ACCESS TO JUSTICE AND LAND DISPUTES IN GHANA'S STATE COURTS: THE LITIGANTS' PERSPECTIVE[1]

Richard C. Crook

1. Regulation of Land Disputes in Ghana: Legal Pluralism and State vs. 'Non-State' Dispute Settlement Institutions

In Ghana, as in the West African region generally, contestation over land is particularly acute, and seems likely to intensify. The pressures of population growth, cash-crop led marketisation, large scale migration, and rapid urbanisation have produced increased competition and land scarcity, and increasingly politicised conflict over land (IIED 1999). Some of these conflicts - host communities vs. migrants, inter-communal, inter-generational, gender-based - reflect the embeddedness of land laws in local power structures and social group membership. Others are linked to the role of the state, either through its articulation with local regimes or through state attempts directly to control land;

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everywhere, these developments are deepening the marginalisation and exclusion of poor and vulnerable groups.

'Land regulation' regimes in such situations have a crucial impact on livelihood decisions concerning crop strategies, labour usage, and survival strategies in the city (DFID 2000). Although Ghana shares with other African countries a situation characterised by high levels of legal pluralism, its particular history, both pre-colonial and colonial, has produced a set of deeply rooted, local social institutions of land regulation which have always been more strongly supported by the state than in many other African states. During the colonial period British policies of Indirect Rule and policies for the regulation of land exploitation led to the incorporation of local or 'customary' laws into a unified common law system, through the institution of Native Courts (Crook 1986; Allott 1957; Crook 2001; Woodman 1996 and 2001). Legal reforms in Ghana since 1986 have incorporated all forms of land tenure, including customary forms, into a single statutory and common law framework, and subjected transfers to both title registration and centralised regulation by a national Lands Commission. But this attempted centralisation and integration of different kinds of regulation has so far proved ineffective, and traditional institutions remain strong (Kasanga et al. 1996; Kasanga and Kotey 2001). Ghana's National Land Policy, published in 1999, now seeks, amongst other things, to harmonise the legal and regulatory framework for land administration through law reform, establishment of special land courts and strengthened customary land authorities, and comprehensive mapping and registration of land holdings and land rights, both customary and modern (Ghana 1999).[2]

In this context, a key question which the legal and institutional reform process must address is how to develop judicial and regulatory institutions which will be effective in reducing or managing growing conflict over land, and protecting land rights, particularly of the rural and urban poor.

Current debates in the literature revolve around two main themes: first, should customary and other non-state land regimes be supported because of their inherent flexibility, social embeddedness and accessibility, or should it be concluded that they in fact facilitate 'legal rightlessness' of the poor as against the state and

[2] The policy is being implemented by the Land Administration Project Unit (LAPU) in the Ministry of Lands and Forestry.

locally inequitable power structures? (Berry 1993, 1997; Basset and Crummey 1993; Chauveau 1997; *contra* Chanock 1991; Ruf 1985; Léonard 1997).

Second, does the plurality of legal orders offer useful choices for the ordinary citizen ('forum shopping') (Benda-Beckmann, Keebet von 1991; Vanderlinden 1989; Griffiths 1986) or does it produce a general ambiguity, lack of enforceability and lack of protection for land rights, particularly for those who lack power in the urban areas (Farvacque and McAuslan 1992; Kasanga et al. 1996; van Leeuwen and van Steekelenburg 1995; Dembele 1997; Larbi et al., 2003)? Indeed, the debate over the problems involved in encouraging local, customary dispute resolution institutions and ADRs (Alternative Dispute Resolution systems) suggests for some commentators that the best way forward is in fact to strengthen the role of state courts and regulatory agencies within a reformed and more integrated system (Anderson 2003; Debroy 2000; Kees van Donge 1999; Nader 1979 and 2001; Maxwell et al. 1999).

In our research[3] on the institutions which regulate access to and dispute over land rights we therefore decided to pay as much attention to the state courts, in their capacity as regulators of land disputes, as to 'non-state' (informal) and customary dispute settlement mechanisms.

The state courts in Ghana, as provided under the 1992 Constitution and the Courts Act, 1993 (Act 459) continue to form a crucial element in the land regulation system - indeed some might say they are the most important. They are constitutionally endowed with the power to apply all the rules of law recognised in Ghana, whether customary, common law or statute, and are resorted to by very large numbers of litigants who wish to see an authoritative settlement of their case. Yet, as is well known, the state courts, particularly the courts of first instance – District Courts, formerly Community Tribunals and popularly known as Magistrates' Courts, and High Courts - have been in a state of crisis for some years, insofar as they are overwhelmed with the large volume of land cases, few of

[3] This article is drawn from work which forms part of a larger comparative project on 'Legal institutions and the protection of land rights in Ghana and Cote d'Ivoire', funded by DFID (UK), in collaboration with Professor Simplice Affou of IRD, Abidjan, CI, and Dr Daniel Hammond of the Department of Land Economy, Kwame Nkrumah University of Science and Technology, Kumasi, Ghana together with a team of researchers.

which can be heard or settled within a reasonable time. There is therefore an urgent need to think about ways in which the court system can be helped to provide a more effective judicial service for the land sector.

This article is based primarily on survey research which examined the functioning of selected state courts, focussing primarily on how they are perceived and experienced by those who use them: - litigants in land cases. How effective do people find these courts? Are they seen as capable of protecting land rights, do they produce results which are acceptable or legitimate in the eyes of the parties themselves, and how far can they contribute to resolving or mitigating the levels of conflict associated with access to, use of and disposal of land in Ghana?

Courts were selected courts from three case-study areas:

1. The Community Tribunal (now Magistrate's Court) in Goaso, which is the District Assembly capital of Asunafo rural district, an area of cash crop agriculture (mainly cocoa) with large migrant communities.

2. The High Court of Kumasi, which serves primarily an urban or peri-urban area characterised by marketisation, severe competition and conflict among statutory, traditional and 'informal' (illegal) systems of land regulation. There are six judges sitting in the Kumasi High Court.

3. The High Court of Wa (Upper West Region) which serves an area where there is a low degree of marketisation, no perceived land shortage and land is allocated at low cost according to local customs. There are very few land disputes, but those that are emerging are linked to the peri-urban growth of this Regional capital.

The research was designed to address three fairly simple sets of questions:

1. Why do people go to Court, as opposed to other forms of dispute settlement institution? (What do they want or expect from the court process? Do they always want a full trial and judgment?)

2. What are their experiences of the litigation process? How 'user friendly' is it, how inclusive and acceptable is it to those who use it?

3. Are there ways in which the service can be improved?

In order to answer these questions we adopted a methodology which begins with the users themselves, and asks them directly about their experiences. We therefore carried out a targeted or purposive survey of 243 land case litigants in the relevant courts, randomly selected over a specified time period. This is unique data in that it is probably the first such survey in the history of research into the Ghanaian legal system. We also interviewed the providers of the judicial service - judges, lawyers, court officials - and observed court proceedings over the same time period.

2. The Court System: Background to the Current Situation

The current court system in Ghana was set up by the Courts Act, 1993, and consists of the superior Courts of Judicature - the Supreme Court, the Court of Appeal, the High Court and the Regional Tribunals - and the lower courts. The High Courts in each Region are both first instance courts for all civil and criminal matters, and exercise supervisory jurisdiction over the lower courts - Circuit Courts and Magistrates' Courts. Under the 1993 legislation the lowest court (at District level) was called a Community Tribunal, and incorporated a lay panel of community assessors sitting with a legally qualified magistrate. These were abolished by Executive Instrument in 2002 and reverted to being Magistrates' Courts under a single legally qualified judge. (The Tribunals were a legacy of the PNDC 'revolutionary' era which were incorporated into the main legal system in the 1993 legislation and served as a form of special criminal court at the Circuit and Regional levels) (Gocking 2000). Since 1993 the Fast Track High Courts have also been added to the system; these do not differ in their jurisdiction or composition, but only in their procedures (although there has been legal challenge to their 'constitutionality').

The Magistrate's Court is the lowest level of civil court which hears land cases; until 2002, it was limited to cases involving property not exceeding five million *cedis* (¢5m, approximately GB£300 at current rates) in value. This meant that they were the main first instance courts in the rural districts, but in the urban areas

especially the metropolises of Kumasi and Accra, they did not in practice hear any land cases which routinely started in the High Court. In 2002 the limit on Magistrates' Courts was raised to ¢50m (around GB£3000), which it is hoped will ease some of the pressure on the High Court. This is probably unlikely in that the pattern of going straight to the High Court has become well entrenched - unless legal practices begin to advise their clients to use Magistrates' Courts on grounds of speed and cost.

The dimensions of the crisis in the first instance courts are well known, and need not be laboured here. The problem is a combination of large numbers of suits being filed and an incapacity to handle the case load expeditiously, causing a huge backlog of unheard cases to build up and long delays for litigants. Such delays mean that many injustices are never resolved and many people are deprived of their rights by the unchecked illegal actions of others. It is thought that land cases themselves account for around 45-50% of the total cases filed nationally (no recent accurate figures are available).[4]

In the Kumasi High Court they have accounted for an average of 45% of all cases over the past five years. More telling, over the period 1997 to 2002, the absolute number of cases filed (and hence pending) increased by 15.7% - and the total number of land cases pending increased by 18.8%. In other words, in spite of efforts made by the *Asantehene* since 2000 to withdraw at least Stool Land cases from the Courts, the rate at which land cases were being settled was constantly outstripped by the rate at which new cases were being added each year[5] (see Table 2.1). The absolute number at the beginning of the five year period was itself daunting, and clearly beyond the capacity of any court system to clear up if it is assumed that most cases will be taken to trial. Unfortunately, as we shall see in the following analysis, the rate of out-of-court settlement in Ghana, unlike that of other legal systems, is extremely low - Mrs Justice Georgina Wood in a recent paper has estimated it to be around 5% (Wood 2002), a view supported by other

[4] According to Kotey, land cases accounted for 41.5% of all pending High Court civil cases in 2002, but excluding appeals pending from lower courts, or on appeal to the Court of Appeal and the Supreme Court (Kotey 2004: 8).

[5] The *Asantehene* is the supreme ruler or King of the Asante Confederation, the most powerful and wealthy traditional ruler in Ghana. The office of a chief is referred to as a 'stool', and stool lands are lands under the control or within the traditional jurisdiction of a chief.

judges and lawyers we have spoken with. It is this unusual characteristic of the Ghanaian system which makes the crisis seem peculiarly intractable and indeed causes those who contemplate it nothing but despair. [6]

Table 2.1: Statistics of Cases at the High Court, Kumasi[7]

Year	1997	1999	2000	2001	2002	Total % increase
Total cases	17,178	17,708	18,413	19,526	19,876	15.7%
New cases	1,948	1,564	1,864	1,725	1,222	
Cases settled	1,157	1,069	1,637	772	582	
Total land cases	7,759	7,739	8,011	9,044	9,214	18.8%
New land cases	445	218	315	389	252	
Land cases settled	117	48	359	65	58	
Land cases as % of total	45%	44%	44%	46%	46%	
% cases settled (total)	6.7	6.0	8.9	4.0	2.9	
% cases settled (land)	1.5	0.6	4.5	0.7	0.6	
% new cases (land)	5.7	2.8	3.9	4.3	2.7	

[6] There are currently six judges in the Kumasi High Court; if they each heard an average of four cases a day, it would take over five years to hear the existing cases filed, assuming that the Court sits for 30 weeks in each year.

[7] Figures derived from statistics kindly provided by the Court Registrar's Office, Kumasi High Court.

Draft figures for the Accra Central Registry present a similar picture; according to Mrs Justice Wood, rates of settlement for land cases over the 1998 - 2001 period fell from 4.2% to 2.6%, and the average minimum time for a litigant who goes through all the levels of the appellate system is between three and five years - but could easily be as much as 15 years.

Although no break down of cases in the District or Magistrates' Courts is available, the number of civil cases dealt with and pending is even more overwhelming. As in the High Court, the number of new cases coming in each year far exceeds the rate of settlement. In 2003-4, the Magistrates' Courts nationally had 59, 031 cases before them, of which 71% were new cases that year. Of that total, 23, 351 (40%) were settled. In Ashanti the equivalent figures were 10, 293 total cases, of which 65% were new, and the number of cases settled was 4230 (41%) (Ghana, 2004).

The 'real cause' of this backlog is of course the subject of a national debate; on the one hand, it is argued that the problem is a 'demand side' one - it is said that Ghanaians are too ready to bring cases without exploring other methods first, that they are too litigious and pursue cases unnecessarily, or that the land tenure and land administration systems themselves are so ambiguous and confusing that they automatically generate 'excessive conflict'. On the other hand, many commentators argue that the problem is supply side - the courts ought to be able to cope with whatever is brought before them but they lack capacity or efficiency in some way. The idea that levels of litigation are 'excessive' is of course difficult to judge - excessive in relation to what standard? Clearly the fact that thousands of people feel impelled to move from informal dispute to formal court action reflects a social and economic reality which cannot be wished away. One needs to ask, why is this happening?

3. Litigants in the Case Study Courts

Our intention in this study was to find out how the courts are used by citizens and how they view their experience of litigation. We therefore selected a sample of actual litigants in three courts: the Kumasi High Court, the Goaso Magistrate's Court and the Wa High Court. The sample was drawn by interviewing all those who attended court for a land case during the period December 2002 - April 2003. This produced a sample of 243 respondents: 186 in Kumasi, 47 in Goaso, and 10 in Wa. Very few people refused to be interviewed when approached. (The sample

in Wa is very small because there were very few cases in Wa, but the respondents were included in the total survey anyway, although it must be borne in mind that the conclusions of the survey will apply predominantly to the two southern courts). We deliberately tried to select a balance of plaintiffs and defendants: 55.6% were plaintiffs and 44.4% defendants. The basic socio-economic characteristics of the litigants were as shown in the following tables.

Table 3.1: Litigants survey: sex of respondents

	Valid %
Male	69.0
Female	31.0
Total	100.0

Table 3.2: Litigants survey: age of respondents

	Valid %
40-64	52.7
65+	34.9
26-39	12.4
Total	100.0

Table 3.3: Litigants survey: educational level of respondents

	Valid %
Up to Standard 7/MSLC	47.3
None	30.0
Secondary/TTC	16.5
Post-secondary	6.3
Total	100.0

Table 3.4: Litigants survey: occupation of respondents

	Valid %
Farmer	52.1
Trader, Worker, Artisan	23.9
Middle-class professional	15.5
Retired	3.8
Pastor	2.1
Unemployed, Student	1.7
Home maker	.8
Total	100.0

As can be seen, the litigants were predominantly (just over two-thirds) male, and, as might be expected, were all from the older age groups. They also had higher levels of education than for the Ghana population as a whole - although not excessively so, given that the modal group, nearly half of the sample, had only a Standard 7/ Middle School Leaving Certificate (MSLC) level. But gender and education (or the lack of it), were quite highly correlated; 60.6% of the women respondents had no education as compared to 16.6% of the men. In occupational terms, the respondents were surprisingly typical of the general population, especially given the predominance of the urban/peri-urban Kumasi respondents in the sample. The number in white collar or professional occupations - including quite low paid clerical jobs - was only 15.5%. The most important conclusion here is that the survey suggests that 'going to Court' is not purely for the rich, powerful or highly educated; a wide range of ordinary citizens use the Courts, including many uneducated women, although clearly they are mainly older citizens and it is more likely to be men rather than women who go to the Court, perhaps on behalf of family groups rather than purely for themselves.

4. Why do People go to Court?

Given the expense and the possible delay, what is it that finally motivates somebody with a land dispute to abandon - or by-pass - the wide variety of informal and traditional methods of dispute resolution available in Ghanaian society, and file a land suit in Court? It can safely be predicted that there is not

one single reason, but that it is probably a combination of factors which underlies such a step.

In the first place, we asked whether it was to do with the nature of the dispute; what kinds of land dispute were appearing in the Courts? The survey provided a surprising answer: the largest single category of cases (over 52% of the total) involved family disputes of some kind, mainly inheritance disputes between different sides of a family, amongst children of the deceased or between the widow and the children, disputes over unauthorised disposition of family land by an individual family member, and property disputes between divorcees (Table 4.1, next page).[8] The common stereotypical view that it is double sales or unauthorised dispositions and boundary disputes - allegedly caused by lack of boundary definition and registration of ownership - which are clogging up the courts is clearly inaccurate. The latter kinds of cases accounted for only 12.8% of the total. Cases against the government or the Lands Commission were a tiny proportion, only 1.2%.

It would be wrong, of course, to suggest that the distribution of types of cause in this survey is somehow representative of the general causes of land disputes in the population as a whole. Our survey of the general population in selected villages in our case-study areas showed that, of village respondents who had experienced a dispute, 50% said their disputes concerned 'trespass' and disputes with neighbours. Only 26% concerned family or inheritance matters. This demonstrates the clear difference between the kinds of cases which villagers attempt to settle themselves, and those which are more likely to end up in court. It is family disputes which are the most likely to be brought to Court, either because the parties feel they need an 'external force' or neutral arbiter to enforce a solution, or because they arouse the most bitter emotions, or because they feel it is feasible. In general it would seem that

[8] 'Family' is used in the European sense here, to denote disputes amongst the father's and mother's sides of families, or between husbands and wives, as well as disputes within matrilineal or patrilineal extended families. In the Akan areas of Ghana, matrilineal descent means that the wives/widows and children of a deceased man are not members of the *abusua* (blood family); hence the very common occurrence of disputes between a man's children and his matrilineal kin (siblings, nephews and nieces). But informants suggest that disputes within the blood family are also becoming more common, especially as the Intestate Succession Law, 1985 virtually created the conditions for litigation over the definition of 'family property', which depends upon showing a 'contribution' to the creation or purchase of the asset by any other family member.

family cases polarise the parties so bitterly that they are more likely to go to a state court.

Table 4.1: Breakdown of land cases by subject matter

	Valid %
Family dispute	52.7
Trespass/Boundary dispute	17.7
Unauthorised disposition of rights in land: by Chief/ Stranger	12.8
Other	7.8
Unauthorised sale of land	4.9
Dispute over cultivation/crops	2.9
Unauthorised disposition of land rights by Land Commission/ Government CPO	1.2
Total	100.0

In fact, given what is known about the dynamics of large extended families such as are found in Ghana, it is not surprising that they are unable to resolve disputes over landed property amongst themselves in an amicable fashion. The bitterness once families fall out, especially over an inheritance, is such that an external and authoritative arbiter is essential. It could be that the lack of cases against government - in spite of the outcry about previous governments' record of improper land acquisition without compensation - simply reflects a reluctance to take on government, which can better afford an endless dispute than even the wealthiest private individual. This can only be speculation; what is clear is that the Courts are being overwhelmed with cases which reflect mainly the deep social conflict which is emerging from changes in the social and economic character of the Ghanaian family, particularly in our cases the matrilineal family. But the boom in litigation cannot be blamed entirely on the matrilineal system, given that in the Volta Region land cases dominate litigation in the courts even more than in Ashanti.[9] A more likely cause is the boom in urban development which is eating up the peri-urban areas of Accra, Kumasi and other main cities at a fantastic rate, much of it without planning permission or other legal title - a boom which is clearly proceeding without much legal challenge by the planning authorities.

[9] The Ewe people of the Volta Region have a patrilineal descent system.

The second issue relates to whether our litigants had gone to court only after exhausting all other possibilities - hence seeing Court as a 'last resort' when all else had failed - or whether they had deliberately made the state Court their first choice for resolving the dispute.[10] Again the survey produced a surprise finding: 47% of respondents had gone to a state Court first, without going through other kinds of dispute settlement procedure, showing that for the majority of the litigants, the Court was the preferred or most obviously appropriate way of getting their dispute resolved (although of course many of the defendants were dragged to Court by the decision of the plaintiffs). Overall, 37% of respondents had first tried to resolve their case using the chief, the elders or more formally, a 'traditional court' process. Only small numbers had used other kinds of dispute settlement, mainly family heads. There were significant differences between Kumasi and the other two locations here, in that in Goaso and Wa respondents were much more likely to have used a traditional court or the chief or elders first (Table 4.2), perhaps reflecting the more rural character of the catchment areas of those courts.

Table 4.2: Methods used to first settle a dispute, by location

	Goaso Magistrate's Court	Kumasi High Court	Wa High Court	Total
State Court	31.9%	52.2%		46.1%
Traditional Court, Chief, Elders	53.2%	29.6%	100.0%	37.0%
Family	8.5%	8.1%		7.8%
District Assembly, Government Official		4.3%		3.3%
Between concerned parties		3.8%		2.9%
Police		1.6%		1.2%
CHRAJ	2.1%	0.5%		0.8%
Informal Arbitration	4.3%			0.8%
	100.0%	100.0%	100.0%	100.0%

[10] This is an issue which is closely linked to debates about 'legal pluralism', with those who celebrate the coexistence of 'customary' and religious law administered by non-state dispute settlement institutions side by side with the laws of the state, arguing that 'forum shopping' benefits the poor and underprivileged.

The reasons which respondents gave for choosing the state Court, either immediately or after other methods had been tried , overwhelmingly reflected the perceived need for authority and certainty associated with court remedies. The largest group (33%) specifically mentioned the authority of the Court; others (28.3%) said they had become frustrated by the failure of the other party to respond or to come to an understanding and so a court action was seen as a way of using an authoritative force to get the issue resolved, whether the other party liked it or not. Many people commented specifically that arbitration was all very well but it lacked 'backing' and could not be enforced if the other party reneged on the agreement. There was also a suspicion about the impartiality of arbitration; one respondent said: 'Arbitration would not have helped because the one who would have sat on the case is part of the plaintiffs'. Many other comments were similar:

> "Whether Arbitration or Court what is needed is fairness. Arbitration has no backing."
>
> "Court is time wasting and high cost implication but I still prefer the court to Arbitration since as a stranger farmer, chiefs will be partial."
>
> "At the arbitration level she [the defendant] did not comply with the ruling thus I think at the court she will comply with the ruling so I prefer the court."

This craving for an authoritative settlement was even more marked in those who were asked to compare their earlier experiences of other forms of dispute settlement with the court: 73% said they wanted 'enforcement' of any judgment (assuming that they would win, of course), a perspective which probably reflects the dominance of 'declaration of title' as the most commonly sought remedy. Again there were some differences between Goaso and Kumasi on this issue, with Kumasi much more likely to cite the authority of the court as their main reason (39.2% as compared with 12%) and Goaso respondents more interested in forcing a resolution on the other party (39.4% as against 11.5%). But levels of education seemed to make little difference to the main reasons for going to court.

5. The Efficiency and Effectiveness of the Court System

5.1 Delays and adjournments

The survey confirmed what is already well known, which is that litigants, particularly in land cases, are experiencing severe delays. Of the respondents, 45% had filed their case more than two years previously, and another 25% had been coming to court for between one and two years (Table 5.1). Even more striking was the number of times people claimed they had had to attend court, mainly for the case to be adjourned without a hearing: 40.9% said they had attended court more than 21 times since the case began - a small group (6.1%) even claiming they had attended more than a 100 times. What is most significant about these findings however, is not so much the length of time cases have been going on, as the prevalence of 'adjournment'. The majority of the litigants whom we interviewed had experienced only preliminary hearings, or, more frequently, only adjournments after appearing before the judge. (Over the period of the survey we did not, of course, expect to find many cases which actually concluded with judgment given; only 9.5% of respondents had had a judgment). It could be said in fact that most of the frustration and inconvenience experienced by litigants is caused primarily by the adjournment practice, which constantly forces parties to attend court (and thus incur costs of time and money) to no apparent purpose. Why is adjournment such a major and indeed routine part of the experience of pursuing a case in court? If this could be understood, major improvements in the system could follow.

Table 5.1: Time since cases were first brought to court

	Valid Percent
Less than 3 months	7.5
3-6 months	7.5
6 months to a year	14.5
1-2 years	25.5
2-5 years	26.0
Over 5 years	19.0
Total	100.0

The litigants themselves, lawyers, judges, and court officials all have their own explanations or theories about the adjournment issue. Some litigants of course blame lawyers for simply not turning up when cases are scheduled, or for agreeing to postponements when asked to by the other party's lawyers or the judge. Lawyers certainly have to acknowledge this perception that they are not interested in concluding cases. But there is a surprising degree of agreement amongst litigants and lawyers that a major problem is parties themselves not turning up - principally defendants, but not exclusively so. In many cases plaintiffs themselves don't turn up for their own cases; one defendant we interviewed in Kumasi was enraged because for a whole year the plaintiff had never turned up, even though he had faithfully attended the court when the case was scheduled. It might be concluded that, in some instances, a court action is a form of harassment calculated to cause the defendant expense and inconvenience which can be prolonged by the necessity for continual adjournments. This is most obviously the case where plaintiffs abuse the court process by obtaining interim injunctions without any intention of seriously prosecuting the case. In many other cases, witnesses do not turn up. It is of course difficult to determine whether there is a 'chicken and egg' problem here; is failure to turn up caused by a well founded expectation that the case will be adjourned, or are adjournments caused by people not turning up? It could be that mundane conditions of Ghanaian life are to blame: transport difficulties, lack of cash, other more pressing engagements.

Whatever the reasons for the extensive degree of no-show on the part of litigants, lawyers agree that there are some administrative and legal/procedural problems to be tackled as well. Some cite a simple insufficiency of judges, caused by the unattractive pay and conditions; others say that there is too much reluctance to bring summonses for attendance and, in the event of that failing, moving for cases to be struck out for lack of prosecution. It is evident that many judges feel that lawyers themselves are often poorly prepared and fail to take appropriate actions on behalf of their clients, and fail to present clear or well documented cases. Judges themselves of course, could strike out cases if they are satisfied that the parties are abusing the process. In a recent 'backlog clearing' exercise the parties to 4,654 old cases were invited to appear before a Special Judge or face being struck out; the result was 77.5% reduction in the land cases on the books (Wood 2002). This outcome tells us little of course about the real reasons for the disappearance of these cases - it could be that they were effectively dead or ill-founded, the parties may have found other solutions, or, more worryingly, the de facto situation had simply been accepted, with whatever consequent injustice.

It is clear that there are some very simple administrative issues which could be tackled; the most obvious is the over-optimistic scheduling of hearings. If 20 or 30 cases are listed for a morning, the majority will be adjourned as a judge is likely to actually hear no more than three or four substantive trials in a session. It might be fairer to the parties if a realistic number of cases were scheduled for hearing and firm dates given, even if they are many months in advance. This would at least avoid the excessive number of wasted trips. Even simple things like making sure the parties know when the date and time of the next hearing is could be improved - in Goaso (where there are few lawyers involved) court officials help the litigants to remember when to turn up by giving them a slip of paper with the appointment written down.

Other administrative issues are less easy to tackle; lawyers and litigants also agree that many cases are adjourned because dockets 'go missing'. There is clearly a lack of capacity in the court administration; paper-based filing systems which are not up-to-date, manual typing and charges to clients even for typing of judgments. But are missing files caused by inefficiency and the lack of a decent filing system or is it caused by what some litigants (and lawyers) allege is deliberate mislaying of dockets by court staff, on behalf of the other party?

It is evident from the above that the issue of delay in the court systems is not simply a matter of 'too many cases'; the ways in which people use litigation, the administration of the courts, the behaviour of lawyers, court officials and litigants themselves, all play a part. And behind it all, is a special feature of the Ghanaian system: the almost total absence of out-of-court settlements. Judges and lawyers who were interviewed, and others who have written on this topic concur that when litigants file a land suit their prime motivation is to go to trial and get a court judgment. Very few are willing to entertain out of court settlements, although this is less so in commercial or contract cases. [11]The only explanation given is that land is somehow a more fundamental, non-negotiable issue; it is not substitutable, has symbolic value and of course increasing economic value both in the growing urban areas and as a security for retirement where there is no social security system. Attempts to encourage law firms to mediate between their clients, and proposals for a formal 'Court Masters' system for dealing with interlocutory matters seem to

[11] Kotey (2004) estimates that in only 8% of pending cases has there been any attempt at settlement, or 9% in the case of reported cases.

have come to nothing.[12] There are proposals for introducing ADR procedures backed by the court, but if this were to become compulsory, like Arbitrations in certain commercial matters, it could lead to undue pressure on weaker parties to settle.

5.2. Costs

Much is said about the cost of going to Court and the way in which it can exclude the poor in society from justice. But there are few reliable guides on how much it actually costs to take a land case through the court system, especially given the enormous variety in the length and complexity of cases and the number of times one has to attend court. It is certainly true that it costs more if a lawyer is used. In the High Court it is very difficult to do without a lawyer; in our two cases, 96.4% of respondents had employed a lawyer as compared with only 36.4% in the Goaso Magistrate's Court. We asked respondents if they could give an overall estimate of how much they had spent so far, and also asked them to break costs down by items if they could not give an overall figure. Just over half of them were able to give a figure (Table 5.2, next page). The modal amount was ¢2-5m, but only a small group (8.2%) had spent more than ¢20m.[13] Few were able (or willing?) to tell us how much they spent on their lawyers, but again the commonest amount given was 2-5 million, 70% falling within the ¢0.5-5m range.

¢20m is a lot of money for an average Ghanaian in regular employment, but the more common amounts (¢0.5-5m) are not as out of reach of a family or family segment acting corporately, or somebody with a farm or business, as might have been expected. The rural poor would of course be unlikely to have access to this kind of money.

[12] This observation is drawn from interviews with two leading Kumasi barristers and a Kumasi High Court judge in 2002-3.

[13] ¢20m, around GB£1200 at current rates, is the equivalent of four years' salary of a basic grade civil servant.

Table 5.2: Estimates of costs of bringing court action

c	Valid Percent
Nothing	1.6
Less than 100,000	4.9
100,000-500,000	7.4
500,000-2m	21.3
2-5m	31.1
5-20m	25.4
Over 20m	8.2
Total	100.0

6 The Experience of Going to Court: How 'User Friendly'?

Perhaps one of the most critical issues in comparing land dispute settlement systems is to find a form of regulation which is simultaneously effective and yet also non-exclusionary, well understood and accepted as fair or legitimate. The only way to find out how litigants perceive the court system is ask them about their own experiences. But the court proceedings can also be observed in order to make a judgment on how the processes work in practice. We adopted both approaches.

The formal state courts inherited from the British colonial system have often been criticised by commentators both Ghanaian and foreign for being 'alien', intimidatory, and entirely unsuited to the norms of Ghanaian society. This rather exaggerated criticism often forgets that, although the core of the legal system - its concepts and rules - indeed remains the English common law, the courts have been operating in the country for well over a hundred years. During that time and especially after independence they have created through case-law and through judicial recognition of many rules of customary law, what could be now be called a 'Ghanaian common law'. And their procedures, as our evidence shows, have in many respects been 'Ghanaianised' too.

In physical appearance and the organisation of the hearing, it is true that the High Courts can seem intimidating. The public, witnesses and parties waiting to be called are physically separated by barriers and a deep well where the lawyers sit, nearest to the judge, whilst the judge is raised up high. Parties are called up to the

bar inside the 'inner area' only when their evidence is required. It is often difficult to hear what is going on and judges and lawyers can often appear to be engaged in private conversations of a technical nature. Only a proactive and open judge can overcome these barriers by setting a good atmosphere in the court. The Goaso Magistrate's Court, by contrast, is an open-sided building located in a public area with no barriers between judge and litigants; whenever cases are being heard, members of the public are to be seen informally crowding around the court or sitting listening. It appears as a locally rooted institution (not least perhaps because of the public entertainment it provides).

Procedures in the Magistrate's Court are relatively flexible and informal, and lawyers only infrequently used. What is most interesting however about the procedures observed is that the British 'adversarial' format in which parties (and their lawyers) are supposed to each battle it out to demonstrate the truth of their cause, and the judge listens, has mutated into a much more 'inquisitorial' process more typical of civil law systems. The judge actively questions and cross examines the parties, seeking to clarify the stories and to establish the truth. The judge in Goaso did this in a highly interactive, informal and non-threatening way, allowing the parties to have their say. This is also happening in the High Court to some extent, primarily it would seem because lawyers are often so poorly briefed and incoherent that the judges frequently resort to speaking directly to the witness in an effort to find out what is being asserted and what points of law are relevant. Judges were also observed intervening in cross-examinations, helping witnesses to establish their points clearly, and indeed cross examining the lawyers themselves. If an interpreter is being used to translate into English, the judges often cut across an interpreter who is too slow or inaccurate and speak directly to the witness in the local language.

The issue of language is of course, even more critical than procedure or style. Again, the frequently heard assertion that the courts are incomprehensible to ordinary Ghanaians because they are based on English is quite wrong. English is only used where it is the common mutually understood language of the parties (particularly important in the multi-lingual northern areas of the country), otherwise a combination of English and the local language (Twi in Kumasi and Goaso) is the predominant mode, and the judge and the court clerks record the evidence in English. Overall, 63.2% of the respondents said that their proceedings were conducted in English and Twi, but this is somewhat misleading insofar as the different locations were very different in their practices: in Goaso, 70% of proceedings were in fact conducted all in Twi, whereas in Kumasi and Wa the

predominant mode was a combination of English and one of the appropriate local languages (Table 6.1)

Table 6.1: Language used in court, by location

	Goaso Magistrate's Court	Kumasi High Court	WA High Court	Total
Twi	69.6%	13.0%		25.9%
English		8.7%	11.1%	6.7%
English/Twi combination	30.4%	78.3%		63.2%
English/Waala combination			66.7%	3.1%
English/Sisala combination			22.2%	1.0%
	100.0%	100.0%	100.0%	100.0%

To the evidence on language we can add the results of another more specific question in which we asked whether the respondents had understood what was going in the trial. Unfortunately as many had not experienced a full trial, many would not answer this question, although those who had felt they had heard enough on an adjournment hearing were willing to say something. Of those who answered, (61% of the respondents) 82% said they had understood the proceedings.

Given that judges in Ghana are adopting a more interventionist or inquisitorial style, the way in which they deal with the parties in front of them and indeed the whole atmosphere of the court as set by the judge determines in a very important way the perceptions which litigants have of the court process. Do they feel intimidated, do they think they have been fairly dealt with, had their point of view listened to? We tried to investigate this issue by asking litigants to describe how they felt the judge had spoken to them during whatever kind of hearing or hearings they had experienced. The results were quite robust and again challenge assumptions about the negative image which the courts are said to have.

Over half of all respondents described the judge in various combinations of positive terms, 'he speaks the truth' (a literal translation of the Twi phrase), he is 'patient', 'fair', 'helpful', and so on (Table 6.2, next page). A few said he was 'fast' - meaning conducted proceedings in a business-like manner, a comment

which we allocated to the positive category. The most commonly used term, which emerged spontaneously in the pilot studies, was the 'truthful' comment. A few gave mixed answers, mostly to say that the judge had various good qualities but was too slow! (This was the predominant answer in Wa). As might be expected from the more informal atmosphere of the Goaso Magistrate's Court, the Goaso respondents were even more positive in their assessment than those in the Kumasi High Courts; but the difference comes largely from the fact that Kumasi litigants were more reluctant to give an opinion at all on the grounds that they had not experienced a trial.

Table 6.2: Perceptions of the judge's language and behaviour, by location

	Goaso Magistrate's Court	Kumasi High Court	Wa High Court	Total
	%	%	%	%
Truthful, fair, etc.	65.9	51.9	10.0	52.8
Unhelpful, harsh, etc.	2.3	1.9	10.0	2.3
Slow	0	2.5	0	1.9
Mixed answer	11.4	1.3	50.0	5.6
Can't say - no trial	9.1	35.0	30.0	29.4
Can't say - not heard/ understood	11.4	7.5	0	7.9
	100	100	100	100

Moreover the Kumasi High Court litigants were overall more committed to the process than those in Goaso - 61.2% to 54.5%, reflecting the fact that Kumasi litigants were more likely to see the court as the first and most suitable place to take their case. Even more striking, the women litigants (most of whom were uneducated) were the most enthusiastic of all, 70.4% saying the case was worth it as compared with 53.7% of men, whereas the most highly educated were the most dissatisfied (only 40% said they thought it was worth it). We tested to see whether the 'worth it' answer was related to the kind of case being brought, but there were not major differences except that those who had cases involving unauthorised disposition by a chief or by a stranger were less satisfied (50%), suggesting that in these cases delay is critical. Once the land has been sold or disposed of to a third party it is very difficult to reclaim it, particularly after a long time interval. Finally as might be expected plaintiffs were more satisfied than defendants (64.9% as

against 50.9%) no doubt because many of the defendants had been dragged to court very much against their will.[14]

Table 6.3: Overall, was it worth it to bring your case to court?

	Valid Percent
Worth it	58.6
Not worth it	30.4
Don't know	8.0
Mixed feelings	3.0
Total	100.0

7. Conclusions

We began our research by asking some apparently simple questions: why do people go to the state court with their land cases? What is their experience of the court system, and are there any answers to the well-known problems of delay and expense which face those litigants? What we found suggests that it is not sufficient merely to blame Ghanaians for 'bringing too many cases', or to propose that there is an easy set of alternatives to the court system based on Alternative Dispute Resolution mechanisms. Our data certainly confirm the sobering dimensions of the crisis - the clear-up rate for pending land cases is not even keeping pace with the flow of new suits onto the books each year, so that total numbers are growing inexorably. Do the experiences of the litigants, lawyers and judges we spoke to provide any clues as to how to deal with this crisis?

The need for authoritative remedies. The most significant finding of the research is that, in spite of all the problems facing litigants when they enter the court system, there is a very strong demand for the authoritative remedies which a court backed by the authority of the state can provide. Once made, people's commitment to litigation is very strong. The extreme reluctance to entertain out-of-court

[14] The observations in this paragraph on the breakdown of responses to the 'was it worth it overall?' question are drawn from cross-tabulations of the Litigants' Survey full data set. Very few of our respondents had had a judgment entered (9.9%), but of those who had, 67% felt that the judgment was fair.

settlements is one indicator of this desire for a definitive remedy; another indicator is the extent to which the state courts are the first choice of large numbers of disputants—in some areas, the majority. Thus solutions based on the idea that a shift to ADRs - including renewed support for customary courts - will somehow relieve the pressure on the state courts are unlikely to be successful if they fail to provide an equivalent degree of authority and enforceability. One strand of reform could be to develop state-supported and -enforced ADRs (in effect a formalisation of out-of-court settlements) or other kinds of state supported tribunals, either at the local level or attached to the courts. But if parties cannot be persuaded to compromise and resolve their disputes by these methods, then they will still resort to the courts.

The state courts still have the potential to offer popular and acceptable forms of justice. The kind of adjudication experience offered by the courts is not as alien or inappropriate as many of its critics would have us believe. Although litigants are infuriated by the delays caused by constant adjournments, they generally respect the way the judges deal with them and most are not excluded by language or other factors from understanding what is going on. Litigants in our survey included a general cross section of the population both by sex and by class (although not by age), and even the least well educated had a generally positive view of the process, seeing it as an essential path to establish what they felt to be of deep importance to them. It is clear from the case analysis that family disputes are the main causes of litigation, rather than disputes between chiefs and their subjects or strangers/ indigenes, which are not appearing in court in the numbers which might have been predicted. In view of these findings, it would seem sensible to build on the more informal and flexible procedures which have developed in the Magistrates' Courts. The latter courts are key 'front-line' institutions operating at the local and rural levels, yet they are badly underesourced and short staffed. This is an allocation which it is perfectly possible to change within the context of a comprehensive programme of court reform.

Reform of the court management and procedures is essential. The above findings suggest that the courts themselves must be reformed and given more capacity to deal with at least some of this strong positive demand, rather than by-passed. Our analysis of cases and of the reasons for delay leads to the strong conclusion that a lot of improvement can be made by simple administrative reforms - the scheduling of cases for instance - and more use of legal remedies for striking out cases which are not being prosecuted properly.

Overall there is a need for a combination of approaches and methods. Given the numbers, neither the state courts nor ADRs can alone deal with the increasing pressure of land disputes. Thus on the one hand, new courts such as the proposed Land Division of the High Court have to be supplemented by invigorated Magistrates' Courts especially in the rural areas and possibly by District-level Local Advisory Committees on land matters as suggested in the National Land Policy. On the other hand, there is clearly a place for the promotion of ADRs where appropriate and acceptable, including court-supported ADR, and new forms of community-based ADR which are given state support in training and procedure. One state institution which is already providing a state-supported informal ADR service is the Commission for Human Rights and Administrative Justice (CHRAJ). But in the end , the state courts cannot be by-passed; they serve a very real popular need for authoritative justice.

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