My Lords,

The Chief Justices of the member countries present,

Ladies and Gentlemen, all protocols observed.

I would like to thank the **Southern African Chief Justices' Forum** for inviting me to speak here today. I have been made to understand that the substantive focus of this programme is on **Sustaining the rule of law to promote socio-economic development in the Eastern and Southern Africa region**. The gradual liberalization of the Kenyan economy over the last two decades has of course had profound implications for the legal system. The efficient judicial enforcement of contractual obligations as well as property rights is a pre-condition for generating confidence among domestic as well as foreign entrepreneurs and investors.

In this regard, the Kenyan judiciary – especially at the High Court and the Subordinate level, has been the target of persistent criticism for mounting arrears as well as inefficiency in disposing of litigation involving business interests. I can attempt to answer both these charges, but it will be more worthwhile to concentrate on specific measures taken to improve judicial efficiency rather than being defensive about the existing problems.

The larger agenda for judicial reforms touches on several issues – namely the methods for selection and appointment of judges at different levels, the urgent need for improvements in the physical infrastructure available to the judiciary, the state of legal education as well as Continuing Legal Education **(CLE)** in Kenya and last but not the least, the continuing debate about judicial accountability. Each of these issues has been intensely debated in various settings and it would not be possible for me to comment on all of them in this speech.

However, I would like to comment on some specific initiatives taken in recent years to improve judicial efficiency in Kenya through better **'case-management'** techniques.

Without doubt, a perpetual hurdle faced by our judicial system is that of mounting arrears. Numerous empirical studies have indicated a time lag between the stages of filing and disposal of cases by courts all over the country. It must be borne in mind that the actual rate of disposal of cases per judge has been consistently improving in recent years, but the rate of institution of proceedings has been growing at an even faster pace. It is this growing gap between the rate of disposal and the rate of institution that is a cause for worry. It is in response to these problems, that it is important to implement effective strategies for proper case management.

Today I would like to focus on the advances we have made, the possibilities that await us and some of the choices that confront us as we attempt to streamline the judicial process towards ensuring timely justice. In this regard, I will emphasise the continuously evolving role of the judge and the judicial system as we move towards more rigorous planning and management in our judiciary. I would also like to refer to the increasing importance of the use of information technology (IT) in facilitating these developments.

'Case management' pertains to the objective of speeding up the litigation process by way of innovation and adaptation. The role of the judge is therefore no longer confined to merely deciding the case, but also requires him/her to play an active part in the manner of its resolution. The concept of applying managerial principles to improve the efficiency of the judicial process is not a recent phenomenon. Faced with the problems of arrears, many judicial systems have reformed to adopt more effective case management strategies. Starting with the United States in the last half of the century and the **1996 Woolf Committee** recommendations in **the United Kingdom**, the measures evolved include emphasis on pre-trial procedures, time-bound hearings, the demarcation between fast and multi-track and a host of other mechanisms. The previously documented principles and procedures followed in the aforementioned countries cannot

be picked wholesale and applied in the Kenyan scenario; these must be adapted and calibrated to suit the ground realities of our country.

In our aspiration for effective case management, we all understand the importance of planning at a national level. It is important in this context to set targets with regard to disposal rates. This will require co-operation at all levels of the judiciary, so that this target is pursued and achieved.

However, setting targets is only the first step. Priority should be given to creating timetables for every contested case and monitoring its progression by means of a computerized Signaling System. In order therefore, to achieve the said objectives, I put in place an **ICT Committee** for the Judiciary. The **ICT** Committee is tasked with the responsibility of formulating an **ICT** policy and Action Plan on computerization of the Kenyan Judiciary and to advise technological, communication and management related changes.

The use of information technology **(IT)** in our justice-system will cross an important threshold with the introduction of the electronic-filing of cases before the Court of Appeal and the High Court. Similar e-filing systems will be planned for the various Surbordinate Courts in the near future. In this regard, a clear roadmap will be prepared in the form of the **"ICT Policy and Action Plan for Implementation of Information and**

Communication Technology in the Kenyan Judiciary", by the **ICT** Committee.

The efficiency of judicial functions is also being enhanced with the use of information technology **(IT)** for case management. Until now, the allocation of matters before different judges and the preparation of cause-lists is a time-consuming process. However, computerization of the higher judiciary will lead to tremendous improvements.

Better '**Case management'** also involves the use of strategies to keep matters out of courts. Apart from the expansion and modernization of the judiciary in our country, it is important to promote the use of alternative dispute resolution (ADR) methods**.**

While private businesses have been increasingly relying on domestic as well as international commercial arbitration in the course of their dealings, the use of methods such as **conciliation** and **mediation** for resolving other categories of civil disputes still needs governmental support. A crucial legislative intervention in this regard is the **The Statute Law (Miscellaneous Amendment) Act No. 6 of 2009** which recognized Court-annexed **ADR** methods in Kenya. Section 81 of the Civil Procedure Act **(CPA)** mandates that Judges can direct parties in civil proceedings to

resort to methods such as **mediation** under circumstances where it is perceived that the dispute can be resolved in a co-operative and non-adversarial manner. This provision is important since a significant portion of pending litigation at the trial level such as **rent disputes**, **property disputes** and those pertaining to **family matters** are best resolved through these methods. Civil litigation has an inherently adversarial character and is widely perceived in society as a tool of confrontation and unnecessary harassment. Especially in instances where parties are otherwise well-known to each other, their involvement in lengthy and acrimonious civil suits can do irreparable damage to their mutual relationships. Under such conditions, judges can use their discretion to direct the use of **ADR** methods under their supervision. If this approach is internalised in our system, it can greatly reduce the case-load before the Courts of Law. A related development in respect of criminal proceedings is the provision for '**plea-bargaining'** which was inserted by way of an amendment to the Criminal Procedure (**CPC)** in **2008**. This provision allows persons accused of certain offences to avoid the stigmatisation associated with lengthy criminal trial. In respect of minor offences, it gives the parties a chance to avoid adversarial litigation altogether.

The understanding of '**case management'** does not stop here. The increasing pressure on the docket of the court will require us to make more

fundamental and innovative changes to our judicial processes. The continuously evolving nature of the judge and the judicial system in respect of improving **'case management'** techniques raise some important issues which need due consideration.

The modern approach to case management envisions the emergence of a pro-active judge, whose function is to set out the issues involved, limit the time taken for each step of the litigation in order to ensure a speedy procedure as well as to decide the outcome of the case. Indeed the underlying message is, to quote Lord Woolf:-

> **"that ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court".** *1*

This change in the function of the judge would seem to imply a basic shift in our judicial system, away from adversarial litigation and towards a slightly more pro-active approach that borders on the inquisitorial style. A possible concern is that the adversarial nature of litigation will be undermined given the new role of the judge. The traditional notion of litigation in common law has been structured around the agency of the parties. Hence, there are questions about the extent and limits of the control that the judge should exercise over the procedural aspects in the courtroom.

In addressing such concerns we must keep in mind that the objective is not to divest the parties of their agency but simply to permit them to handle their legal proceedings in a controlled environment. Under the supervision of the court, the core issues relating to the case can be identified and addressed with greater speed, while frivolous aspects can be ignored. Pro-active judicial involvement in case-management thus serves to improve the effectiveness of the adversarial process rather than to supplant it. It is also of great importance to ensure that the justice that we are trying to secure is "**just and ready**" as opposed to "**rough and ready**". Though expediting judicial proceedings is of great importance, there must be mechanisms in place to ensure that this does not compromise the rights of the parties involved. Especially in the field of criminal law, the rights of the accused cannot be undermined, and any mechanisms adopted to expedite management of the cases must conform to standards that secure for the accused the right to a fair trial. Ultimately, both parties benefit from an expeditious trial so long as it is ensured that no great detriment is caused to either party.

All of what we have accomplished, and a large part of what we hope to achieve can only be made possible by the use of information technology. I have already referred earlier to the computerised signaling system for

monitoring the progression of pending cases, the computerised tracking of '**bottleneck**' areas and the promotion of alternative dispute resolution **(ADR)** methods as well as '**plea-bargaining**'. The Information Technology will make the decisions of the Court of Appeal, the High Courts as well as Subordinate Courts freely available on-line.

I therefore fully endorse the implementation of information technology (IT) solutions right from the Court of Appeal to the subordinate courts. Information technology will enable Judges to assume far greater responsibility in tracking and managing cases. A national level tracking mechanism can therefore enable the monitoring of the progress of cases, the scheduling of Judges' workloads and the listing of cases among other parameters. The progress of a case right from the stage of first instance to its conclusion can be recorded and information about costs and delays made available. Indeed the availability of this information increases the accountability of the Judiciary and would thereby increase its efficiency.

There is also a suggestion to the effect of making judgments authenticated by digital signatures available on-line. Such innovative suggestions are a welcome addition to our efforts in improving efficiency and making our courts more accessible. Technology thus opens up myriad possibilities to improving case flow, co-ordination between courts, maintaining statistics

and is an important component of the roadmap for reforms in the administration of Justice in Kenya.

I would like to point out however that planning and management is not a '**magic potion'**, whose brew will cure the system of the malady that is judicial arrears. It is however a key facet in an integrated approach for ensuring timely justice. The adoption of an effective management system needs to be coupled with other longstanding requirements such as **improving judicial infrastructure**, **increasing the strength of the judiciary**, **promoting alternative dispute resolution** and **implementation of legislative reforms** to truly prove effective. Case management and planning is therefore vital to the functioning of a modern Judiciary. Its implementation will however at some stage require serious reflection on the changes required in our system. I am confident and optimistic that if implemented appropriately it will go a long way in addressing the problems of arrears and delay.

I, once again, express my gratitude to the **Southern African Chief Justices' Forum,** for having organized this **Conference**. I salute you.

Thank you.

J. E. GICHERU, EGH,

CHIEF JUSTICE

FOOTNOTES

Cited from: Lord Harry Woolf, Access to Justice-Final Report (Department of Constitutional Affairs: United Kingdom, July 1996), at Section II, (Introduction) Para.1

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OTHER REFORMS AND PROPOSED REFORMS

1. The number of high court judges has been increased from 38 to 70 while that of court of appeal from 8 to 14.But presently there are only 11 court of appeal judges and 46 high court judges in post. We intend to fill the vacant posts soon.
2. New courts are being constructed increasing the number of magistrates court from 110 to 118 and high court from 8 to 14.The biggest court in Nairobi is under construction, it will have 56 court rooms.
3. Specialized court have been established namely:

-Family Division

-Criminal Division

- Constitutional and Judicial review Division

-Commercial and Tax Division

- Environment and Land Division

-Civil Division

4. Judicial Training Institute operationalized
5. Law Reporting Institutionalized through the establishment of the National Council for Law Reporting.
6. Improved terms and conditions of service:

-Recent Increment of judges salaries

-Recent payment of magistrates and paralegal staff of certain allowances

7. Promulgation of schemes of service for magistrates and paralegal staff.
8. Establishment of the judiciary pension schemes.
9. Establishment of in and out patient medical schemes

10. Introduction of open days .

11.Bi-annual Ethics and Anti-corruption Committee are appointed to investigate cases of corruption or perceived corruption.

The government appointed a task force on judicial reforms on 29th May 2009.The task force is due To present its report next week.It has recommended far reaching reforms ,eg

1. Restructuring and expansion of the judicial service commission to include:

-The Law society

-A representative of the magistrates

-A Representative of the private sector.

2. Qualifications for appointment of the Chief Justice and Court of Appeal - 15 years up from 7 years.

High Court 10 years up from 7 years.

3. Appointment to be on the basis of competitive transparent process where vacancies are advertised and interviews are conducted by the Judicial Service Commission before successful candidates are presented to the President after vetting by the intelligence services.

4. A Complaints sub commission of the judicial service commission to be established to receive and consider all complaints against judicial officers (including Judges)

5. On backlog :

-The task force has proposed the appointment of Commissioners of Assize to help in the High Court as a temporary measure.

-Increase the number of Court of Appeal Judges to 30 and High Court Judges to 120.

-Establish small claims courts

-start weekend/24hours courts in urban centers.

6. On court administration:

-pending the establishment of the Supreme Court and the creation of the Post of Deputy Chief Justice, the Chief Justice to appoint Presiding Judge Of the Court of Appeal and Principal Judge of the High Court to assist the Chief Justice with administration.

-As a long term intervention Court administration will be done by

Professional administrators in place of magistrates

7. Performance evaluation and appraisal to be introduced.

8. Peer review mechanism to be institutionalized.

9. Stepping up the implementation of income,assests and liabilities to monitor acquisition of wealth.

I once again, express my gratitude to the Southern African Chief Justices` forum for having organized this conference.I salute you .

Thank you

J.E. GICHERU,EGH,

CHIEF JUSTICE