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CHALLENGES AND OPPORTUNITIES FOR KENYAN LAWYERS IN THE 21ST CENTURY

*By Tom O Ojienda**

1.0 Introduction

It would be foolish to pretend that lawyers excite nothing but respect and admiration from the public[1].Indeed, the legal profession, and lawyers at large have been the fatalities of serialized and age old public attack. This attitude may be justified simply, and yet, it also has an intricate angle. Simply, contemporary society demands efficient and exemplary service from lawyers. Ideally, this is as it should be. The Lawyer in Kenya, just like in any other commonwealth jurisdiction, has no *carte blanche* in the performance of his duties once a brief is accepted[2]. Even so, a section of the public simply believes that the vocation of lawyers is not honourable, the strict adherence to professional ethics and code of conduct notwithstanding. In this regard, Du Cann observes[3]:

> *"The Law troubles only those who are themselves in trouble, and it is not surprising that what Lord Simon, who rose to be Lord Chancellor of England, called a 'painful prejudice' should be created against those who appear to live on others' misfortunes..."*

Be that as it may, lawyers have also in some cases not been up to the public expectations. As a result, their utility to the society in the private and public domains has come under close scrutiny and criticism. Kenya has not been an exception to professional maladies with respect to the legal profession. Many a times, the legal profession has come under scathing attack, both for the misconduct of its members, and the perceived and actual lethargy in the maintenance of professional standards. Against that backdrop, the Legal profession has, *inter alia*, sought to put its house in order by reviewing legal education and the structures for disciplining errant advocates, the black sheep of the legal profession.[4]

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* President, East African Law Society. Member, Council of Legal Education.

[1] Richard Du Cann, *The Art of the Advocate*, page 13.

[2] G.B.M Kariuki, Professional Ethics: Presentation to the IBA/LSK African Regional Conference held in Nairobi

[3] Ibid.

[4] This has been attained through a string of amendments to the Law Society Act, Chapter 18, and the Advocates Act, Chapter 16 of the Laws of Kenya.

Even as it seeks to put its house in order, there are many challenges which will still need to be taken in hand. These challenges are posed both by incoming opportunities, and the prevailing deficiencies in the structuring and organisation of the legal profession.

This paper seeks to explore some these challenges and opportunities, as they impact on the Kenyan lawyer and the public in the 21st Century. Addressing these challenges will be of great significance not only to the legal profession, but also to the general public[5]. This stems from the elemental role that the law plays in societal regulation[6]. That is the essence of the legal profession.

2.0 LEGAL EDUCATION

> *"The minute you read something and you can't understand it, you can be sure it was written by a lawyer. Then, if you give it to another lawyer to read and he don't know just what it means, then you can be sure it was drawn up by a lawyer. If its in a few words and is plain, and understandable only one way, it was written by a non-lawyer[7]."*

The quality of legal services provided by Advocates is predicated on the quality of legal education. For this reason, any fall in the standards of the services provided by the legal profession in all spheres to a large extent depends on the quality and structure of Legal Education that is adopted by any given country.

For some time, the three East African countries had no programme for legal education, jointly or individually. Lawyers practicing in Kenya, Uganda and Tanzania were trained either in the United Kingdom or in India. No institutions of legal and paralegal training were available or contemplated for indigenous inhabitants. The bar and the bench were therefore exclusively managed by immigrant professionals and personnel.

Structure of Legal Education in Kenya

In Kenya, legal education has assumed a two-tiered structure. Until the recent restructuring of legal education in Kenya, anyone wishing to practice law in Kenya had

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[5] Section 4 (e) of the Law Society of Kenya Act provides thus, *' The objects of which the Society is established are- to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law;..."*

[6] Hon. B.A Samatta has observed that, *"...the law deals with everything from agriculture to Zebra crossing."* In 'Reaping the benefits of the East African Community' in *The East African Lawyer* (Issue No. 4, August 2003).

[7] Will Rodgers in *The Roycroft Dictionary and Book of Epigrams* (1923).

to first obtain a degree in law from a recognized university if the degree was obtained outside Kenya. By default, University of Nairobi was the only institution recognized by the government to offer a degree in law. This state of affairs existed until July 1994 when a Faculty of Law was established at Moi University

University Education was intended to provide the basic three year degree course, leaving the job or organizing the post-degree practical training to the bar. The degree course was based on a three year learning period where upon graduation, the graduates were to undertake lessons at the Kenya school of Law, sitting bar examinations at the end of the period to prepare them for admission as advocates, during which time the students were attached to advocate's chambers for practical training under the supervision of advocates qualified for that purpose as their masters.

This structure has been fundamentally reviewed. In addition to possessing a Law degree from a recognized university in Kenya or outside Kenya, it is now mandatory to attend the Kenya School of Law which is run by the Council of Legal Education for eighteen months, one year at the school and six months in chambers as a pupil.Only then can one be admitted as an advocate.

Whilst the bulk of Kenyan legal jurisprudence, statutes and case law borrow heavily from Britain, the structure and content of the courses has not evolved to meet the contemporary needs of Kenyans. This situation is exacerbated by the existence of age old statutes which were adopted in wholesale from the English legal system. This state of affairs is in my view the greatest challenge facing legal education in Kenya.

The products of such a system cannot be of utility to the ordinary Kenyan. In synopsis, legal education in education has not responded to changes in the Kenyan society. This state is undesirable given that some of the statutes, case law and jurisprudence that were borrowed from the British have been overhauled in Britain from where we borrowed them.

There is need to ensure that the methods of instruction in the Kenyan universities is not only standardised but where need be, as a result of research and studies on the most suitable methods of instructions. As a result of such a study, recommendations should be made and implemented that reflect not only the needs of the law student but that is

also responsive to the needs of the consumers of legal services. The customary and contextually unresponsive inclination of adopting western trends will not suffice. The Kenyan Legal system and its legal education must be home-made, tailored to respond to the Kenyan context!

There is also the need to standardise training in the chambers. Moreover, the welfare of pupils during such training should be further looked into.

3.0 PROFESSIONAL ETHICS AND STANDARDS

The legal profession is not only a commercial venture; it is the repository and sentinel of fundamental ideals that are intrinsic to the proper functioning of the human society. As Hugh Patterson Macmillan, a Scottish jurist observed[8]:

> *"The practice of law is more than a mere trade or business, and...those who engage in it are the guardians of ideals and traditions to which it is right that they should from time to time dedicate themselves anew."*

Given this special position that the legal profession holds, it has in the course of its development developed special rules and codes of conduct to govern the conduct of its members. Actually, the emergence and development of the rules of professional ethics/etiquette and conduct is traceable to the self imposed rules by the English bar dating way back to the 6th century as good manners among gentlemen.

These rules were meant to correct the imbalance in relation to the profession and the client. They were thus meant to prevent abuse culminating in the establishment of a code of conduct[9].Therefore, the object of the rules of ethics in the legal profession, and indeed in any other profession, is to protect the public by ensuring that the highest standards of competence, honesty, confidentiality, and integrity are upheld.

Indeed, the society's expectations of the legal profession cannot be gainsaid. The late Chief Justice C. B Madan had this to say:

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[8] Ibid.

[9] Concerning this inclination it has been observed that, *'..the lawyer also courts disapproval by his frequently churlish and sometimes overbearing attitude towards those who have been forced, often much against their better inclinations, into contact with the law..."*(ibid)

"...The Lawyers duty to his community in his role in National development is higher than that of the ordinary citizen because of his training and specialised knowledge. A higher requirement of integrity and personal discipline is demanded of a lawyer. He has to rise above some of the severest tests and temptations which come his way because of the trust placed in him not only in money matters but also in his skill as a professional man to safeguard his client's liberty."

Professional conduct requires strict adherence to the express rules enshrined in the advocates Act to govern the conduct of the Legal profession amongst advocates. The Breach of these rules may amount to professional misconduct. In ***Re A Solicitor*** [10]and ***Relydell,*** the House of Lords held that a solicitor who carried the practice of undisclosed profit sharing it with another party who presented conflicting interest was guilty of professional misconduct. Etiquette on the other hand refers to the rules of good manners as the legal profession is supposed to be constituted by gentlemen[11].

One of the greatest challenges that bedevil the legal profession in the 21st Century is the incidence of professional misconduct. As in many other legal systems, the Kenyan legal profession has not been impervious to professional misconduct by advocates. Professional misconduct creates unnecessary distrust between the public and the legal profession.

By virtue of section 81 of the Advocates Act, the power to make rules with regard to professional conduct and discipline of members resides in the Council of the Law Society of Kenya. The Role of the Chief Justice is limited to the approval of the same. Rules that have been made under section 81 include:

- Rules of Professional Conduct and Etiquette (Code of Ethics)
- The Advocates (Accounts) Rules
- The Advocates (Deposit Interest) Rules; and the
- Advocates (Accountant's Certificate) Rules
- Advocates Continuing Legal Education Rules
- Advocates Professional Indemnity Regulations

[10] 93 LT 838.

[11] Breach of such rules amount to unprofessional conduct. Examples include: chewing gum in court, attending court while drunk, running a brothel or living from the earning of prostitution, insults to the public or incompetent representation by an advocate.

Professional conduct is conduct that conforms to the spirit and the actual text of the rules prescribed by under the Advocates Act. The breach of such rules will amount to professional misconduct for which punishment is prescribed.

In as far as adherence to professional ethics and conduct in the legal profession is concerned, the greatest challenges are twofold:

(a) To ensure that advocates are indoctrinated to know, value and esteem professional ethics and standards;
(b) To ensure that there exists a suitable framework for the disciplining of advocates who act contrary to professional ethics and codes of conduct.

These are the challenges that the Law Society of Kenya has had to contend with. The yardstick with which the legal profession is judged by the society depends on competence, efficiency, integrity, courage and fearlessness in standing up to defend the rule of Law. These are the hallmarks that characterize a dynamic, effective and progressive profession. They enhance the public confidence in us as lawyers. Therefore, the maintenance of these qualities serves to enhance our ability to discharge our duty as guardians and watchdogs for the protection of the rule of law and catalysts for social and political change. Professional misconduct destroys these gains.

The Advocates Act has mechanisms both for the reporting and dealing with errant advocates. On discipline, the Act[12], *inter alia,* provides as follows:

> *"Every Advocate and every person otherwise entitled to act as an advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof and, subject to this Act, to the jurisdiction of the Disciplinary Committee..."*

Primarily, two institutions are involved in dealing with cases of professional misconduct. These are:

(a) The Complaints Commission
(b) The Disciplinary Committee

[12] Section 55.

(a) The Complaints Commission[13]

The Complaints Commission is established by Part X of the Advocates Act. Its function complements that of the Disciplinary Committee which occupies a higher position. According to the Advocates Act:[14]

> *"There is hereby established a Complaints Commission...which shall consist of such Commissioner or Commissioners as shall be appointed by the President for the purpose of enquiring into complaints against any advocate, firm of advocates, or any member or employees thereof"*

Whenever a complaint is made pursuant to the provision hereinabove, the commission is obligated to inquire into the substance of the complaint. If the complaint has substance, the responsible firm or advocate shall be notified and called upon to answer the complaint within a reasonable period..

The Commission also has power to summon and examine witnesses on oath. Moreover, it may take all such steps as it may consider proper and necessary for the purposes of its inquiry. The Commission may award reimbursement of expenses not exceeding Kshs 100,000. Moreover, the Commission may issue a warrant for the amount of any sum ordered to be paid, and even tax the costs against the advocate.

By amendment of the Advocates Act, any person who without any lawful excuse fails or refuses to assist the Commission when required to do so shall be guilty of an offence[15].

(b) The Disciplinary Committee

The discipline of advocates is presided over by the Disciplinary Committee. Unlike the Complaints Commission, the disciplinary Committee has more teeth to deal with professional misconduct.

The Committee may also issue a warrant for the levy of the amount of any sum ordered to be paid. Moreover, it may also make such order as will be appropriate as to the payment of any party of the costs incurred.

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[13] See also The Statute Law (Miscellaneous Amendment) Act No. 2 of 2002.
[14] Section 53.
[15] Ibid.

Significant legal amendments have been made with regard to the Committee. Firstly, the composition of the Committee has been expanded to include three lay persons. Importantly, the services of the Committee will now be available to a wider section of clients courtesy of the creation of regional disciplinary Committees.

Time will tell whether these amendments are substantial in ensuring that advocates adhere to long established professional ethics and standards. There is need to ensure that clients are well advised as to the existence of disciplinary mechanisms. On its part, the legal profession needs to pull up its socks. Also, the laymen must be aware that like any other profession, the legal profession has its black sheep.
It is high time that disciplinary procedures and mechanisms were introduced for judges and other legal persons, including the paralegals who are not amenable to the Advocates Disciplinary mechanisms. The Legal profession does not only consist of advocates. This is a serious void that ought to be taken care of. Judges, magistrates and lawyers working with the government also need to be disciplined.

4.0 THE ART OF ADVOCACY

Advocacy involves telling a story in a systematic and coherent fashion, through the written and the spoken media. That system is what refered to as the art of advocacy is. It is an art because it varies with the individual, the setting, and competence of the particular advocate. In the case of **R v MAHDI**, the Court of Appeal (Criminal Division) presided over by the Lord Chief Justice of England (Lord Taylor) allowing the appeal in a considered judgement on March 15, 1993, said of the Appellant's Counsel's submission:

> *""It seems to me that the defence have a very powerful argument which they have put very powerfully and I decided that not only is it powerful but it is unanswerable."*

No Counsel could have asked for a greater recognition and compliment. The advocates' vocation requires nothing less but the perfection of the art of advocacy. The art of advocacy is in some sense like the art of war. Excellent advocacy skills are indispensable especially in the adversarial system. Always, the advocate will be called

upon to act on behalf of his client. In representing his client's interests, it is his advocacy skills that make the day.

An experienced trial lawyer does not fear a trial because he knows he was made and trained to do battle. A warrior - trial lawyer lives for the battle. He has been trained and it is as if everything he has done has lead up to the battle. A warrior's heart, he lives for the battle. No retreat, no surrender. He holds his clients life in his hands. Freedom or prison, it all depends upon the out-come of this trial. Preparation is everything. Planning, gathering the evidence, preparing for cross-examination. It is real work. A defender of the civil rights and the constitution and the humanity of mankind. It is an adversary system. Everything, everything depends upon how well the lawyer does his/her job. You can only be free to the extent that others are free.

Sir Robert Megary[16] on the same footing once told an audience at the University of Nairobi that the advocate should do all that his client could fairly do for himself in a trial or in an appeal. He spoke of four absolutes in the relationship that should mark the advocate client relationship.

These were honesty, reliability, confidentiality and trust. Three of these should underlie the duty of an advocate as an officer of the court. The advocate's duty to the client should never override his duty to the court. The Case of MEEK v FLEMING[17], a judgement of the Court of Appeal in England on this point is illustrative. It involved Victor Durand QC. A brilliant advocate. He was one of the stars of the English Bar. He was a member of the Nigerian Bar. MEEK v FLEMING resulted in the suspension of Victor Durand from practice for two years. His career was in ruins. What did he do? Or what did he fail to do? The Court held that Victor Durand's decision to conceal certain facts from the Court, albeit made after anxious consideration, was wrong; his duty to the Court was unwarrantly subordinated to his duty to his client[18].

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[16] The Hon. Mr Justice Kneller, Justice of Appeal writing in *The Advocate*, Vol. 11 No. 4, July 1984 in an article titled, *'The Advocate and the Court'*.

[17] (1961) 2 Q.B.366-385.

[18] Victor Durand was briefed to defend before a judge and jury, a case of assault and wrongful imprisonment brought against the Metropolitan Police. Chief Inspector Fleming was central in the case and a key witness. At the time the writ was issued, Fleming was a Chief Inspector, but at the time of trial he (defendant) had been reduced in rank by a disciplinary board to station sergeant for being party to an arrangement to practice a deception on a Court of law in the course of his duty as a senior police officer. That was known to the defendant's legal advisers, but a decision, for which leading Counsel for the defence assumed full responsibility, was taken not to make it known to the Court. Under cross-examination Fleming was asked: Q. "You are Chief Inspector, and you have been in the Force, you told us, since 1938?" A. "Yes, that is true." That answer was a lie. Victor Durand did nothing to

In a symbiotic sense, the possession of good advocacy skills has worthwhile returns both to the advocate and his client. Which is why, there is no benefit in lethargic and shoddy advocacy skills on the part of any advocate. Not only are such cases disheartening, they lower the high and well deserved esteem with which the public holds the legal profession. These skills are relevant at the two primary stages of advocacy:

(a) Pre-trial Preparation

(b) The Actual Trial Process

Pre-trial Preparation

A case well prepared is a case won. Winning cases usually begins at the preparatory stage which involves: related case law research, statutory and constitional research, preparation of pleadings, and the filing of necessary documents.

Majorly, it involves research and the drafting of necessary pleadings. Trial preparation should actually begin immediately after briefing/receiving instructions from a client.

Principally, trial preparation entails:

(a) Collecting and Collating of facts relevant to the case

(b) Research on All applicable laws

(c) Drafting and Preparation of all the relevant legal documentation

(d) Organization of all the relevant evidence i.e. exhibits, witnesses etc

(a) Collection and Collation of facts Relevant to the Case

An advocate must ensure that he collects and collates all the facts relevant to his case. This will of necessity need the filtering of relevant facts from the interviews/instruction from the client. Great skill is required in acquiring these facts, and using them to argue the particular case

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correct it throughout the trial. He won but that judgement was set aside on appeal. Victor Durand paid dearly for his failure in his duty to the Court.

(b) Researching on All Applicable Law

The merit or failure of any given case will at the end of the day depend upon a point of law. That being the case, an advocate must ensure that even if he does not know all laws, he knows where to get them. A good understanding of substantive and procedural law is indispensable in this regard.

(c) Drafting and Preparation of all the relevant documentation

Good drafting skills coupled with an appreciation of the facts and law relevant to the case is indispensable in the art of advocacy. The drafting and preparation of legal documentation must comply with the procedural laws i.e. the Civil Procedure and Criminal Procedure Acts.

(d) Organization of Relevant Evidence/Documents

Order is indispensable in trial preparation. An advocate must ensure that all the necessary evidence is collected and organized. All the necessary documents must be obtained in accordance with the existing procedural and substantive law.

In regard of the facts, an advocate should utilize the provisions of Order X, of the Civil Procedure Rules, Civil Procedure Act [3] and the provisions of the Evidence Act[4], in so far as production of documents is concerned.

Other factors

- All the relevant evidence must be organized in the order in which the advocate expects to introduce it.
- All witnesses must be aware that they will be expected to testify in court. The Advocate must ensure that they are well prepared but he / she must not coach them.
- It may be a good idea to prepare the following documents:

    a) Trial Brief.
    b) Trial Manual

[3] Cap 10
[4] Cap 80

a) **Trial Brief**

This would contain:

- A short statement of the facts.
- Any contentions of the client i.e. pertaining to innocence or liability.
- A memorandum of the applicable law.

Merits

A trial brief would:

- Help in organizing the file.
- Enhance one's speed in recalling the relevant facts and applicable law.
- Impress the judge / court with one's preparation.
- Enhance an advocate's chances of adequately dealing with preliminary objections on points of law.

b) **Trial Manual**

This could, for instance, contain:

- A synopsis of the opening statement.
- A list of witnesses and a corresponding list of the subject matter of their testimony.
- A list of questions for each witness.
- A list of documents to be introduced then and when to introduce them.
- The subject areas to be covered during direct and cross examination of witnesses.
- Hypothetical questions to be asked / proposed to expert witnesses.
- A place to list ideas which occur during trial and which one may wish to incorporate into his closing statement.
- A list of exhibits to be adduced as evidence.
- Copies of documents which the court may need i.e. authorities.

As a final consideration, one must ensure that they are conversant with the court rooms, personnel and court procedure before trial.

The Actual Trial Process

During the trial process, the following qualities will be indispensable:

a. **Persuasiveness-** The ability to move by argument
b. **Patience-**Gives the advocate a chance to learn the opponents and the court
c. **Decency-**An advocate must be decent when appearing in court
d. **Humility-**An advocate must be humble and courteous to the court and the client
e. **Competent-**Professional Competence is demanded during the trial process
f. **Punctuality-** An advocate must be punctual in court attendance
g. **Honest-** In his submissions before the court an advocate must be honest

Other qualities that will invariably carry the day during the trial process are: objectivity, invention and innovation, discernment, courage, industry, adaptability and flexibility. Lord Denning's notes on the art of advocacy advised thus[19]:

1. Be brief in re-examination
2. Open clearly, but not at too great length
3. Never call unnecessary witnesses
4. Never interrupt opponent or object to questions unless it is flagrant
5. Do not labour points of law
6. Do not speak loud
7. 'Take this from me, that what grief soever a man hath, ill words work no good and learned counsel never use them' Coke
8. Treat every court with utmost respect: express what you have to say, if justified, firmly but with patience
9. Brevity, Clarity and Fairness: Slow in Speech
10. In summing up, even to a judge , state briefly the law before proceeding to the facts
11. Accept the word of counsel absolutely
12. If you have one good point and other doubtful technical points, do not take the technical points but rely on the good point, for the weakness of one may influence the tribunal in regard to the others by way of creating a suspicion of unsoundness

[19] Edmund Heward, *Lord Denning- A Biography* (2nd Ed) Barry Rose Law Publishers-1997.

13. Always prepare the first few sentences of a speech-it is highly important to start slowly, clearly, with confidence without fumbling with words.

In as far as the advocate is concerned, the trial process involves:

(a) Direct Examination
(b) Cross Examination
(c) Re-Examination
(d) Closing Speech

Direct Examination

The following principles are essential during direct examination

- Do not lead the witnesses except on undisputed matters-leading a witness alludes to questions framed in a manner that allows the witness to understand from the questions themselves what answers he is supposed to give
- Do not put questions to the witnesses which contain the evidences (advocate) wants to establish instead of eliciting the evidence from the witness.

Leading questions ought to be avoided for the following reasons:

- They destroy the reality of the evidence
- They prevent the character of the witness from emerging
- They destroy the reliability of the evidence by suggesting the answer to be given by the witness
- The cast a shadow of suspicion on the impartiality of the examiner
- They reduce the value of the evidence generally
- They give the opponent a chance to object

It is advisable that during direct examination, an advocate should simply tell the story and sit down.

Cross Examination

The basic goals of cross examination are:

- To fortify or corroborate favourable testimony
- To discredit or case doubt on the veracity of adverse testimony, not only the testimony of the witness on the stand but other adverse witnesses as well

- To test the credibility of testimony
- To impeach the competence of the witness
- To demonstrate the motives or partisanship of the witness
- To secure favourable admissions & facts
- To obtain materials for closing arguments

The two principal goals of cross-examination are therefore to: weaken the opponent's case and to establish facts favouring your case. Cross examination is therefore a powerful tool.

There are no hard and fast rules in cross examination. One may rise to the occasion depending on the surrounding factors/circumstances. That be as it may, cross-examination ought to be done with courtesy, decency, restraint and consideration to the witness.

Cross examination is not an opportunity to bully the witness. Basic techniques in cross examination include:

- Be prepared: know the subject of the testimony, the witness, your case, and the Judge
- Use simple language: your questions must be understood by the witness as well as the assessors
- Ask only leading, closed questions which require short, simple answers
- Listen to the answers
- Keep your objective hidden
- Cover the important objects, such as the most devastating material early
- Do not belabour minor points
- Examine improbabilities
- Plan some surprises for the witness.
- Lay the ground work for your closing argument.
- Ask for facts not evaluations
- Stay in control of the witness
- End with triumph.

Re-examination

Re-examination should be undertaken principally with a view to mitigate the damage done during cross examination. It should never be a replay of direct examination. It should therefore be confined only to the issues that have arisen out of cross examination.

It can be utilize to highlight the strong part of an advocates case, provided they have been touched on during the cross examination. While conducting re-examination, it is important to ensure that:

- The judge's attention is refocused to your theory of the case
- The witness is given an opportunity to explain confusing answers given during cross examination or any other possible discrepancies in previous testimony.
- Reinforce the positive aspects of the direct testimony of each witness
- Ask a quick-paced, short answer questions, which simplify and clarify the major points you wish to make with each witness
- End with a 'clincher' question.

Closing Speech

The closing speech should be a brief, concise and accurate summary of the facts, the law applicable and their interrelationship. Principally, it should be a summary of one's case, yet again highlighting the strong points of your case and the weak points of your opponent's case.

The Challenge that faces the legal profession with regard to the art of advocacy is simple and straightforward. Do we still have artists? Have the artistic standards of advocacy deteriorated.

This is an important question because the artistry of the advocate is his main arsenal, both for his and his client's interests. It is through these skills that the advocate defends the rule of law and human rights. Unfortunate as it is, there is concern that standards of advocacy have been lowered. This should concerns legal practioners in all spheres. Like a doctor, who needs the best medical equipment and drugs, the advocates arsenal is the art of advocacy. Advocacy is a war, wherein the principal arsenal is the art of advocacy.

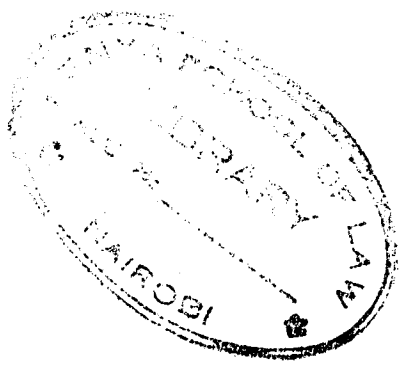
5.0 CHALLENGES AND OPPORTUNITIES FOR KENYAN LAWYERS IN THE 21ST CENTURY.

The 21st Century has arrived with its own challenges and opportunities for the legal profession. That being the case, the legal profession and the society at large has to wake up and face these challenges in a manner that will enhance the utility of the legal profession in this century.

These challenges and opportunities have both positive and negative facets. Hopefully, the negative facet of these challenges and opportunities can be turned round for the benefit of both the legal profession and the public, who are its consumers and employers.

As we have seen in the foregoing paragraphs, challenges to the legal profession are posed by the current structure of legal education, waning professional ethics and conduct, and the art of advocacy. Here we briefly examine the following concepts, with the opportunities and challenges they pose to the legal profession in the 21st Century:

- Globalisation of the Legal Profession
- Expanding Areas of Practice
- Advancement in Technology
- Evolution of the Law Firm
- Commercialisation of Law



6.1 Globalisation of the Legal Profession

> *"The practice of law making is being increasingly affected by international issues, and lawyers as a profession have a great challenge and responsibility to be internationally well informed*[20]*."*

Empirically, globalization is the sum of millions individual acts by people who have availed themselves of the potential granted them by the technologies that shrink the

[20] Philip F. Zeidman, Chair-International Bar Association Foundation.

planet[21]. Globalisation is one of the most dominant socio-economic phenomena of the 21st Century. Indeed globalisation has swept the whole globe. America[22], Europe, Asia and Africa have not been exempt from this global phenomenon.

Indeed, we have the East African Community of which Kenya is a principal member. While in Europe the European Community has moved many miles ahead of other worldwide efforts at globalisation, there can be doubt to the critical observer that the world will soon be a global village. The day that national borders and sovereignty will be a thing of the past is fast approaching.

Globalisation has challenges as well as opportunities. As one commentator has observed:

> *Globalization is a double edged sword; a power vehicle that raises economic growth, spreads new technology and increases living standards in rich and poor countries alike, but also an immensely controversial process that assaults national sovereignty, erodes local culture and tradition and threatens economic and social stability. A daunting question of the 21st Century is whether nations will control this great upheaval to whether it will control them."*

The daunting challenge for the legal profession is to be able to meet the challenges and opportunities offered by globalisation. This of necessity requires the legal profession to begin thinking and acting globally. Indeed, as commerce traverses the borders and cut throat competition in businesses and vocations become the order of the day, only the strong will survive, and as natural selection will dictate. As traditional boundaries to economic activity disappear, the most aggressive, innovative and intelligent players search the world for opportunities to create global markets. Clients, on their part are demanding different and highly specialized products and are purchasing them from the new generation of competitors who focus with laser-like precision[23].

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[21] See Law Council of Australia: A Discussion paper on challenges for legal profession, September 2001.

[22] Respondents to a Walker Clark on-line survey in May and June 2006 reported that a significant part of their law firms' business involved international clients. More than 60% of the 917 respondents said that their law firm had provided legal services within the past two years to local clients who do business or invest in a foreign country. 44% reported that their firms had provided legal services to a foreign client during that same period.

[23] Ibid.

Closer home, we have the East African Community which has come with a myriad of opportunities and challenges. The East African Treaty envisages cooperation and regional integration in manifold areas[24]: trade, educations, agriculture, governance etc.In giving effect to globalisation, the Advocates Act has already been amended to allow Ugandan and Tanzania Advocates to practice in Kenya.[25] It is important to note that the treaty itself does not allow cross-border practice[26]. It is loosely crafted to allow consensus building and cooperation in as far as practice and harmonise of other legal issues are concerned. Tanzania and Uganda have also taken a similar action.[27] The treaty, therefore envisages cooperation and final integration in the provision of legal services: education, judiciary and advocacy etc.

Challenges are already being experienced in as far as cross-border legal practice is concerned. Apparently, there is grumbling by a section of Ugandan and Tanzanian Advocates who have argued that their Kenyan counterparts being more aggressive hoped to have access to their largely unexploited legal market at their expense. However, there seems to be general consensus that integration of legal practice will in the long run benefits all and sundry. When fully operationalised, the cross border

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[24] The Treaty for the establishment of the East African Community was signed on the 30th of November 1999. This signing was the culmination of nearly three years of thorough negotiations and consultative processes among the East African people in their quest for reconstructing the system of cooperation that had prevailed in the region in the 1960's and 1970's before the collapse of the former community in 1977. The treaty entered into force on the 7th July 2000, following its ratification by the East African partner states, Kenya, Uganda and Tanzania.

[25] Section 13(1).

[26] Article 26 of the treaty reads thus,

> "(1) In order to promote the achievement of the objectives of the community as set out in articles 5 of this treaty, the partner states shall take steps top harmonize their legal training and certification; and shall encourage the standardization of judgements of courts within the community.
> (2) For purposes of paragraph 1 of this article, the partner states shall through their appropriate national institutions take all necessary steps to:-
>
> (a) Establish a common syllabus for the training of lawyers and a common standard to be attained in examinations in order to qualify and to be licensed to practice as an advocate in their respective superior courts;
> (b) Harmonize all their national laws pertaining to the community; and
> (c) Revive the publication of the East African Law Reports or publish similar law reports and such journals as will promote the exchange of legal and judicial knowledge and enhance the approximation and harmonization of legal learning and standardization of judgements of courts within the community.
>
> For purposes of paragraph 1 of this article, the partner states may take such other additional steps as the council may determine.

[27] Ibid.

practice will undoubtedly offer great opportunities to advocates from all the three countries.

It is unfortunate that the impact of globalization on legal practice, and in particular the law firm has not received systematic attention. This is despite the universal recognition that the practice of law and the economic and personal lives of lawyers is on the brink of transformation. There are various challenges that globalization of law, and the legal profession in extension will create. *Inter alia*, these are:

(a) Law Firm Strategy
(b) Streamlining of Municipal Law to International Standards
(c) Cross-Border Disciplinary Mechanisms
(d) Logistics of Service and Quality in a Globalized World.
(e) Information technology

Law Firm Strategy

As commerce traverses national borders, law firms will continue having international clients, in the sense that these clients may need legal services that traverse the municipal jurisdiction of the particular law firm. Thus, law firms will have to re-invent themselves and begin thinking and operating in a global sense.

Streamlining of Municipal Law to International Standards

Currently, there is conflict of Laws. In fact, this is one of the reasons which has been a deterrent of the globalization of Law. As one commentator has observed[28]:

> *"If you look at privacy as a test case on the globalization of law, you can see how difficult it will be to tackle money transmissions, trade, environmental protection, and terrorism...The European Union has created a model for protecting consumer privacy, but a dominant world player like the United States isn't willing to adopt the same type of privacy restrictions any time soon."*

With time, and in avoiding these conflicts, and as a result of agreement between cooperating and integrating countries and regions, these laws will have to be

[28] Mark Grant, Co-Author, *The Law of the Internet.*

harmonized. As things are, the law has been lagging behind globalization. There is urgent need to remedy this defect.

Cross-Border Disciplinary Mechanisms

While Kenya has for instance allowed Ugandan and Tanzanian Advocates to practice in Kenya, and Uganda and Tanzania have done the same, there seems to be no unified system of maintaining standards of practice. There is no machinery for recording and dealing with professional misconduct. Practice involves regulation of the advocate involved. Yet again, the law has been left behind in this aspect.

Logistics of Quality and Service in a Globalized World

Related to Advocates disciplinary mechanisms is the question of quality of legal services. Will globalization be an avenue for the deterioration of legal services? How will national bar associations regulating the quality of advocates coming into their countries? What about the quality and structure of legal education? Is there not need to standardize legal education as a means to globalization? What measures will local bar associations need to make in order to facilitate the globalization of law?

Information Technology

Information technology is an indispensable facet of globalization. The internet has been an important tool for globalization[29]. Modern technology has been instrumental in shrinking the globe and expanding the range of ideas and experiences. Globalization will of necessity Law firms, and other legal institutions to enhance their capacity in utilising technological progress.

All in all globalization has had, and will continue having a series of opportunities and challenges to the legal profession. The Kenyan legal profession should not be left behind in the global journey. Lethargy on our part will allow infiltration of our market by foreign lawyers, a status which does not augur well with the interests of the legal profession. There is an urgent need to reform the necessaries weaknesses, and harness the incoming and present advantages of globalization.

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[29] Ibid

6.2 Expanding Areas of Practice

> *"To put this all into language more pertinent for a legal audience, the demographic changes I have mentioned have made possible and necessary the development of fields of legal practice that the founding fathers....would never have been able to imagine...*[30]*"*

Compared to past generations, the present generation has evolved in manner that may not have been possible nor anticipated by the preceding generations. There have been many changes, in the social, religious as well as the commercial spheres of the society. The legal profession has not been spared by this wind of change. In as far as many challenges have also been experienced courtesy of these changes; there have been a significant expansion in areas of practice for legal practioners.

Courtesy of globalization, the legal profession is slowly but surely assuming and multinational character. Today, lawyers traverse the globe in the process of litigation. This is a new phenomenon. In this regard, there is developing a new class of legal practioners, you may call them international advocates/lawyers. As result of the globalization of law, law firms have been forced to traverse borders and establish firms in foreign countries. This is especially so in the western countries. Importantly, the harmonization of law to conform to international standards is a reality that is here with us. Clearly, globalization has created new and hitherto unavailable opportunities to lawyers. In the East African context, there is cross border practice.

It would seem that as a single factor, globalization has created manifold opportunities to legal practitioners, and many more opportunities will still be availed to legal practitioners. That be as it may, practioners who will benefit from globalization are those who by virtue of capacity building will be able to exploit this vast market. Another area which has created many opportunities for lawyers is information technology which has been one of the outstanding phenomenons of the 21st Century.

However, it is important to note that while information technology has created a myriad of opportunities, these opportunities may vary from country to country

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[30] H.W Arthur's, Will the Law Society of Alberta Celebrate its Bicentenary? Key Note Address: Law Society of Alberta-100th Anniversary Conference, Edmonton-October 26, 2007.

depending on the state of exploitation of information technology. Obviously, third world countries like Kenya have not fully embraced information technology.

Be that as it may, information technology and intellectual property rights have created opportunities some which are yet to be exploited by Kenyan lawyers. In as far as the legal practioners are concerned, there have emerged new areas of practice: taxation, consumer law, human rights and refugee law, land use and environmental law, estate planning and energy law. Moreover, there are many tribunals, which require the service of lawyers. For instance: industrial Property tribunal, Energy Tribunal, Rent Tribunal, the National Environmental Tribunal etc.

Thus, there are many opportunities to be harnessed both by practitioners and non-practitioners. The challenges that are posed by these new areas of practice are twofold. Firstly, most legal practioners are often slow to charter previously uncharted paths. Secondly, the law is often late in regulating the new areas. In the Kenyan context, there is need to ensure that new areas of practice are properly regulated. Innovation and invention requires boldness, Kenyan lawyers must learn to take advantage of these new areas of practice.

Finally, there is need to ensure that as lawyers harness the opportunities arising from the new areas of practice, they retain the essence and nature of the legal profession. In that regard, the wisdom of H.W Arthur is timely:[31]

> *And now a paradox: while specialized knowledge is moving lawyers farther and farther away from most of their professional colleagues, it is moving them closer and closer to their 'relevant other'. If you are an energy lawyer, you'll want to walk the walk and talk the talk of the oil and gas industry; if you are a labour lawyer, your "relevant other" are HR managers and union officials; if you are a tax lawyer, you will be spending a lot of time with accountants. Good lawyering for specialists, I want to say, tends to immerse them in adjacent bodies of non-legal knowledge."*

[31] Ibid

6.3 Advancement in Information Technology

> *"By all accounts, software- as a service (SAAS) is taking the legal world by storm- and other recent developments, such as virtualization and open source software, are knocking at the door*[32]*."*

There can be no doubt that technological advancement, and in particular information technology is one of the phenomenal features of the 21st century. Soon, relevance of irrelevance will be defined in terms of information technology. That being the case, one cannot afford to be ignorant of information technology, its benefits and demerits. Law regulates all spheres of life, information technology inclusive. In as far as Law and information technology is concerned, there are two main challenges.

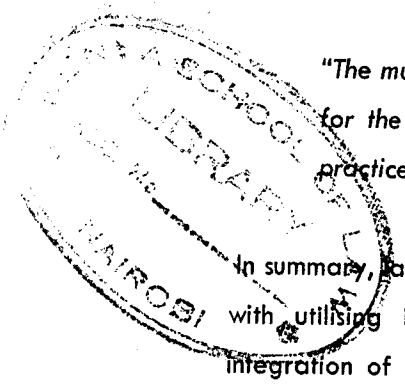
The first challenge involves the utility of information technology by the legal profession. At the bottom of the challenge should be an examination of the extent to which the legal profession has harnessed information technology for the benefit of the profession, and by extension the public. Secondly, and most important, as the key regulatory agent in the society, does the law offer substantive regulatory frameworks? As a matter of fact, technology has been misused to facilitate technological fraud. In essence, are the existing legal mechanisms sufficient?

In as far as utility of information technology is concerned, it will be noted that currently, computer programs have been invented that perform basis tasks such as preparing simple wills, mortgage papers, divorce documents and conveyancing transactions[33]. Online dispute resolution is another invention of information technology. Through it, large quantities of information can now be transferred via the internet quickly and cheaply. Moreover, there is the possibility of communication via e-mail, and or video conferencing without physical presence, reduced delays, and accessibility to relevant documents by all parties any time.

In Kenyan, the prevalent ways in through which information technology is exploited is through use of the word processing programs. However, as noted above, information technology has availed other support packages in addition to the word processing programs.e.g. in relation to conveyancing, debt collection and litigation. Utility of

[32] Homepage, Law Technology News in www.ltn.com

information technology is therefore majorly limited to the word processing programs. The lethargy of the legal profession in harnessing information technology is a global disease:



"The mundane reality is that lawyers the world over use computers overwhelmingly for the automation of support functions rather than areas at the core of legal practice...[34]"

In summary, lawyers have failed to respond to, and harness the advantages that come with utilising information technology[35].Moreover, on both sides of the Atlantic, integration of al or even most of the computer systems used in large offices (e.g. accounts,wordprocessing,litigation support[36] etc) remains the exception rather than the norm[37].

Opportunities offered by information technology to the legal profession are numerous. For instance, Electronic mail between fee-earners eliminates 'telephone tag', enable everyone on the network to be contacted with one message, appointments to be arranged, and documents circulated for comment and the experience of colleagues around the office to be shared when a lawyers encounters a problem that is new to him or her but not necessarily to everyone in the firm. In Kenya, Electronic mail, fondly refered to as e-mail is yet to be taken advantage of. In Australia, lawyers use the desktop PC's and a modem can already inspect online all titles to land in the Titles Office and obtain land search certificates covering planning orders, compulsory acquisition proposals and easements in a matter of seconds[38].

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[33] Ibid.

[34] Alan Paterson, Information technology and the North American Legal Profession, 6th Bileta Conference 1991.

[35] While in excess of 60% of UK firms use computers for word-processing and accounts, less than 15% of them use them to run support packages e.g. in relation to conveyancing, debt collection or litigation. Legal officers in North America are no less committed to computerising their support functions. The latest large law firm study in the United States (IIT, 1990) shows that every one of the top 500 law firms which responded used computerised accounts, time-keeping and billing packages.

[36] One of the most prevalent uses of databases in North America is litigation support. Such databases contain either the full text of all the documentary evidence in a case or abstracts and keywords from such documents. In any litigation where there is a plethora of documents these systems enable lawyers to access and cross check information for inconsistencies far more quickly and effectively than any manual system.

[37] Ibid.

[38] American lawyers can also search all patent files and records of registered and pending trademarks on line from their offices.

In the pursuit of efficiency and increased productivity, it is important that the legal profession harnesses the benefits of information technology. This would of essence involve technological investment and the drawing up of strategic and business plans which envisage utility of information technology. Moreover, there will be need to establish management structures that applies well beyond the confines of information technology. Finally, it is important to take note of the fact that the benefits of information technology apply equally to small firms as to large.

Even as the legal profession catches up with information technology, it will be important for laws to be developed with regard to information technology. As a matter of fact, information technology has brought a new field of law[39]. The fields to be traversed by cyber lawyers are breathtaking and broad: free speech, undesirable/unlawful content, misdirection of internet traffic, hacking, defamation, trade secrets, patents and copyright, enforceability of contracts, tax issues, security issues, financing of dotcoms, joint ventures, mergers and acquisitions and government regulation. Even though the Kenyan legal profession has lagged behind in utilising information technology, it would seem that the Kenyan legislative structures have been slow to respond to developments in information technology. There is need to cure this legislative void.

6.4 Evolution of the Law Firm

> *"The reason why millions of Americans are empowered to participate in alternative work arrangements, start small businesses, or strike out on their own is because our economy is free, flexible, and resilient. It rewards those who work hard, take risks, create innovations, and embrace change...[40]"*

An interesting concept that has taken the legal profession by storm is the nature and evolution of the law firm. For a long time, law firms have been modelled alongside the partnership form of business. This traditional model is increasingly being revised by a number of countries for its failure to cater to some of the institutional needs of the present age. This is for the simple reason that law firms are becoming commercially oriented in as far as the making of profits, expansion of capacity and capital acquisition is concerned. Since law firms are also business vocations in one way or

[39] Ibid

another, there has been a tendency towards innovation of the traditional structure of the law firm. As has been observed by the US chamber of Commerce[41]:

> *"Workers and companies must be free to create and select from a wide range of business solutions and working arrangements to meet the demands of today's market place."*

Innovation and evolution of the law firm has not been well received in all quarters of the legal profession. In Kenya, Law is practiced as sole proprietorships or partnerships. The idea of partnerships has not been well received by the Kenyan Legal fraternity. While the debate on the nature of the legal profession has not been subject to serious debate, it is an issue that is currently gaining pre-eminence all over the globe. This status has of course been invented by commercial necessity. There is an increasing need to ensure that restrictions that inhibit the legal firms from harnessing commercial advantages are removed. These will of course have to balance against the interests of the client and the important role of the legal profession.

In Britain, for example, two structures that have been the subject of intense debate are:

(f) Legal Disciplinary Practices(LDP's)
(g) Multi-Disciplinary Practices[42] (MDC's)

What are LDP's? These are law practices which permit lawyers from different professional bodies, for instance solicitors and barristers in England[43], to work together on an equal footing in the provision of legal services to third parties. They may permit others (e.g. HR professionals, accountants) to be managers, but these other are there to enhance the services of the law practice, not to provide legal services to the public.

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[40] Ibid.
[41] U.S Chamber of Commerce, *Work, Entrepreneurship, and Opportunity in 21st Century America*, A Special Report From the US Chamber of Commerce, May 2006.
[42] See Daly, *"Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership,"* 13 Geo. J. Legal Ethics 217 (2000).
[43] Most firms of solicitors are organized as partnerships are organized as partnerships. By contrast, barristers practice as sole practitioners, though they may group together in chambers and share common services. However, both are subject to rules prohibiting outside ownership of interest.

On the other hand, MDP's are defined as practices that bring together lawyers and other professionals (e.g. accountants, chartered surveyors) to provide legal services; indeed legal services might be a small part of their work. In England, the *Clementi Report* concluded that LDP's should be permitted and that non lawyers should be allowed to be partners (or directors) of such practices, subject to the principle that lawyers be in a majority by number in the management group[44].

In as far as the evolution of the law firm is concerned; these are some of the key questions to be answered:

- Why should law firms elect one form of business over the other?
- Why should law firms elect a business structure that allows outside ownership?
- What are the potential benefits and risks of outside ownership to the law firm and its clients?
- What potential benefits and risks to both the firm and its customers does a regulatory limit on the amount of outside ownership come with?
- What should be the link between ownership and the control of a law firm?
- What are the regulatory responses that will promote benefits and risks related to outside ownership?

Providing satisfactory answers to the questions above is by no means a simple and straightforward exercise[45]. There are serious managerial, ethical and professional issues to be addressed. That be as it may, it is increasingly becoming obvious that Law firms must be structured in a manner that promotes efficiency. As has been observed[46]:

> *"... In the absence of some market failure we would expect businesses to seek out the most efficient organizational structure, in which case constraints on a firm's structure would be liable to reduce efficiency. We therefore need to ask whether there exists market failures or imperfections that would lead legal firms to*

[44] The Clementi Commission concluded MDP's should not be allowed. It was their view that if LDP's were first allowed, experiences of LDP's would help in determining whether it was desirable and manageable to introduce full blooded MDP's.

[45] A number of commentators have argued that the big accounting firms have effectively established MDP's in the United States, as well, notwithstanding Rule 5.4.

[46] Richard A Brealy and Julian R Franks, *The Organizational Structure of Law Firms: A Discussion of the Recommendations of the 2004 Review of the Regulatory Framework for Legal Services in England and Wales.* - July 13 2005.

structure in ways that may increase firm profitability but nevertheless reduce welfare."

The main challenge lies in the inclination and desire by law firms to evolve from the private partnership model to the public corporation model. Law firms are not an exception in this trend[47]. It will be noted that while most large manufacturing and retail businesses in developed economies are organized as public corporations with outside shareholders and hired managers, professional businesses i.e. law firms are for the most part organized as partnerships.[48] The reason for this inclination is simple,public corporations can access finance more easily that private partnerships.

Interestingly, this trend is all over. For instance, management consultancy firms, which also have low capital requirements, have also chosen to raise significant amounts of capital through IPO's[49]. As the practice of Law becomes more capital intensive in Kenya, the evolution of law firms to meet capital demands will be inevitable. In the developing countries, this is the prevailing scenario.

Globalization of Law will of essence require the expansion of legal firms, domestically, and on an international plane. Moreover, as technology progresses the need to enhance the informational technology capacity will necessitate external and substantial financing. Thus, restriction s on outside financing may act as a brake to competition and expansion of law firms.

Naturally, a partnership is more suited to a labour intensive business. The Practice of Law is slowly evolving from a purely labour intensive business into a capital intensive business. The evolution of the structure of the law firm is therefore inevitable to meet the emerging capital intensive nature of Law. Commercial wisdom dictates that when a business becomes more capital intensive, it must have an incentive to restructure as a

[47] In some cases, the choice of structure is constrained. Until 1970, investment banks in the USA were prevented from forming listed companies. After these listing restrictions were removed, investment banks began to adopt the corporate form.

[48] This is true for consultancy firms, accounting firms, architects, medical practices, advertising agencies.

[49] Raising Capital through IPO's is driven by the desire to reduce borrowing.

public corporation. That be as it may, In the UK as well as in the US, legal practices have been constrained from outside ownership[50].

While the Kenyan debates on the structure of the Law firm have revolved around whether or not to form a partnership, on the global level, things are much more serious. As the legal profession continues in its upward trend, as it becomes more capital intensive and takes advantage of opportunities offered by Information technology and globalisation, the picture is bound to change in the very near future. The question is, are we ready for the change? Will the change of the structure of the law firm pose serious challenge to professional ethics and the essence of the legal profession? What regulatory regimes would be able to deal with the challenges necessitated by commercial reality[51]? This is the challenge of the 21st Century.

6.5 Commercialisation of the Legal Profession

> *One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market...Both special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are a means to a goal that transcends the accumulation of wealth*[52]."

As may have been gleaned from the previous paragraphs, the legal profession is increasingly being commercialised. This is one of the reasons why in some countries, law firms have even evolved from the traditional partnership structure to the company structure. This is just a tip of the iceberg!

As law firms evolve their structures to harness commercial advantages, profit should not be the driving factor. All professions, I must stress, survive because of their clients, the people they serve. The legal profession should be swayed by higher values which

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[50] US states prohibit law firms from having 'layman' equity investors (although they need not be wholly owned by their practicing partners. New South Wales is an exception in allowing outside ownership and multidisciplinary practices, and other states in Australia plan to follow suit.

[51] See Andrews, *"Nonlawyers in the Business of Law: Does the One who has the Gold Really Make the Rules?"* 40 Hastings Law Journal 577 (1989).

[52] O'Connor J in *Shapero v Kentucky Bar Association (1988) 486 vs 466.*

traverse economic advantage. If and when the restructuring of law firms will be an eventuality, it will be important to come up with a legal framework that balances the commercial advantages and the best interests of the client[53].

In as far as information technology and it's utility is concerned, here again the interests of the client should be the driving force. If appropriately harnessed, information technology would ensure that the delivery of services to clients is more efficient than it has been. Critically, on wonders how much faster the wheels of justice would be running if lawyers had invested in, and were conversant with the dynamics of information technology.

Yet another critical area, which has been affected by commercialisation, is legal education[54]. While in the traditional legal set-up, legal education had a broader and nobler aim, with the advent of 'the age of profits', and the increasing tendency of the state to privatise the provision of legal education, there has emerged institutions of legal education whose main concern is profits. Thus, indoctrination of the students into the traditional ideals of the legal profession, and thorough training in law has been considered a waste of time, and a commercially sterile exercise. The inevitable result of this trend is that such institutions are increasingly producing lawyers who are not up to the standards required of them

In Kenya, for example, there is the proposal that has been made concerning the advertisement of legal business[55]. This will have serious ethical ramifications. Already, there are persons who are offering legal services not being advocates and contrary to the Advocates Act. Importantly, many advocates are increasingly becoming interested only in financial gain. Justice is being sacrificed at the altar of money.

It is essential that the legal profession re-evaluates the ideals and values that it stands for[56]. While every vocation should be able to monetarily support itself, that must not be the sole motivation. Justice should not be bought, neither should it be sold.

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[53] See Preliminary report of the American Bar Association Task Force on Corporate Responsibility, 58 Bus. Lawyers 189, 206 (2002).
[54] See Thomas R Andrews, *Challenges to the Legal Profession in the New Millennium*- JFBA/Hitotsubashi University-February 21, 2003.
[55] See The Advocates (Practice) (Marketing & Advertising) Rules, 2008.
[56] The primary consideration in defining the practice of law is the protection of the public. Thus, for a person's conduct to be considered for the practise of law , there must be another person toward whom the benefit of that conduct is directed. This person is the client.

Commercialisation of law is the very antithesis of justice; it is trend that lawyers should shun as if it were leprosy. In any case, the profession stands to gain more, if it is viewed as the bulwark of justice, rather than merchants of justice:

6.0 CONCLUSION

In conclusion, laws, society, and the composition of the legal profession have been fundamentally altered to conform to the societal status. While change is inevitable, it must be guided in the positive direction. This is the challenge of the 21st Century! In as far as legal education is concerned, it will be important to ensure that it instils a sense of justice and efficiency in the incoming lawyers. The Legal profession is an institution for justice; therefore, legal practitioners should ensure that their conduct is not only beyond reproach but also geared towards competence. The institutions of discipline should be able to catch up with the black sheep of the profession, and discipline them. This would serve as an important avenue for the vindication of the legal profession, whose reputation has been waning in the eyes of the public.

Finally, globalisation, growth of areas of practice, advancement in technology, evolution of the law firm, and the commercialisation of law poses significant and life threatening challenges to the legal profession. The Kenyan legal profession should not be ignorant; neither should it drag its feet in responding to the cited challenges and opportunities. The role of the law and by extension legal practitioners cannot be gainsaid. Consequently, that which needs to be improved must be improved. Change must not change the essence and nature of the legal profession.

This is for the simple reason that the legal profession is not any other profession, and the words of Honourable Justice, Professor Dr. G.W Kanyeihamba in this regard are priceless[57]:

> *"Professional standards must ideally be kept in all societies, but in my opinion, no where else are these standards of more paramount importance than in three professions which intimately affect the human being in its welfare, living and health, namely the medical profession, the legal profession and religion. The first*

[57] G.W Kanyeihamba, "The *Legal Profession, the Judiciary and Justice,"* Address at the Jurists of the Year Award Ceremony,10th December 2003, the International Commission of Jurists (Kenya Section).

controls a persons health, the second affects one's existence, living and property and the third affects and controls one's will and spiritual wealth."

THE END