brief should be limited to legal arguments.

(ii) The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention ought to be governed by the principle of neutrality, and fidelity to the law…

(iv) An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other *amici*, so as to introduce only novel aspects of the legal issue in question that aid the development of the law. [[[15]; citing matemu at [41]. See also *Muruatetu*. The Supreme Court applies a stricter standard for the admission of *amici* in criminal cases than in civil cases. An *amicus* in a criminal case must not unfairly prejudice the accused or shift the focus of the litigation away from the issues raised by the accused.]]

The *amicus* applicant by ICTAK asserted that it had expertise in information communication technology that would be useful to the courts. Petitioners and respondents objected, and the court denied the ICTAK's application. The court did not determine whether the ICTAK had sufficient expertise, but it did find that its briefings did not 'address points of law not already addressed by the other parties.' [17]. Although information communication technology was relevant to the dispute, the application was too general and 'not focused on a specific question falling for determination before this Court.' [18].

In a related case, *Raila Amolo Odinga & Anr v Independent Electoral and Boundaries Commission & 2 Ors & Law Society of Kenya (as Amicus Curiae) [2017]* eKLR, the court identified *Matemu* as the leading case on *amicus* applications. The court stated that impartiality was the most significant consideration for the court. 'Most important, as a friend of the Court, a party must not be partisan as he has no personal stake in the matter save for fidelity to the Constitution and assisting the Court reach a legally sound determination.' [15]. Despite claims that the amicus applicant, the

35 Kerkering (n 33) 19.

Law Society of Kenya (LSK), was not impartial, the court admitted the LSK. It noted that the LSK had a statutory mandate to assist the government and the court on matters relating to the administration of justice and the rule of law. Neither internal disputes among members of the LSK nor the political aspirations of its individual members rendered it partisan. Instead, the court evaluated the application 'on the basis of the Society's objectives and not individual Society members.'

Two key points emerge from the ICTAK and LSK cases. First, an *amicus* applicant must identify with specificity the issues it will address. It is not sufficient to make general assertions about areas of law for which an applicant can assist. Second, an applicant may be better positioned to overcome challenges to its impartiality if its mission includes the development of the rule of law.

Ultimately, however, the case law on *amicus* participation is inconsistent. As the case law progresses, a more coherent standard may arise. A thorough analysis of Kenyan case law has been produced, including suggestions on what to include in applications and recommendations on what the courts should consider when deciding applications.[36] Although this publication has not been endorsed by the Court, it will provide extensive guidance to litigants looking to qualify as *amicus*.

Given the procedural and substantive limits imposed on *amicus* participants, public interest litigants should also consider applying to join in cases under Article 22(2)(b), which authorises participation for 'a person acting as a member of, or in the interest of, a group or class of persons.' Such 'interested party' participation may provide litigants with a more significant opportunity to affect and direct the litigation.

Rule 2 of the Mutunga Rules define an interested party as 'a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings.' In *Muruatetu*, the Supreme Court held that an interested party does not sufficiently demonstrate that it has a personal stake in the matter if it 'only seeks to champion the public interest'.[37]

- Examples of interested party and *amici curiae* are: *Independent Policing Oversight Authority v AG* [2014] High Court Petition 380 of 2014, eKLR. The National Police Service Commission (NPSC) carried out a recruitment exercise for police officers at various centres throughout the country. Allegations of corruption, tribalism, nepotism and other malpractices emerged. The Independent Policing Oversight Authority argued that the NPSC should cancel the exercise. Interested parties joined in support of both sides, including those who would have been eligible for recruitment but were excluded and those who were recruited and objected to the claim that the exercise should be cancelled.
- *Muslims for Human Rights v Inspector General of Police* [2015] High Court Petition 19 of 2015, eKLR. The issue, in this case, was whether the petitioners'= right to fair administrative action under article 47 was violated following notification by the Inspector General of Police of his intention to declare them as specified entities associated with terrorism. The Katiba Institute and Kenya National Commission on Human Rights participated in the case as *amici*.[38]

36 ibid 186.
37 Muruatetu (n 31) [46].
38 [2015] High Court Petition 19 of 2015, eKLR [2].

In the cases analysed, the *amici* were generally NGOs with mandates in specialised areas such as legal aid, women and children rights, environmental rights and constitutional law. Individuals, commissions such as the Commission for the Implementation of the Constitution (CIC), and professional bodies like the Law Society of Kenya (LSK) also joined suits as *amicus*.[39]

The Constitution's intent to expand standing in instituting proceedings, particularly participation of *amicus* and interested parties, has been achieved, at least to a limited degree, in the years since its promulgation. The full potential of these provisions, however, remains uncertain. Although the recent cases regarding amicus participation in elections disputes provide some guidance, the question of who can participate as amicus and what issues can be raised remains unresolved. As a result, a public interest litigant should carefully consider whether participating as an interested party would provide a better strategy for impacting the litigation.

Which High Courts have been hearing PIL?

Courts are important in analysing trends of PIL in Kenya because they are the avenues for enforcement of rights that are guaranteed under the 2010 Constitution. The court system is established under Chapter 10 of the Constitution. It comprises superior courts – the Supreme Court, a Court of Appeal, and High Courts – and subordinate courts – Magistrate Courts and Kadhis Courts, among others. Although issues relating to the violation of constitutional rights can arise in any court, Article 23(1) vests jurisdiction in the High Court for enforcement of a constitutional right. The High Court is established under article 165(1), and under sub-article (3) it has jurisdiction to, among other things:

b. determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

d. hear any question respecting the interpretation of this Constitution in-cluding the determination of –

   i. the question whether any law is inconsistent with or in contravention of this Constitution;

   ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; and

   iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government.

Therefore, the High Court is the court of first instance for all PIL matters relating to the Constitution.[40] A High Court decision can be appealed to the Court of Appeal and finally may end up at the Supreme Court.[41] Supreme Court decisions are binding on all lower courts, and Court of Appeal

39 Refer to Osman v Minister of State for Provincial Administration & Internal Security High Court Constitutional Petition 2 of 2011, eKLR; Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme [2013] High Court Petition 65 of 2010, eKLR

40 See the High Court Organization and Administration Act, 2015 (No 27 of 2015) for more information on how the High Court is structured and managed.

41 The Court of Appeal and the Supreme Court are established under articles 163(1) and 164(1) respective-ly. For more information on the jurisdiction of these courts refer to the Appellate Jurisdiction Act (Cap 9) Laws of Kenya, and the Supreme Court Act 2011 (Cap 9A).

decisions are binding on the High Courts and subordinate courts. As a result, PIL cases that are appealed to the Court of Appeal or Supreme Court have precedential significance that will impact subsequent cases. However, because many of the cases are not appealed, the majority of the PIL cases addressed in this report and in the compendium are from the High Court.

Unlike in some other countries (notably India, and to some extent South Africa and Canada) very few cases can be submitted directly to the Supreme Court. It has exclusive original jurisdiction under Article 163(3)(a) to hear challenges to presidential elections and, under Article 136(6), may provide advisory opinions on issues relating to county government when specifically requested to do so by a state body.

Requests for advisory opinions brought under Article 136(6) include:

- *Re the Principle of Gender Representation in the National Assembly and the Senate* [2012] Supreme Court Advisory Opinion Application 2 of 2012, eKLR. The issue for consideration was whether Article 8(b) (the two-thirds gender requirement for elective public bodies) applied to the 2013 general elections or was to be applied progressively. The Supreme Court advised that the two-thirds gender rule should be interpreted as a progressive goal and need not be applied in the 2013 general elections.
- *Speaker of the Senate v AG* [2013] Supreme Court Advisory Opinion Reference 2 of 2013, eKLR.[42]
- *Re the National Land Commission* [2015] Supreme Court Advisory Opinion Reference 2 of 2014, eKLR. The National Land Commission (NLC) sought clar-ification from the court on its functions and powers vis-à-vis the functions and powers of the Ministry of Land, Housing, and Urban Development in light of three statutes enacted under Article 68: the National Land Commission Act, the Land Act and the Land Registration Act.[43]

Although not filed directly to pursue the public interest, they are considered PIL cases because they set legal precedent, clarify constitutional provisions, enforce existing law, foster accountability, and benefit the public at large.

The Kenyan Courts intend to have at least one High Court in each county and, according to the judiciary website, there are 20 High Court stations, including ones in Bomet, Bungoma, Busia, Eldoret, Embu, Garissa, Garsen/Hola, Homa Bay, Kajiado, Kericho, Kerugoya, Kiambu, Kisii, Kisumu, Kitale, Kitui, Machakos, Malindi, Marsabit, Meru, Migori, Mombasa, Murang'a, Nairobi, Nakuru, Nyamira, Nyeri, Siaya, Voi, Tharaka-Nithi and Turkana.[44]

Of the cases analysed, the vast majority were filed in Nairobi, which may be explained in a variety of ways, including that the majority of legal practitioners[45] and public interest NGOs are based in Nairobi,[46] and only the Nairobi court station has a permanent constitutional and human rights division.[47] A few of the cases were filed in the Employment and Labour Relations Court and

42 Brief facts of the case were discussed at p 11. For more facts, refer to the compendium of case summaries.
43 [2015] Supreme Court Advisory Opinion Reference 2 of 2014, eKLR [23].
44 Kenya Law Reports, 'High Court Judge's Postings' <http://kenyalaw.org/kl/index.php?id=4685> ac-cessed 26 July 2016.
45 Yash P Ghai and Jill Cottrell (eds), The Legal Profession and the New Constitutional Order in Kenya (Strath-more University Press 2014) 13–14.
46 Of the 19 organisations interviewed, 11 have offices only in Nairobi.
47 ibid

Environment and Land Courts. These are specialised courts established under the Constitution with the status of a High Court that can hear and determine human rights issues related to their specific man-dates.

Although not necessarily affecting its precedential value,[48] whether a High Court case was heard by a single judge or by a panel of judges is an important consideration under PIL because they address substantial questions of law.[49] The multi-judge panels for the High Court comprised either three or five judges. According to Art 165(4) of the Constitution, multi-judge benches in the High Court are appointed by the Chief Justice to hear matters that have been certified as raising 'a substantial question of law'. The courts have often relied on the following definition of a substantial question of law:

> *…one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the… Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.*[50]

In *International Legal Consultancy Group v Senate* [2014] High Court Const Pet 74 of 2014, eKLR, the High Court addressed whether the Senate could summon governors and county executive commission members to answer questions. The Court held that the case should go before a multi-judge panel because it raised a 'critical and substantial question of law with regard to the powers of the Senate vis a vis governors and oversight over county finances'.[51] In *Mombasa Cement Ltd v National Assembly* [2015] High Court Const Pet 177 of 2015, eKLR the court denied a request to refer a matter to a multi-judge panel because it held that a single-judge bench had the same precedential value as a multi-judge bench and that the issue had already been addressed in a previous case.[52]

Decisions from a multi-judge bench are often PIL related or affect the public interest because they involve substantial questions of law and will likely create precedent. By itself, however, the fact that a decision arose from a multi-judge bench is not a determinative element of a PIL.

The High Court cases analysed that did have a multi-judge bench addressed untested provisions of the Constitution, unique facts not plainly covered by law, the constitutionality of legislation, and highly publicised cases. Examples are the challenge to the constitutionality of the County Development Fund in the *CDF* case,[53] which was heard by three judges; the politically charged case on the suitability of Uhuru Kenyatta and William Ruto to run for office while facing trial at the *International Criminal Court in International Centre for Policy & Conflict (ICPC) v AG* [2013] High Court Petitions 552, 554, 573 & 579 of 2012 (Consolidated), eKLR (*ICPC case*); and *Eric Gitari v Non-*

48 Mombasa Cement Limited v National Assembly [2015] High Court Const Pet 177 of 2015, eKLR [19].
49 Ninety-two percent of the cases analysed were heard by a single-judge bench while the rest, including all Supreme Court and Court of Appeals cases, were heard by a panel of judges.
50 Mombasa Cement Limited v National Assembly (n 48) [20]; quoting Sir Chunilal V Mehta and Sons v Century Spinning and Manufacturing Co [1962] AIR 1314 (Supreme Court).
51 [2014] High Court Constitutional Petition 74 of 2014, eKLR [21].
52 (n 48) [18].
53 Institute of Social Accountability v National Assembly [2015] High Court Petition 71 of 2013, eKLR.

Governmental Organisations Co-ordination Board [2015] High Court Petition 440 of 2013, eKLR (the *Gitari* case) in which a three-judge panel addressed the right of sexual minorities to associate and express themselves through a duly registered non-governmental organisation.

Some of the CSOs interviewed stated that there is an advantage to a panel of judges hearing a case. They believed that in politically charged cases or cases of immense public interest, a panel of judges is ideal, as tension and responsibility are spread out among the judges. For a single judge bench, on the other hand, pressure can cause the judge to make a conservative decision so as not to be exposed to political backlash. The disadvantage of a panel of judges, according to the CSOs, is that it can delay the case, especially when the judges are not from the same court station.

What issues and which articles of the Constitution have been the subject of public interest litigation?

The scope of this study does not allow for conclusions on what are the most litigated themes or chapters of the Constitution. Of the cases reviewed, however, ninety percent raised human rights related claims under Chapter 4 of the Constitution. The other ten percent addressed challenges on the constitutionality of law, actions, or decision taken under other constitutional provisions, values and principles, such as rule of law, separation of powers, citizenship, devolved governance, leadership and integrity, public finance, and national security.

Legal Representation and Advocacy

Of the cases analysed, sixty percent of the petitioners were represented by counsel, while five per cent of the petitioners represented themselves. There are a variety of reasons why petitioners may hire counsel to represent them, including that they lack knowledge of the law, court procedure, and legal advocacy. The CSOs interviewed noted that legal skills are necessary to ensure success in PIL. One human rights defender said that he felt hindered by his lack of legal skills and felt compelled to hire a lawyer for cases with complicated legal technicalities and drafting needs. He also noted that the court is more deferential to lawyers during courtroom advocacy.

The case law did not provide information on why those who proceeded without counsel chose to do so. Some reasons may include the inability to afford a lawyer, inaccessibility to a lawyer for those in rural areas, or a lack of trust in the legal community.

In ninety percent of the cases, the respondents – the majority of which were public institutions or officers – defended the suits. In the remaining ten percent, the respondents failed to respond, defaulted, or conceded. In some cases, this information was missing, but in others the court noted that the government did not defend the suit and judgment was awarded to the petitioner by default.[54] It is not clear whether the government's defaults were the result of some tactical decision, negligence, or a combination of the two, but it is surprising that the state sometimes chooses to incur the consequences of a default judgment when it would otherwise have an opportunity to provide a defence.

54 Mohamed Balala v AG [2012] High Court Constitutional Petition 41 of 2011, eKLR (High Court found that respondents had conceded after failing to respond to the petition).

For the most part, the courts relied on legal authority, whether national or international, to support their decisions. In seventy percent of the cases analysed, local case law was cited while fifty-three percent cited foreign case law. In some instances, the court noted whether the petitioner or respondent cited the cases on which it relied. In other instances, it was not clear whether the cases cited by the court were taken from the parties' pleadings or whether the court conducted independent research. In a few cases – five percent – no authority, whether local or foreign, was cited. The most quoted foreign jurisdictions were Canada, the United Kingdom, the United States of America, South Africa, and India. From East Africa, Uganda was the most quoted. In twenty percent of the cases analysed, international law, including treaties, general comments and special rapporteur reports, was quoted.

International law may have been relied upon to provide guidance in situations where Kenyan laws or regulations did not sufficiently address an issue. For example, in *Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme* [2013] High Court Petition 65 of 2010, eKLR, a case touching on the right to housing, the court noted the lack of eviction guidelines in Kenya and then cited United Nations (UN) guidelines on forced evictions as authority.[55] This incorporates internationally accepted standards into the country. CSOs interviewed stated that they quoted comparative jurisprudence and international law for a variety of reasons, including when: there was no Kenyan law or jurisprudence on the issue before court; comparative jurisprudence provided different perspectives or options on how to deal with issues, including innovative remedies for societal problems; comparative jurisprudence could be used to recommend that best practices from the international level be adopted on the national level; or as authority to support arguments that legal principles should be interpreted progressively with the hope of encouraging a similar practice in Kenya.

The CSOs interviewed also relied on policies, regulations, expert opinions, letters from public authorities, gazette notices, medical records, academic literature, and national or county government development plans as authority or evidence to support their claims.

The fact that the courts are relying on comparative jurisprudence, international law, and other supporting documents demonstrates how important it is for petitioners to support their petitions with legal research and arguments. It is undoubtedly to the petitioners' advantage for the court to rely on the research they supply, rather than conducting its own research or relying on the information provided by the respondents. The cases show that a high standard for legal research has been set and that competent counsels must meet that standard.

55 (n 39) [109].

Relief Requested in PIL Cases

The heart of any public interest litigation is to obtain relief that successfully addresses the societal harm. The case law and interviews have provided valuable insight into the relief sought by the parties and granted by the courts, the role of monetary judgments in PIL, and the potential for the Court to impose sanctions for what it believes to be misconduct.

Article 23(3) of the Constitution provides that a court may grant the following relief for violation of fundamental freedoms:

- a declaration of rights
- an injunction
- a conservatory order
- a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24
- an order for compensation
- an order of judicial review.

All these kinds of relief (and more, as the list is not exhaustive) have been granted by the courts in PIL cases. In nearly all cases, the petitioners requested multiple forms of relief. For example, litigants sought declarations while challenging the lawfulness of the actions of public and state offices,[56] the fitness of individuals to hold office,[57] the failure to enact policies or regulations, and the validity of election declarations by the Independent Electoral and Boundaries Commission[58]. Nearly all of the petitioners in the cases reviewed requested the court to issue a declaration of rights to either affirm that such a right existed or to protect such a right from being violated. Because a declaration of rights clarifies the respective rights and obligations of the parties to the proceedings, without actually conferring a legal right that can be enforced, it was almost always accompanied by a request for additional, more specific relief.

Conservancy orders, which preserve the legal status to ensure that the issues remain subject to adjudication during the proceedings,[59] have been sought in some PIL cases. For example, in *Nation Media Group Limited v AG*, the petitioners sought conservancy orders preventing the respondent from filling vacant positions on the Media Council and the Communications and Multimedia Appeals Tribunal pending the determination of the case.[60] It appears that in at least a few cases, the conservancy orders resolved the dispute since no further decisions were found within the eKLR database. It could be that the court conservancy order was sufficient to change a respondent's behaviour and so further prosecution was unnecessary; that the parties reached an agreement outside of court; or that the conservancy orders expired and the petitioner chose not to continue the litigation of the case.

56 Muslims for Human Rights v Inspector General of Police [2014] High Court Petition 62 of 2014, eKLR [2].
57 Benson Riitho Mureithi v J W Wakhungu [2014] High Court Petition 19 of 2014, eKLR [4].
58 Mary Wambui Munene v Peter Gichuki King'ara [2014] Supreme Court Petition 7 of 2014, 2014 eKLR.
59 For an explanation of conservatory orders, Nation Media Group Limited v AG High Court Petitions 30 & 31 of 2014 and Judicial Review Misc. Appl. 30 of 2014 (Consolidated), eKLR [14].
60 ibid 3.

Where gaps in policy exist, petitioners have also requested the court to order the rele-vant public authority to formulate policy. For example, in *CK (a child) v Commissioner of Police*, the petitioners sought an order of mandamus directing the Minister of Justice to implement the National Policy Framework required under Section 46 of the Sexual Offences Act.[61] In *Kenya Society for the Mentally Handicapped v AG*, petitioners sought an order compelling the minister responsible for education to create a legal policy framework for the education of those with disabilities.[62]

In some of the cases where lawfulness of actions or decisions of public officers were challenged, the parties also requested orders to set aside the decisions and nullify any actions done based on those challenged decisions. For instance, in *Gabriel Nyabola v AG*, the petitioner asked the court to set aside policies relating to free basic education and to prevent such policies from being implemented.[63] Similarly, in *Muslims for Human Rights v Inspector General of Police* the petitioners requested that a curfew that had been imposed on Lamu County be lifted because it violated the Constitution.[64]

Petitioners in some cases also asked for compensation or damages – either general or exemplary. In WJ v Amkoah the court awarded compensation to two juvenile petitioners for damages suffered as a result of sexual abuse by a teacher.[65] Notably, J. Mumbi Ngugi held all respondents – both the perpetrators of the sexual assault, the Teachers Service Commission, and the state – jointly and severally liable for failing to fulfil their duties to the petitioners. The William Musembi court ordered payment of 250,000 shil-lings each to over 320 petitioners after a finding that the respondents had unlawfully demolished the petitioners' houses.[66] Other examples include:

- Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security, in which the court awarded damages of 200,000 shillings each to about 1,122 persons for violations of their right to housing.[67]
- C.O.M. v Standard Group Ltd, in which the court awarded damages of 1.5 mil-lion shillings for violations of the right to privacy and dignity.[68]
- JL v SL in which the court awarded damages of 50,000 shillings for viola-tions of freedom from discrimination and the right to education.[69]
- Samura Engineering Ltd v Kenya Revenue Authority, in which the court awarded damages ranging from 600,000 to 1.2 million shillings to some petitioners for violations of their right to privacy and property.[70]

In all cases, the petitioners requested that the respondents pay the costs of the suit. Costs include lawyers' fees and other disbursements of the parties, but do not include court fees.[71]

61 CK (a Child) v Commissioner of Police [2013] High Court Petition 8 of 2012, eKLR [3].
62 Kenya Society for the Mentally Handicapped v AG [2012] High Court Petition 155A of 2011, eKLR [6].
63 (n 27) [8].
64 Muslims for Human Rights v Inspector General of Police (n 56) [2].
65 (n 28) [165].
66 (n 29) [91].
67 (n 39) 8.
68 COM v Standard Group Ltd [2013] High Court Petition 192 of 2011, eKLR [32].
69 (n 28) [20].
70 [2012] High Court Petition 54 of 2011, eKLR [104].
71 The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Rule 2.

In most instances, the court did not award costs and directed the parties to bear their own costs, or made no orders as to costs. However, in four percent of the cases, the court granted costs. The most notable award of costs occurred in the *ICPC* case, which is pending appeal. The *ICPC* court stated that, although the petitions challenging the fitness of the President and Deputy President to hold office were brought as a matter of public interest, the respondents were entitled to costs because 'they had to defend several petitions.'[72]

In all the cases where compensation was awarded, costs of suit were also given. In other cases, no reason was given as to why costs were awarded. For example, in *Republic v Cabinet Secretary for Ministry of Interior*, the petitioner had applied to be granted citizenship on the basis of her marriage to a Kenyan citizen. Despite making repeated inquiries, she did not receive a response from the director of immigration. The court found this violated her right to fair administrative action.[73] In *Joseph Letuya v AG*, the High Court ordered that the respondents pay costs after ruling that the evictions of members of the Ogiek community violated their rights under the Constitution.[74] In these cases, awards of costs seem to follow the common law tradition of the victor getting costs of the suit as a matter of course.

In many cases, relief was directly tailored to address the specific harm caused by the constitutional violation. For instance, in cases asserting the right to housing, alternative housing, before eviction, was requested.[75] In cases focusing on use of public funds and good governance, parties requested that they be allowed to audit accounts.[76] In cases asserting the right to health, petitioners requested a directive to government for provision of drugs, medical facilities and services.[77] Petitioners have requested the return of documents improperly seized by the state, restitution,[78] and in cases of unlawful detention, *habeas corpus*.[79]

By analysing the remedies sought, the objectives of the petitioners can be summarised as the following: clarification of the content of human rights provisions through declarations; enforcement of human rights through injunction and judicial review orders; policy creation; change of policy; implementation of policy; change of practices or processes; change of law; integrity and accountability in political and appointive positions; transparency and accountability in the use of public funds; and clarification of division of functions between national and county governments. If compared to the aspirations of Kenyans in passing a new Constitution, it can be surmised that Kenyans have exercised their right and duty to defend the Constitution. The question is whether this has been effective in entrenching a culture of rule of law in the country. That question is best answered whether or not court judgments are implemented.

72 International Centre for Policy & Conflict v AG [2013] High Court Petitions 552, 554, 573 & 579 of 2012 (Consolidated), eKLR [169].
73 (n 26) [36].
74 [2014] High Cour Elc Civil Suit 821 of 2012, eKLR 19.
75 See William Musembi v Moi Education Centre Co (n 29); Osman v Minister of State for Provincial Administration & Internal Security (n 39); Richard Were v Permanent Secretary Ministry of Health [2014] High Court Petition 568 of 2012, eKLR; Mitu-Bell Welfare Society v AG (n 30); Micro and Small Enterprises Association of Kenya, Mombasa Branch v Mombasa County Government (n 30).
76 See Independent Policing Oversight Authority v AG [2014] High Court Petitition 390 of 2014, eKLR.
77 See Luco Njagi v Ministry of Health [2015] High Court Petition 218 of 2013, eKLR; Mathew Okwanda v Minister of Health and Medical Services [2013] High Court Petition 94 of 2012, eKLR.
78 See Osman v Minister of State for Provincial Administration & Internal Security (n 39).
79 See Masoud Salim Hemed v DPP [2014] High Court Petition 7 & 8 of 2014 (Consolidated), eKLR.

Duration of Litigation

In regard to cases analysed, and filed in the first three years after promulgation of the Constitution, 4 were filed in 2010, 16 in 2011 and 21 in 2012.[80] This gradual growth is expected as the Constitution was not implemented until August 2010, and that implementation occurred in phases. Thus, some issues had not ripe for determination. For instances suits on leadership and integrity for elective positions could only have been filed in 2012. However, the trend changed in 2013 and 2014. Both years saw significant increase in suits filed. This is not surprising. As government agencies, commissions, and institutions matured, people began to test the limits of the Constitutional provisions that established and govern them. This will likely be the case until there is settled jurisprudence on core issues, values and principles in the Constitution.

Kenya Law Reports, the primary database for Kenyan case law, does not track the procedural history of the cases and there is no other readily available resource to do so. As a result, it was not possible to determine with any accuracy the duration of a case from the date filed until the date a final judgment was issued. Kenya Law Reports does, however, does include information on the date a case was filed and the date on which a decision was delivered. Based on these dates, 27 cases were decided within less than one year; 35 cases were decided within one year; 14 cases were decided within two years; 7 cases were decided within three years and 2 cases were decided within four years of filing. The year the suit is filed is indicated by the number of the suit. The date and month of filing are unavailable unless a physical search of the pleadings is made in the court registry. Therefore, from this data, it can be surmised that the typical public interest suit is decided within two years of filing. All the CSOs interviewed said that the time it takes to resolve court cases is an obstacle to filing PIL. They noted that delays can defeat the purpose of public interest litigation that seeks to rectify an emergent public wrong and requires a quick remedy.

Success Rates of Public Interest Litigation

Of the cases analysed, twenty-five percent were dismissed. The courts cited different reasons for dismissal, including:

- The court found either that there was no denial, violation or threat to fundamental rights or that laws, regulations and policies were constitutional.[81]
- The court found the subject matter to be an issue of policy, which is the preserve of the legislature.[82]
- The court found that the facts did not disclose a clear dispute for determination or that it could not provide the relief requested.[83]

80 Between 1 July 2011 and 30 June 2012, 574 cases were filed in the constitutional and human rights divi-sion; 544 were pending and 529 were decided. In the following period, 642 cases were filed, 732 were pend-ing and 386 were decided. See The Judiciary of Kenyan, 'State of the Judiciary Address 2011-2012' <http://tinyurl.com/zf7rwlr> accessed 1 June 2014; The Judiciary of Kenya, 'State of the Judiciary Re-port 2013-2014' <http://www.judiciary.go.ke/portal/state-of-the-judiciary-report.html> accessed 11 March 2014.

81 See Richard Dickson Ogendo & 2 Others v Attorney General & 5 Others [2014] High Court Petition 70 of 2014, eKLR

82 See Mathew Okwanda v Minister of Health and Medical Services (n 77).

83 See National Conservative Forum v Minister of State for Provincial Administration and Internal Security [2014] High Court Petition 31 of 2013, eKLR.

- The issue for determination was speculative.[84]
- The issue raised was not ripe for determination.[85]
- The court found that unlawful encroachment into public/private land should not be rewarded and allowed eviction.[86]
- The court lacked jurisdiction to hear and determine the case.[87]
- The court found that the petitioner had not exhausted statutory procedures before filing the petition.[88]
- The court found that no request for information had been made to the public authority before approaching the court.[89]
- The court found that the petition addressed the structuring of executive or public offices, which was outside its mandate.[90]
- The court found it could not go into the merits of intended criminal charges that are the purview of subordinate courts.[91]

The research indicates that most suits that were filed have been successful, although this finding might be skewed as cases were chosen for their jurisprudential value or their impact. The success is due, in part, to the court's willingness to entertain suits in the public interest (Articles 22(3)(d) and 159(2)(d) and Rule 10(3) of the Mutunga Rules).[92] The court has heard cases raising novel such as the rights of sexual minorities,[93] lawfulness of surrogacy agreements,[94] and violation of equal protection due to the government's inability to curb the spread of small arms.[95] Even when dismissing some suits, the courts gave some instructions or suggestions to public authorities that would improve the condition complained of. For instance, in *Peter Makau Musyoka & 19 Ors v Permanent Secretary Ministry of Energy & 14 Ors*,[96] though the Court found that the residents' right to a clean and healthy environment had not been threatened by the proposed coal mining, the court still directed the government to involve the residents in the environmental impact assessment and benefit-sharing processes. In *Richard Were v Permanent Secretary Ministry of Health* the petitioners, employees of the Ministry of Health, were given notice to vacate their houses.[97]

84 See Okiya Omtatah Okoiti v AG [2014] High Court Petition 593 of 2013, eKLR.
85 See Law Society of Kenya v Transition Authority [2013] High Court Petition 190 of 2013, eKLR.
86 See Kepha Omondi Onjuro v AG [2015] High Court Petition 239 of 2014, eKLR.
87 See ICPC case (n 72).
88 See Evans Nyambega Akuma v AG [2013] High Court Petition 513 of 2012, eKLR.
89 See Kahindi Lekalhaile v Inspector General National Police Service [2013] High Court Petition 25 of 2013, eKLR.
90 See ibid.
91 See Hussein Khalid v AG [2014] High Court Pet. 324 of 2013, eKLR.
92 AG v Coalition for Reform & Democracy [2015] Court of Appeal Civil Application 12 of 2015, eKLR. This is an appeal of the interim orders given by Odunga J in the CORD case, [2015] High Court Petition 628, 630 of 2014 & 12 of 2015 (Consolidated), eKLR.
93 See Eric Gitari v Non-Governmental Organisations Co-ordination Board [2015] High Court Petition 440 of 2013, eKLR; Republic v Kenya National Examinations Council, ex p Audrey Mbugua Ithibu [2014] High Court Judicial Review 147 of 2013, eKLR.
94 See AMN v AG [2015] High Court Petition 443 of 2014, eKLR.
95 See National Conservative Forum v Minister of State for Provincial Administration and Internal Security (n 83).
96 Peter Makau Musyoka & 19 Ors (suing on Their Own Behalf and on Behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 Ors [2014] High Court Constitutional Petition 305 of 2012, eKLR.
97 (n 75) [5].

The court found the notice to be lawful but extended the period for relocation to two months from the initial fourteen days to safeguard the rights of the petitioner's children.[98] The court in in Veronica Njeri Waweru v City Council of Nairobi [2012] High Court Petition 58 of 2011, eKLR – in which the petitioners, who were traders licensed to conduct business on city council property, were ordered to relocate – reached a similar result. The court affirmed the relocation order but extended the deadline for relocation from 14 to 60 days to safeguard the petitioners' business interests.[99] The court has also given priority to cases of immense public and political interest like the 'CORD case',[100] which challenged the constitutionality of the Security Laws (Amendment) Act, 2015 for breach of the Constitution and human rights, filed and finalised within three months.

Appeal Rates

Of the cases analysed, only eleven percent were appealed. However, because this was desk research, it could be that some more cases were appealed but the judgments have not been posted on Kenya Law. This, however, is unlikely since all courts are required to send their judgments to Kenya Law Reports for review and publication on eKLR, the Kenya aw Report's electronic database. Also, as earlier noted, because most cases analysed were filed at the Nairobi High Court, it could be that appeals have been filed but not heard (the court is currently hearing appeals filed in 2013). It could also be because, as noted earlier, the majority of the cases are against public authorities that only appeal issues that they feel are crucial to them, such as the appeal of the orders in the CORD case.[101]

Use of Media

Some cases have drawn substantial media coverage either because they addressed socially polarising issues (the *Gitari* case[102] and an ongoing case on the right to legal abortion (*FIDA-Kenya & 3 Ors v AG & 2 Ors*[103]), terrorism (the *CORD* case[104] and *MUHURI* case[105]), political ramifications attached to the case (presidential petition case,[106] CDF case,[107] ICPC case,[108] and *Council of Governors*

98 ibid 23.
99 [2012] High Court Petition 58 of 2011, eKLR [39].
100 CORD (n 92).
101 ibid
102 The Star, '"Why NGO Board Must Register Gay And Lesbian Rights Group"' (See footnote n 65)
103 High Court Nairobi Petition 266 of 2015
104 Daily Nation, '"Security Laws Illegal, Declares High Court"' < http://www.nation.co.ke/news/politics/Security-laws-illegal-declares-High-Court/-/1064/2633342/-/dcaek0z/-/index.html > Note that this appears in the politics section (See footnote n 44)
105 Standard Digital, '"Ban on Muhuri, Haki Accounts Lifted"' http://www.standardmedia.co.ke/article/2000182397/ban-on-muhuri-haki-accounts-lifted.
106 Daily Nation, '"Cord Moves to Supreme Court over Uhuru Poll Victory"' <http://www.nation.co.ke/News/politics/-/1064/1721666/-/b012m8/-/index.html>
107 Daily Nation, '"High Court Declares CDF Illegal"' < http://www.nation.co.ke/news/CDF-High-Court-Parliament-Senate-Legislation/-/1056/2630632/-/v2vtevz/-/index.html >.
108 Standard Digital, '"Uhuru, Ruto Integrity Case Ruling Due Next Week"', <http://www.standardmedia.co.ke/article/2000076743/uhuru-ruto-integrity-case-ruling-due-next-week >.

& 3 Ors v Senate & 53 Ors [2015] High Court Nairobi Petition 381 of 2014, eKLR,[109]) prominence of the individuals involved (*CORD* case[110]), and numbers of people affected by the suit (*TSC* case[111]).

Most CSOs interviewed noted that they set a media strategy for all stages of the litigation. They stated that pre-suit media advocacy generates interest in the issues to be raised, notifies potential petitioners about the suit, and forewarns other potential respondents that the issue will soon be litigated. While media advocacy during the trial informs the public of the status of the case, CSOs must ensure that the publicity does not interfere with the court proceedings. Post-judgment media advocacy publicises the decision of the court, which can pressure respondents to comply with court orders.

However, CSOs noted that before they implement a legal strategy, they must carefully analyse whether it would cause more harm than good. Some indicated that using the media could jeopardise the success of future interventions with state authorities, cause them to become antagonistic during litigation, or cause them to refuse to comply with court judgments. Additionally, when an issue is unpopular with the public, media publicity tends to hinder rather than help gain public support, such as in the *CDF* and *Gitari* cases.[112] Another concern is that the media sometimes sensationalises the cases or misunderstands the issues, which may polarise groups or create a backlash against the petitioners. It has been noted that the government also uses the media to demonise CSOs, which has made the public suspicious of some of the causes they champion.

Enforcement of Remedies

Most of the CSOs interviewed stated that most remedies granted by the courts are not implemented. They also noted that the government takes a long time to change law and policies or pay compensation, if it does so at all. This has forced parties to file contempt proceedings or judicial review orders against the public officers charged with implementing the decisions. These contempt proceedings, however, are slow and increase the costs of litigation. CSOs have also noted that payment of compensation can be delayed when stay orders are issued pending appeal. This is compounded by the fact that appeals take a long time to be determined. Other CSOs indicated that, rather than return to court, they believed it more useful to petition Parliament to pass legislation that gives effect to court orders. Others have successfully lodged complaints with the Commission on Administrative Justice (Office of the Ombudsman) for enforcement of court orders. CSOs stated that they would also work with duty bearers to help them enforce orders. One CSO noted that it mobilises protests and demonstrations to highlight lack of compliance with court orders. In cases where courts ordered information to be released by public institutions, CSOs sent out letters requesting the information, to test whether or not the request would be granted.

109 Standard Digital, "'Senate Sued Over County Boards'", <http://www.standardmedia.co.ke/article/2000131406/senate-sued-over-county-boards>

110 CORD (n 92).

111 Daily Nation, "'TSC Challenges Order to Pay Teachers' September Salaries'",< http://www.nation.co.ke/news/TSC-challenges-order-to-pay-teachers-September-salary/-/1056/2916958/-/w0owrcz/-/index.html >

112 CDF (n 53); Gitari (n 93).

According to CSOs interviewed, PIL has successfully been used to invalidate laws that violate the Constitution. CSOs noted that although the invalidated provisions are no longer enforced by the state, the laws are not amended by Parliament to reflect the courts' orders. Others noted that sometimes the legislature tries to introduce new laws that are similar to those that have been invalidated by the court. Most indicated that creation of new policy is quite difficult. That said, some practices have changed, such as provision of documentation to intersex people that accurately reflects their gender identification.

The CSOs noted that the remedies sought can determine the ultimate success of the case: if the remedies sought are only declarations which do not require any implementation to be operational then the suit is a complete success. However, if the suit seeks specific orders and compensation, success may be impaired because court remedies are often ignored. This means that rule of law is still a challenge in Kenya; although good jurisprudence is important, social change will only occur when those judgments are capable of being enforced. To achieve such social change, CSOs will not only have to rely on traditional mechanisms of enforcement but will also need to develop new and innovative ways to enforce court judgments.

PIL and the Legal Aid Act

On 22 April 2016, the President assented to the Legal Aid Act No. 6 of 2016, which has the potential to change the PIL landscape in Kenya significantly. The object of the Act, among others, is to provide affordable and accessible legal services and legal aid to indigent persons.[113]

The Act establishes a National Legal Aid Service (NLAS) that will create and adminis-ter a national legal aid scheme and, among other things, promote research on legal aid, access to justice, and legal services to indigent persons. The NLAS will administer a legal aid fund, which will be financed primarily by the state, but also supported by outside grants. The NLAS will provide legal aid to eligible persons at government ex-pense in some areas, including matters of public interest.[114] To represent clients under the fund, a person or organisation must apply for accreditation.[115]

The Legal Aid Act has been a work in progress for years. Although the success of the Act will depend on its practical implementation, it provides a powerful resource for those pursuing PIL.

113 Legal Aid Act (6 of 2016) s 3(a)-(b).
114 ibid 35(2)(e).
115 ibid 56.

Observations and Recommendations

Most CSOs interviewed noted that the courts have become much more accessible since the implementation of the 2010 Constitution, mainly due to relaxation of locus standi provisions. This has meant that marginalised communities, minorities and underprivileged individuals have been able to access courts either by themselves or through CSOs. Using the media to publicize decisions has also increased the public's awareness of their rights under the Constitution. CSOs have also benefitted from the publicity as more people become aware of their respective missions and mandates. Jurisprudence is slowly developing around public interest and the courts are increasingly willing to ground their decisions in constitutional and international authority. CSOs noted that PIL had opened avenues for redress of issues that would otherwise not have been litigated, such as rights of intersex individuals, regulation of in-vitro fertilisation, right of citizens to access information held by the state, and economic, social and cultural rights. In fact, some remarked that the 2010 Constitution had made it so that there is no issue affecting citizens that cannot be litigated.

Nevertheless, the CSOs interviewed expressed frustration with the ability to enforce judgments, and identified this as a pivotal hindrance to successful PIL. Despite these difficulties, they recognised that the cases have created some measure of accountability for public authorities and officers. For example, the deputy solicitor general was found to be in contempt of court because he failed to pay court ordered compensation to a torture victim.[116]

There are also challenges in instituting proceedings in the public interest. The follow-ing are the summaries, from the data and interviews conducted:

- Implementation of court orders is difficult because s. 21(4) of the Government Proceedings Act prohibits attachment of government property to force payment of money awarded by courts, and it also prohibits individual liability of public officers in payments of money or costs.[117] This means even after succeeding in the litigation petitioners have an arduous task before them of ensuring that state agencies comply with court orders. CSOs noted that enforcing orders that require changes to the law or to policy is especially difficult.
- Costs of litigation can be prohibitive, especially for indigent individuals. This means that most have to approach CSOs for legal aid. The ability of CSOs to provide legal aid is contingent on numerous factors, including the limits of their mandate, donor requirements, considerations of staff security, likelihood of costs being awarded against them, and how far along the trial has proceeded before their joinder. CSOs sometimes have to provide transport to individuals to attend court, and in group suits with large numbers of people this can impede the success of the litigation. Media campaigns are also expensive. It has been noted that most donors shy away from funding PIL cases that have political ramifications. This donor reluctance may impede the ability of CSOs to litigate on the integrity and accountability of public officers.

116 Standard Digital, Deputy solicitor general found guilty of contempt, 8 May 2015, < http://www.standardmedia.co.ke/article/2000161470/deputy-solicitor-general-found-guilty-of-contempt>.

117 A suit has been filed in the High Court challenging the constitutionality of this section of the Govern-ment Proceedings Act; James Mwangi Wanyoike v AG [2012] High Court Misc Civil Suit 1656 of 2005, eKLR.

- Many CSOs fear that costs will be awarded against them, especially following the decision in the *ICPC* case, which ordered the petitioners to pay extensive costs to the respondents. The ICPC decision has caused CSOs to shy away from being the primary parties in suits and, instead, to participate as *amicus curiae* or interested party. Donors are also hesitant to fund PIL because of the risk that costs may be awarded against CSOs.
- Certain controversial or unpopular public interest matters may cause a backlash against CSOs that can impact the security of the organisations and their staff. Intimidation is often used to induce individuals to stop litigation. They suggested in such cases a CSO should be a co-petitioner.
- Suits take a long time to complete, which often defeats the purpose of PIL and may cause individual petitioners to despair and discontinue their participation in the suit. Other times, the suit is overtaken by events, making it redundant. Some attributed the delay to the involvement of *amici* and interested parties in the preliminary stages of the trial. Others attributed the delay to an insufficient number of judges in the constitutional and human rights division or to the transfer of judges mid-trial. And others blamed frequent adjournments by the AG's Office.
- Parties are often forced to hire lawyers because court procedures are complex and require legal skills. The lawyers that are hired should be skilled in PIL or the suit might be lost.
- CSOs have encountered a hesitant judiciary, especially in novel issues or litigation with political ramifications. CSOs were of the opinion that the judiciary needs to be more assertive and proactive to meet its mandate under the Constitution.
- Managing expectations of individual petitioners who expect to get money from the state, or in-fighting in large groups of petitioners, can be a challenge for CSOs involved in litigation.

Based on this review, the report makes the following recommendations:

- Thorough research is necessary before filing suit so as to understand the facts of the case, the relevant law, and the remedies that are appropriate to the situation. As noted before, courts have dismissed suits for lack of jurisdiction, for being vague, for being premature and for requesting improper remedies. Comparative research is also important in cases where local jurisprudence is lacking or is weak (more so in the area of social, economic and cultural rights). Use of evidence to support the claims, such as academic literature, expert opinions, and reports contributes to the success of the suit. The choice of petitioners is also important; CSOs that engage in PIL have to scrutinise potential petitioners to ensure that they do not have any ulterior motives or intentions, that they should not be easily intimidated or compromised and are committed to the completion of the trial process.
- CSOs need to have client-management policies or strategies in place before commencement of the suit. They should detail clearly: the objectives of the litigation; the remedies being sought and the probability of success; the obligations of the CSOs to the client and the client to the CSOs during and after the litigation; and communications procedures during the litigation, including a complaints procedure, to avoid conflict during the litigation because of different expectations.
- CSOs need to be familiar with the law, including positive developments in the law of evidence that they can take advantage of, to succeed in their cases. For example, the Mutunga Rules do not require strict adherence to the rules of evidence to prove human rights violations and can also allow a public interest suit to continue until completion where a petitioner has lost interest midway.

- Partnerships with CSOs are important in PIL suits. CSOs can provide expertise in caucuses, drafting pleadings, interrogating facts and framing issues and remedies. CSOs can also provide supporting evidence in courts by way of opinion or reports. Partnerships also avoid filing multiple suits on the same issues by CSOs. CSOs working together can also reduce costs of litigation because they have different competencies; for instance, some provide legal aid while others excel in media advocacy. Working as a group can also mitigate risks to persons involved in the litigation and can shield individual petitioners from intimidation. Also, CSOs noted that partnerships are crucial for client management when working with large populations of affected persons.
- CSOs should partner with academic institutions to generate information that can be used in support of PIL, particularly with regard to specialised or technical aspects of some claims, such as in land planning and management, housing, taxation, and environmental protection. CSOs should carefully weigh the risks and benefits of a suit before filing and should consider seeking settlements or alternative measures to litigation. Before they decide to litigate, CSOs should make sure that they have done an extensive factual investigation and have managed the client's expectations. They should set a litigation strategy with clear timelines for all phases of the case, including pre-filing, pendency of the litigation, post-judgment, and appeal.
- In some instances, the use of the media, both mainstream and social media, can contribute towards the success of PIL. The media can be used to publicise an issue and possibly animate the public, which can provide positive pressure on the courts to expedite the hearing. The media can also be used to highlight instances of non-compliance with court orders. However, a careful analysis of the public's perception towards issues being litigated must be done before the media is used, so as avoid a backlash, which might compromise the litigation.

The study also revealed ways in which CSOs can strengthen their ability to successfully use public interest litigation by building their capacity, working more closely together, or pushing for institutional or procedural changes. Recommendations in this regard include:

- Advocating to establish a legal aid system in the country that, among other things, gives incentives for advocates to provide *pro bono* services by, for example, awarding continuous professional development (CPD) points.
- Creating court rules that, among other things, allow public interest litigators to use informal documentation to begin a suit, provide guidelines for awarding costs against respondents found to have violated the Constitution or other legal provisions in public interest suits, and establish timelines for processing of petitions.
- Promoting the use of audio equipment in all courtrooms will allow all participants to follow proceedings, especially where vulnerable petitioners are in court. Audio improvements should also include the use of interpreters to allow for vulnerable petitioners to meaningfully participate in proceedings.
- Creating an incentive for the AG's Office to be proactive in carrying out its mandate as the defender of public interest by developing court rules that would require the AG's Office to pay costs of litigation in matters in which it should have, but did not, exercised its role as defender of public interest.
- Developing strategies for ensuring that judgments can be enforced, including seeking legislative reform to allow the courts to attach government property or to seek compensation from public officers in their individual, as well as official capacities.

- Advocating for an increase in the number of judges – especially those sitting in the Constitutional and Human Rights Division – and increased training of judges on human rights and PIL. The capacity of the AG's office should grow with the increase in the number of PIL suits to avoid delay caused by frequent adjournments due to a high caseload.
- Training of journalists by CSOs on reporting of PIL cases/public interest issues could avoid erroneous or misleading reporting that could that could compromise a case.
- Developing a platform by CSOs, segregated by sector of work, will allow them to share best practices in the formulation and drafting of PIL, disseminate jurisprudence and strategies on how it can be improved, discuss challenges in the court process and strategies on how to overcome them, and share on-going initiatives to avoid duplication of suits in court.

Conclusion

There is no question that the 2010 Constitution has triggered an increase in PIL, but much still needs to be done. The efforts to use PIL show that the community, NGOs, and CSOs see it as a critical tool for developing a culture of constitutionalism in Kenya. Nevertheless, that transformation cannot occur until PIL litigants can enforce the judgments issued in their favour. PIL litigants must continue to support the judiciary and ensure that its judgements are not just paper tigers, but enforceable documents that will affect change within the government. Finally, PIL litigants must also continue to raise the standard of litigation by conducting thorough legal and factual research in support of their claims.

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