

**SUBSTANTIVE JUSTICE OVER PROCEDURAL LAW IN KENYA; GAINS UNDER  
THE 2010 CONSTITUTIONAL DISPENSATION**

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## **DEDICATION**

I dedicate this research to my entire family, particularly my parents and grandmother who are not only my best friends but also the greatest gift God ever gave me. May God continue to bless the works of your hands.

## **ACKNOWLEDGEMENTS**

I take this opportunity to thank the Almighty God for giving me the strength and energy to undertake this research.

I would like to express my profound gratitude to my supervisor Ms. Anne Kotonya who gave me invaluable assistance, guidance and insightful comments in writing this project. Your critical thoughts and support went a long way in helping me shape my idea and develop it to this research. The errors, omissions and other deficiencies that may be in this work are entirely mine.

I cannot forget to appreciate Hon. P.W. Wasike, Resident Magistrate Kitale Law Courts to whom I was attached to during my Judicial Attachment. His urge to administer justice and give effect to the values of the constitution ignited the urge to think of this topic as a possible research area.

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I am also grateful to my law teachers Dr. Ambani J. Osogo and Mr. Kariuki Francis whose inputs to this project led to improvement of its quality.

## DECLARATION

I SITUMA JACOB WANJALA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Anne Kotonya

## **LIST OF CASES**

*Anarita Karimi Njeru v Attorney General [1979] KLR.*

*Augustino Mwai v Okumu Ndede [1995] KLR.*

*Biguzzi v Bank Leisure PLC (1999) 1 WLR 1926.*

*Chemigas Limited v BOC Kenya Ltd [2001] eKLR.*

*Daniel Arap Moi v John Harun Mwau [1994] KLR.*

*Gibson Kamau Kuria v The Attorney General [1985] KLR.*

*Githere v Kimungu (1976-1985) EA 101.*

*Joseph Mutwiri Mberia & another v Council of JKUAT [2013] eKLR.*

*Kamani v Kenya Anti-Corruption Commission [2010] eKLR.*

*Kenya Bus Service Ltd & another v Minister for Transport & 2 others [2012] eKLR.*

*Kibaki v Moi & Others [1998] eKLR.*

*Luka Kitumbi and 8 others v Commissioner of Mines and Geology and another [2010] eKLR.*

*Maathai v Kenya Times Media Trust Ltd (1989) eKLR.*

*Maina Mbacha & 3 others v Attorney General [1989] KLR.*

*Matiba v Moi & 2 others [1994] 1KLR.*

*Mechanical Engineering Plant & 2 others v Standard Chartered Bank Kenya Ltd [2009] eKLR.*

*Mumo Matemau v Trusted Society of Human Rights Alliance & 5 others [2012] eKLR.*

*Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR.*

*Pepco Construction Company Limited v Carter & Sons Limited [2000] eKLR.*

*Philip Chemwolo & another v Augustine Kubende [1986] eKLR.*

*Raila Odinga and Others v IEBC and Others [2013] eKLR.*

*Re Coles [1907] 1 K.B. 1.*

*Republic v Elmann [1969] E.A. 357.*

*Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR.*

*Samuel Wakaba v Bamburi Portland Cement [1997] KLR.*

*Stanley Githunguri v Republic [1986] KLR 1.*

*Teachers Service Commission v Kenya National Union of Teachers & 3 others [2015] eKLR.*

*Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2010] eKLR.

*Uchumi Services Limited v Chengo Katana Koi & 4 others* [2008] eKLR.

*Uhuru Kenyatta v Star Publishers Ltd* [2012] eKLR.

## CHAPTER ONE: INTRODUCTION

### 1.1 Abstract

Disputes are inevitable in any society. This calls for the establishment of disputes mechanisms that resolve disputes expeditiously and at affordable rates. The citizens should not be left to despair in the pursuit of justice but instead the legal institutions should create an enabling environment that enhances the delivery of justice at any forum<sup>1</sup>. For many years, technicalities were given prominence by our courts<sup>2</sup>. This made it very hard for the applicants in particular and the public in general to access justice. Access to justice was merely an appendage to the repealed constitution. The courts were reluctant to administer justice due to absence of the rules of procedure. Therefore, many litigants were driven away from the seat of justice before their cases could see the light of the day.

The period prior to 2010, when the overriding objective principle and the constitution were promulgated, striking out of pleadings for reasons that were purely technical was the rule rather than the exception<sup>3</sup>. In many instances, cases were struck out of the record of the court for trivial failure on the part of the applicant to file submissions on time or serve the respondent with the applications<sup>4</sup>. This resulted in untold suffering to the people to the extent that they lost faith in our court systems<sup>5</sup>. The courts were obsessed with technically sound decisions, which according to Justice Mutunga, lead to the emergence of mechanical jurisprudence.

The judiciary had been heavily criticized for its perceived failure to uphold the rule of law<sup>6</sup>. This resulted in lack of confidence in the judiciary. The consequences of lack of confidence in the judiciary were evident during the 2007 Post Election Violence,<sup>7</sup> where more than a thousand

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<sup>1</sup> Nguyo P, 'Arbitration in Kenya: Facilitating Access to justice by identifying and reducing challenges affecting Arbitration' Unpublished LLM Thesis, Nairobi University, 2015, 9.

<sup>2</sup> *Samuel Wakaba v Bamburi Portland Cement* [1997] KLR. During this period, justice was sacrificed on the altar of strict adherence to provisions of procedural law which at times created hardship and unfairness.

<sup>3</sup> *Augustino Mwai v Okumu Ndede* [1995] KLR.

<sup>4</sup> *Kibaki v Moi & Others* [1998] eKLR. The High court dismissed Kibaki's presidential petition case on technicality, stating that Kibaki should have personally served the president with the election petition challenging the results. The Court of Appeal upheld the High Court decision.

<sup>5</sup> Justice Willy Mutunga, "The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions," University of Fort Hare Inaugural Distinguished Lecture Series, October 16, 2014.

<sup>6</sup> The Judges and Magistrates Vetting Board, *Determination concerning the judges of the Court of Appeal*, 2012 eKLR.

<sup>7</sup> Report of the Independent Review Commission (IREC) on the General Election held in Kenya on 27 December 2007. The report stated that during the election period in Kenya, a material contributor to the tension at National Tallying Centre, broadcast live to the country, was the absence of an effective Electoral Dispute Resolution mechanism to resolve the mounting challenges to the integrity of the results from Kibaki Strongholds. The response by the Electoral Commission of Kenya Chairman Kivuitu, directing challenges to courts, merely served to exacerbate

people were killed and hundreds of thousands displaced<sup>8</sup>. The public no longer had confidence in the judiciary and due to this, judicial reform was identified as one of the areas of focus towards restoring the credibility, integrity and independence of the judiciary.

The judiciary was devoid of the fundamental principles that characterize an effective judiciary. An effective judiciary is one that; is accessible, dispenses justice without delay and in accordance to law and equity. It protects and promotes the purpose and principles of the constitution<sup>9</sup>. Justice delayed is justice denied; this saying had gained notoriety in our justice system because of the fact that it was usual for a case to be determined after about four to six years from the date of institution<sup>10</sup>.

The power to strike out pleadings, and in the process deprive the party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases<sup>11</sup>. As a basic right, access to justice requires us to look beyond the dry letters of the law. It acts as a reaction to and protect against legal formalism and dogmatism<sup>12</sup>. It has two dimensions; procedural access which entails fair hearing before an impartial tribunal and substantive access which is about fair and just remedy for a violation of one's rights.

The miscarriage of justice prompted the want to cure this variance in the justice system. There was the need to give the judiciary a new face. This could only happen if there was an overhaul of the entire structure starting with the rules of procedure. There has been gradual steps taken to address this problem. The judiciary, through the rules committee has endeavored to simplify and expedite the various procedures for approaching the courts contained in different pieces of legislation<sup>13</sup>.

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matters. Orange Democratic Movement (ODM) representatives, adverting to the appointment of five new Judges a few days earlier, made plain their distrust of the judiciary and insisted on their challenges being resolved there and then, if necessary delaying the announcement of the final result.

<sup>8</sup> The Independent Review Commission (IREC) Report 17 December 2008.

<sup>9</sup> Republic of Kenya, *State of the Judiciary Report, 2012-2013*. The judiciary has as its mission to deliver justice fairly, impartially and expeditiously, promote equal access to justice and advance local jurisprudence by upholding the rule of law.

<sup>10</sup>Nguyo P, 'Arbitration in Kenya: Facilitating Access to justice by identifying and reducing challenges affecting Arbitration' Unpublished LLM Thesis, Nairobi University, 2015, 3.

<sup>11</sup> *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR. The court ought to be hesitant to strike out pleadings based on technicalities.

<sup>12</sup> *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR.

<sup>13</sup> Section 81, *Civil Procedure Act*, (Chapter 21 of the laws of Kenya). The committee is mandated to make rules providing for any matter relating to the procedure of civil courts.

The courts procedures have been reenacted to reflect the wishes of the Kenyan people by recognizing the overriding objectives of the court is to deliver justice in a fast, affordable, expeditious and proportionate manner.

The enactment of the new constitution in 2010 marked a new beginning<sup>14</sup>. The constitution came in strongly to address these challenges that had faced the judiciary. The general trend, following the enactment of the *inter alia* section 1A and 1B of the Civil Procedure Act, Section 3A and 3B of the Appellate Jurisdiction Act and Article 159(2) (d) of the constitution, is that courts today strive to sustain rather than to strike out pleadings on purely technical grounds<sup>15</sup>.

The reality of this promise shall be brought to fruition only when the courts enforce the constitutional and statutory provisions that are critical to the administration of justice. It is incumbent upon the courts to develop highly competent and indigenous jurisprudence<sup>16</sup> that will be trend setting and allow a progressive and a purposive interpretation of the constitution and other laws in order to facilitate access to justice for all Kenyans.

This study examines the extent to which the jurisprudence emanating from our courts have strengthened the constitutional provisions on access to justice. It will discuss the prominence that the courts are giving or ought to give to substantive justice and not strict adherence to rules of procedure. It is the constitutional aspiration that disputes be resolved and settled in a timely manner and that justice be dispensed to all.

## **1.2 Background to the problem**

The constitution provides that it is a fundamental right of every citizen to access justice through the courts<sup>17</sup>. It also establishes the judiciary, as an independent organ tasked with the interpretation and dispensation of justice. The courts have to interpret the laws in a manner that gives life to the constitutional provisions and promotes its values<sup>18</sup>.

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<sup>14</sup> Article 48, *Constitution of Kenya (2010)*. It obligates the state to ensure that the citizen have an access to the courts. This access to justice therefore need not be limited by strict adherence to technicalities. Article 159 (2) (d) requires courts to dispense justice by abhorring legal technicalities that necessarily hinder the delivery of substantive justice.

<sup>15</sup> *Nicholas Kiptoo Salat v Independent Electoral and Boundaries Commission & 6 others*[2013] eKLR

<sup>16</sup> Justice Mutunga W, 'The Vision of the 2010 Constitution of Kenya,' keynote Remarks on the occasion of celebrating 200 years of Norwegian Constitution University of Nairobi, 19 May 2014.

<sup>17</sup> Article 48, *Constitution of Kenya (2010)*.

<sup>18</sup> Article 259, *Constitution of Kenya (2010)*.

It is therefore a seemingly blatant breach of the constitution and statutory provisions for the court to overlook these provisions or otherwise to interpret the same in a manner that is retrogressive and which fails to honour the new constitutional philosophy<sup>19</sup>.

The right to access justice had been threatened, violated or infringed upon by the courts in the past by its failure to abhor legal technicalities<sup>20</sup>. Today, the right to access justice seem to have crystalized after the enactment of the new constitution in Kenya. However, this right can be threatened if the courts fail to honour their constitutional mandate of delivering justice without being bound by technicalities. Therefore this study appraises the decisions of the courts of record in Kenya and critically analyses the impact of dismissal of cases based on legal technicalities on substantive justice.

### **1.3 Statement of the problem**

The 2010 constitution requires courts to dispense justice without being bound by legal technicalities. The courts are supposed to guarantee equal protection for all the people's rights enshrined in the constitution. The state has now been given the obligation to ensure justice for all unlike in the previous constitution where access to justice was a privilege to many. Whereas this study appreciates the intention behind the provisions of articles 48 and 159 (2) (d), it is of the view that these provisions might not guarantee enhanced access and dispensation of justice if the courts fail to give life and meaning to these provisions through a purposive interpretation.

The courts, have interpreted these provisions differently and in the exercise of their discretion. However, the discretion, ought not to be exercised capriciously but the court has to take into account the values and principles enshrined in the constitution. Such interpretation need to promote access to justice and not inhibit the same.

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<sup>19</sup> Walter Khobe; 'The Court of Appeal is failing to give effect to Constitutional Aspirations.' *The Platform Legal Magazine* (2016). The author is an advocate of the High Court of Kenya.

<sup>20</sup> *Nicholas Kiptoo Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR. The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases.

#### **1.4 Theoretical Framework**

The study will be guided by John Rawls' theory of justice. The theory was put forward in the year 1971 and it entails the maximization of liberty, equality for all, and fair equal opportunity<sup>21</sup>. To him justice is the first virtue of social institutions, as truth is of systems of thought. Being first virtues of human activities, truth and justice are uncompromising. Rawls was responding to the philosophy of utility propounded by Jeremy Bentham. Utilitarianism espouses the greatest happiness for the greatest number. According to Rawls, this is an insufficient measurable method to direct the governance of society. The individual is an end in himself and so, according to the primacy of an individual, he may never be used as a means to the end.

The theory of Justice was developed from social contract theory to which he generates principles of justice for assigning basic rights and duties and determining the division of social benefit in a society<sup>22</sup>. Rawls explains that each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override<sup>23</sup>. He advocates for the elimination of all inequalities of opportunity based on birth or wealth. All in all the idea of justice has a direct link with right, equality and entitlement.

In his theory of justice, he explains the hypothetical case of the veil of ignorance. This is at the original agreement in which the social contract is entered into. At this point, no one knows what class, race, religion social circumstance, sex would end up after the conclusion of the social contract. Therefore, the parties would be inclined to choose a position that advances justice as no one knows not where he/she will end up in the society. In his view, these conditions guarantee fairness for all prospective members of society in the creation of the principles of justice that will order society. On this basis, the research shall aim to realize the ideas expounded by Rawls that access to justice is fundamental to our existence and that it has to be guaranteed and protected at all cost.

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<sup>21</sup> Freeman M, *Lloyd's Introduction to Jurisprudence*, Sweet and Maxwell, 2014, 583.

<sup>22</sup> Rawls J, *A Theory of Justice*, Havard, USA, 1971, 1-2.

<sup>23</sup> Andrea M, 'Dismissal of cases on Legal technicalities Versus Substantive Justice: A critical analysis of the Court of Appeal of Tanzania Decisions' Unpublished LLB Thesis, St. Augustine of Tanzania, 2015, 24.

## 1.5 Literature Review

The subject on access to justice has been popular among published theories, but few have scrutinized the need to abhor legal technicalities in the administration of justice.

Prior to the promulgation of the constitution of Kenya 2010, the efficiency, independence, integrity and public confidence in the judiciary was at its lowest ebb<sup>24</sup>. The constitution heralded a number of progressive reforms in the judiciary. With its full implementation, it is hoped that the judiciary will be transformed into an effective, efficient, independent and responsive institution that dispenses justice to all in a timely manner.

It now a well settled principle of law that procedure, is the handmaid of justice and not the mistress thereof<sup>25</sup>. Thus rules of procedure exist to provide a formal channel where justice can be attained fairly and without delay<sup>26</sup>. However, over time, legal technicalities and strict adherence to the rules of procedure have been given prominence by some judges and lawyers<sup>27</sup>. Strict adherence to procedures inhibit the court's ability in dispensing justice.

Legal technicalities are strict rules of procedure, points of law or small set of rules as contrasted with the intent or purpose of the substantive law. The technicalities ensure strict adherence to the letter of the law and may prevent the spirit, intent or purpose of substantive law from being enforced<sup>28</sup>.

Thomas Aquinas defines justice as the constant and permanent determination to give everyone his due. It is the fair and proper administration of the law<sup>29</sup>. Substantive justice thus means justice fairly administered according to the rules of substantive law, regardless of any procedural error not affecting the litigant's substantive right; a fair trial on merit<sup>30</sup>.

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<sup>24</sup> Republic of Kenya, *Judiciary Perception Survey Presentation*, 2012.

<sup>25</sup> *Githere v Kimungu* (1976-1985) EA 101). The court considered a procedural error or blunder on a point of law and noted that, ' the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress, and that the court should not be bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice, this is a particular case, and this a principle in which a court must remember when judicially exercising its discretionary powers''.

<sup>26</sup> *Re Coles [1907] 1 K.B. 1, 4* Justice Collins M, recognized that the courts are not strictly bound by the rules of procedure, which are generally meant to assist the court in delivering justice. They are not compelled to do that which will amount to injustice.

<sup>27</sup> Clark E, 'The Handmaid of Justice' *Washington University Law Quarterly* (1938), 297.

<sup>28</sup> Black's Law Dictionary 8<sup>th</sup> Edition, west publishing Company, USA (2004), 1234.

<sup>29</sup> Black's Law Dictionary 8<sup>th</sup> Edition, (2004), 881.

<sup>30</sup> Elizabeth M, *Oxford Law Dictionary*, Oxford University Press, London, (2001), 275.

The new constitution revamped people's faith in the judiciary as an organ for the administration of justice. The judicial authority is derived from the people<sup>31</sup> and therefore the judiciary has the mandate of serving the same people by ensuring that the courts are accessible and that justice is duly served to all. The constitution guarantees equal protection for everyone. It therefore demands that justice must be done to all irrespective of status.

Lawrence B. Solum has extensively discussed the importance of procedural justice. He acknowledges the practice of sacrificing procedural justice on the altar of substantive fairness by the courts<sup>32</sup>. The real work of procedure is to guide. It is said that the regulation of primary conduct is the work of the general and abstract norms of substantive law clauses of the constitution, statutes, and common law rules of tort, property and contract. But substance cannot effectively guide conduct without the aid of procedure. A theory of procedural justice is a theory about the fairness of the institutions that administer justice<sup>33</sup>. The author however has not examined the legal technicalities which might hinder access to both procedural justice and substantive justice.

Thomas Main, argues that substantive law is inherently procedural. He suggests that the construction of substantive law entails assumptions about the procedures that will apply when substantive law is ultimately enforced. Those procedures are embedded in substantive law and, if not applied, will lead to over- or under-enforcement of the substantive mandate<sup>34</sup>. He posits that understanding that procedure is substantive, and that substance is procedural debunks two myths: first, that there is a substance-procedure dichotomy, and second, that procedure is the inferior partner<sup>35</sup>.

Courts, by deciding cases, make law. This is the more rational view of the judicial process. Thomas Fitzgerald argues that the legislature and the court perform the same function. The former develops general norms of conduct while the latter develops specific and general norms. Specific by deciding the rights and duties of the parties to the particular case, general, through the doctrine of adherence to precedent. Whereas the legislature has the express power to make laws, the law making power of the court is to be exercised cautiously and only in instances where there is a

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<sup>31</sup> Article 1 (3) c and 159, *Constitution of Kenya* (2010).

<sup>32</sup> Lawrence B, 'Procedural Justice' *Southern California Law Review*, (2004), 139-144.

<sup>33</sup> Lawrence B, 'Procedural Justice', 139-144.

<sup>34</sup> Thomas OM, 'The Procedural Foundation of Substantive Law' *Washington University Law Review* (2010), 801.

<sup>35</sup> Thomas OM, 'The Procedural Foundation of Substantive Law', 801.

lacuna in the law. The court interpret the laws in order to determine the rights and duties of the disputants. The legislative and general judicial norms is formal. When judge-made law takes the shape of rules of court, the difference in form largely disappears. It goes without saying that rules of court cannot contravene provisions of constitutions and it has never been doubted that the substantive law and the law of jurisdiction are likewise immune to change by court rules. Starting with the proposition, which apparently is accepted without question that the rule-making power does not extend beyond the field of procedure<sup>36</sup>.

Edward Clark agrees with Justice Collins M, that a court cannot conduct its business without a code of procedure. He posits that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress. The court ought not to be tied by rules, which are only intended to guide it, as to be compelled to do what will cause injustice in the particular case. He is however quick to note that such sentiments, when expressed as abstract propositions, will no doubt win the assent of all. When applied to concrete cases, there is danger that some judges and lawyers will honour it in the breach than in the observance. The court ought to direct its attention to the service of justice and only let rules act as a guide towards the attainment of that goal.

Eric Christiansen<sup>37</sup> recognises that South Africa has a transformative constitution, which guarantees the protection of human rights. It was the goal of constitutional makers to ensure that the constitution has provisions that promote substantive justice. He notes with approval the approach taken by the South African constitutional court in advancing substantive justice and the use of innovative methods to protect the rights and fundamental freedom of the people. He calls this, a 'justice oriented ideology'<sup>38</sup>. When countries amend their laws, they seek a superior justice than the one previously dispensed with by the former regimes.

Since the end of apartheid, the courts have been at the forefront of advancing justice in its fuller dimensions to all under the guide of the constitution. The constitution declared the new nation to be 'a society based on democratic values, social justice and fundamental human rights'<sup>39</sup>. The

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<sup>36</sup> Thomas Fitzgerald, 'To what extent may courts under the rule making-power prescribe rules of Evidence?' *American Bar Association Journal*, (1940), 482-489.

<sup>37</sup> Christiansen E, 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice', *The Journal of Gender, race & Justice* (2010), 1-7.

<sup>38</sup> Christiansen E, 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice', 14.

<sup>39</sup> The Preamble, *Constitution of South Africa* (1996).

author observes that the court's interest has been to advance substantive justice. It does this through its institutional authority. Purposive interpretation and creative application of the court's jurisdiction and remedial authority can advance genuine justice. It is therefore incumbent upon the court to apply and put into effect the provisions that saturate the constitution and ensure that there is access to justice for all.

Whereas the study appreciates the existence of constitutional and statutory provisions on access to justice and the abhorring of technicalities by the court, it questions their effectiveness to advancing the rule of law and the dispensation of justice. It posits that the presence of such provisions is not enough to guarantee the advancement of justice. They need to be implemented and adhered to by the courts.

### **1.6 Research objective**

This study aims to examine the jurisprudence emanating from our courts and analyse whether it gives life to the constitutional provisions on access to justice. The objectives are based on the fact that judicial officers subscribe to different schools of thought, and that their interpretation and application of the constitutional and statutory provisions is influenced by these schools.

The objectives of this research are:

- i. To demonstrate the enhanced access to justice and an expeditious disposal of court cases due to the purposive interpretation of Article 159 (2) (d) of the Constitution.
- ii. To make evident the ramifications that would arise from the otherwise failure to interpret the constitution and all statutory provisions in a manner that promotes the expeditious access to justice.

#### **1.6.1 Research questions**

The following questions will be posed and addressed in the course of this research:

- i. How did the former constitution provide for the right to access justice and how did the courts' interpret and apply of the same?
- ii. How should the new constitutional, statutory provisions and the rules made thereunder be interpreted in order to promote access to justice?

- iii. Are the constitutional safeguards against adherence to technicalities sufficient to guarantee access to justice and a fair judicial process?

### **1.7 Significance of the study**

This study suffices the following significance:

- i. The study shows possible solutions to be adopted by judges, magistrates, judicial stakeholders and advocates to ensure that justice is not denied on technicality basis.
- ii. The study helps the public at large to understand and access their rights in litigation and help them to build confidence to our justice system.
- iii. The study helps the government in law and policy reforms in order to ensure that justice is not denied on technicality basis.

### **1.8 Hypothesis**

The researcher in this study works under the assumption that:

1. The mere inclusion of access to justice and the abhorring of legal technicalities by courts as fundamental rights in the constitution is not a guarantee of their accomplishment.

## **1.9 Methodology**

This is predominantly a qualitative research that utilized mainly desktop methods to collect both primary and secondary information about the study. Primary sources of information are legal instruments including the constitution of Kenya, the various statutory provisions that address access to justice through our judicial system and Reports of various Taskforces and Commissions. The decisions of the superior courts also formed part of the primary source of information for the study. Secondary sources of information were also used, the main sources being books, journal articles and electronic databases.

The adopted methodology above limited the research only to the already published materials. This led to a generalized conclusion arrived at from the study of a small sample of facts and cases. This approach tends to present the findings as precise, narrow and not generalizable. The method chosen did not incorporate collection of data on the subject matter.

The study did not adopt a quantitative research method which includes the use of questionnaire, interviews, survey technique and structured observation due to the limited time allocated for the research. This study is part of the course work for the requirements for the award of the degree of Bachelor of Laws. The study, therefore, has to be conducted and submitted within the prescribed academic calendar period.

## CHAPTER TWO: ANALYSIS OF THE PRE-2010 ERA AND THE MAIN LEGAL PROVISIONS GUIDING THE DISPENSATION OF JUSTICE

### 2.1 Introduction

The executive arm of government imposes control on all persons in almost every aspect of life. This calls for an independent judiciary to check on the excesses of the other arms of government. The citizens must be able to challenge the legitimacy of executive action before an independent judiciary. It is from the executive pressure or influence that judges require particularly to be protected<sup>40</sup>.

Just like many of the former British colonies, Kenya inherited the common law adversarial system with its attendant English practice and procedure<sup>41</sup>. This system has always been at the centre of public criticism for contributing to delays in the dispensation of justice together with its attendant procedural technicalities<sup>42</sup>.

The judiciary in Kenya, had been founded upon the belief that the law emanates from the sovereign command. Simply put, law as it is, is the sovereign command<sup>43</sup>. The Kenya's jurisprudence suggested that the law had to be interpreted literally and that the words in the statutes and the constitution were to be given their natural meaning<sup>44</sup>. This was legal formalism. The approach hindered judicial activism<sup>45</sup> and the application of reason on technical cases before the courts. Legal formalism was the judicial philosophy that had dominated most of our jurisprudential inquiry. The mechanical jurisprudence was characterized by formalization of law (law as formal

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<sup>40</sup> Lord Philip of Worth Matravers, President of the United Kingdom Supreme Court: 'Judicial Independence and Accountability; *A view from the Supreme Court*' <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdg> on 7 December 2016.

<sup>41</sup> J.B. Ojwang, *The Common Law, Judges Law: land and Environment before Kenyan Court*, Strathmore University Press, Nairobi, 2014, 2.

<sup>42</sup> Justice Robert VM, "*Breaking the Mould; Addressing the Practical and Legal Challenges of Justice Delivery in Tanzania: Experience from the Bench*", TLS, Arusha February 2012, 7.

<sup>43</sup> *Republic v Elmann* [1969] E.A. 357. The Elmann doctrine was developed during this constitutional phase. The courts interpreted the constitution just like the statutes and it gathered the spirit of the constitution from the language of the constitution. The constitution was construed according to the ordinary cannons and principles of construction.

<sup>44</sup> Muthomi Thiankolu, '*landmarks from Elmann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation in Kenya*', January 2007 Nairobi, Kenya. The paper provides an overview of the approach taken by our court in interpretation. It establishes a progressive move from the strict and literal interpretation to a more purposive interpretation.

<sup>45</sup> Black's Law Dictionary (8<sup>th</sup> ed.2004), defines judicial activism as a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.

rules) and for the most part this traditional idea failed to recognize the idealization of law that is law as principles and policies<sup>46</sup>.

The judiciary had for long been considered a ‘department’ or the ‘third’ arm of government, imputing that it was not equal to the executive or the legislature<sup>47</sup>. This subordination of the judiciary not only undermined its development, but also exposed it to several forces, which led to its decline<sup>48</sup>. According to Montesquieu’s tripartite system, the three arms of government are equal and complement each other for a proper functioning state.

## **2.2 Jurisprudence emanating from the courts before the Introduction of the Principle of Overriding Objective**

Over the years, the judiciary has been accused of historical failure to efficiently, effectively and fairly adjudicate over politico-legal disputes<sup>49</sup>. The role of the judiciary is not confined only to resolution of purely legal disputes, but also legal issues of a political nature, such as elections, constitutional review and interpretation and enforcement of human rights<sup>50</sup>. In the 1980s and 1990s, the courts of law were accused of interpreting the law without regard to the political and social realities, as well as the aspirations of the needs of the people. The result was that the courts pounced on technicalities to strike out cases and not dispensing justice.

The judiciary was perceived for many years to have abdicated its role as custodian of the rule of law and vanguard of fundamental freedoms. The courts were accused of failing to uphold fundamental rights and freedoms, the principle of separation of powers and rule of law in cases before them. In a number of cases, the High Court failed to enforce the Bill of Rights, holding that the provisions were ‘inoperative’ due to lack of rules contemplated by the constitution<sup>51</sup>. The court ended up becoming a slave of its own rules to the extent that it could not rectify injustices.

As the custodian of the law, the court, when faced with a situation of competing claims they should be guided by the instructive words of Lord Denning: *‘where there is any conflict between the freedom of the individual and any other rights or interest then no matter how great or powerful*

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<sup>46</sup> Nancy B & Nkatha K, “*Transforming the Kenya Law Reform Commission: From Formalism to Realism.*” June 2009.

<sup>47</sup> Final Report of the Task Force on Judicial Reforms (*The Justice Ouko Report*) July 2010.

<sup>48</sup> Final Report of the Task Force on Judicial Reforms.

<sup>49</sup> Justice Nancy Baraza, “The manifesto of the Modern Judiciary” Seventh Annual Judges Colloquium, Serena Beach Hotel Mombasa, Kenya on 15 August 2011.

<sup>50</sup> Final Report of the Task Force on Judicial Reforms.

<sup>51</sup> *Maina Mbacha & 3 others v Attorney General* [1989] KLR.

*those others may be, the freedom of the humblest citizen shall prevail*'.<sup>52</sup> The Kenyan courts did not heed to that call at that time.

### **2.3 The prominence of procedural technicalities in the court system**

It was the rule rather than the exception for the courts to strike out pleadings and sometimes the entire suits based on procedural technicalities<sup>53</sup>. The applicants were strictly supposed to comply with the rules of procedure because non-compliance, however slight the mistake, could attract severe penalties from the court. The Court of Appeal was on record for striking out appeals if they did not satisfy the procedural requirements. One of the rules which led to the striking out of appeals was rule 85 of the Court of Appeal rules. This rule was the guiding authority with regard to primary documents<sup>54</sup>.

The courts are bound to decide cases without undue regard to the technicalities of procedure and without undue delay<sup>55</sup>. This notwithstanding, the position adopted by the court had been very different. The courts had on several occasions pounced on technicalities to impede the delivery of justice. This was the incident in the case of *Chemigas Limited v BOC Kenya Ltd*,<sup>56</sup> where the appellant wrongfully indicated a wrong case number. The court of appeal relied on the mistake and struck out the entire appeal on that ground. The court noted that the requirement for the case number be included in the title is not futile. The number is the identifying mark of every case and its omission or incorrectness is a fundamental defect. This resulted in a miscarriage of justice as the court could have otherwise granted the appellant leave to amend and indicate the correct number.

The court arrived at the same findings in *Pepco Construction Company Limited v Carter & Sons Limited*<sup>57</sup>, where a party named 'Pepco Construction Company Limited' was mistakenly described in the Notice of Appeal as 'Pepco Construction & Transport Co Ltd', the pre-amended name in the file. Holding these defects incurable, the court said, these errors are not the sort of errors that can be cured under rule 44<sup>58</sup>. This approach by the court denied the appellant the right to have the

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<sup>52</sup> Lord Denning; 'Freedom under the law' *Hamlyn Lectures First Series* (1994), 4.

<sup>53</sup> *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR.

<sup>54</sup> The rule states that a formal decree or order is a primary document. The absence of a copy of the decree, the appeal was liable to be struck out as incompetent.

<sup>55</sup> Section 3 (2), *Judicature Act* (Chapter 8 Revised in 2015).

<sup>56</sup> [2001] eKLR.

<sup>57</sup> [2000] eKLR.

<sup>58</sup> Rule 44, Court of Appeal Rules, on application for leave to amend any document.

matter heard on appeal solely on its advocate's shortfall of wrongly indicating the name for the company. The court ought to have exercised its discretion and interpreted rule 44 in order to allow for an amendment to the pleadings. The draconian move by the court resulted in the appellant being driven away from the seat of justice before the court could determine the case.

## **2.4 Enforcement of the Bill of Rights**

Most constitutional matters involve challenging the exercise of public authority on violations<sup>59</sup>. Litigants pursuing matters against state organs or any other person were likely not to get justice from the court except on very few occasions. In some decisions there had been palpable hostility towards the liberal interpretation of the constitution<sup>60</sup>. In some instances the court had been tied to the procedure even when doing so would amount to injustice.

For a long time, courts could not enforce the Bill of Rights. The rights embodied in the Bill were dead<sup>61</sup> because the Chief Justice had not made procedural rules for their enforcement<sup>62</sup>. Save for a few isolated judgements like the decision in *Githunguri v Republic*<sup>63</sup>, the courts adopted an unprincipled, inconsistent<sup>64</sup> and conservative approach to constitutional interpretation.

This was the position in the case of *Gibson Kamau Kuria v Attorney General*<sup>65</sup>. The applicant who had his passport seized by the government through its agents, had requested for the return of the same because he wanted to travel outside the country. His request was denied. He made an application under section 84 of the constitution saying that the government's action was contrary

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<sup>59</sup> The Kenya Section of the International Commission of Jurists, *Constitutional Law case Digest* Volume II 2005.

<sup>60</sup> *Republic v Elman* [1969] EA 357.

<sup>61</sup> *Joseph Maina Mbacha & 3 others v The Attorney General* [1989] KLR.

<sup>62</sup> *Gibson Kamau Kuria v The Attorney General*, [1985] KLR. At the time of the matter, the Chief Justice had not made rules with respect to the practice and procedure of the High Court in relation to the exercise of its jurisdiction to enforce fundamental rights and freedoms. The Chief justice's power to make rules is provided under section 84(6) of the repealed constitution. Surprisingly, no such rules were made even after this decision, until 2001. The 2001 Rules, popularly known as 'Chunga Rules', provided for automatic stay of proceedings in subordinate courts pending the determination of a constitutional reference to the High Court. This led to the abuse of court process as accused persons, especially those charged with corruption and related offences, took advantage of the automatic stay to indefinitely delay the proceedings. This lacuna has since been cured by Rule 29 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rules, 2006, popularly known as "the Gicheru Rules".

<sup>63</sup> [1986] KLR 1.

<sup>64</sup> Muigai G, 'Political Jurisprudence or Neutral Principles: Another look at the problem of Constitutional Interpretation' *East African Journal*, 1 (2004), 1.

<sup>65</sup> [1985] KLR.

to section 81 of the constitution, which guaranteed every individual the right to move freely and, therefore, his right to move freely in and out of Kenya.

The court in dismissing his application stated that it lacked the jurisdiction to hear the matter since the Chief Justice had not made rules of practice and procedure as envisaged by the constitution. The court accepted to be tied by the technicalities by stating that the absence of the rules affected its determination of the said case. It succumbed to the absence of the rules and failed to put the interests of justice before the procedures. Being the custodian of justice, the court ought to have determined the matter and set precedence henceforth that even in the absence of procedure, its eyes are set on justice for all. The court, in that instance missed the historical moment of positioning itself as a guardian of the people's rights.

In the case of *Daniel Arap Moi v Harun Mwau*<sup>66</sup>, the court of Appeal could not decide on matters raised as constitutional arguing that the court had no appellate jurisdiction on such matters. Even though this rule must have intended to cure some mischief, it fundamentally denied parties their right of having their matters determined by the highest court in the land. Constitutional issues being fundamental owing to the fact that they touch on the supreme law, must not be made to suffer at the preliminary level simply because of a certain technical omission or commission.

However, in *Matiba v Moi & 2 others*<sup>67</sup>, the petitioner filed an election petition at the High Court challenging the election of the respondent as the president of Kenya. The petitioner had become physically incapacitated sometime prior to the elections and had given his wife the power of attorney. He did not personally sign the petition, a technicality that the respondent pounced on until the court struck out the petition. The case was dismissed on the grounds that petitioner was unable to personally sign the election petition papers.

The respondent, raised a preliminary objection arguing that the petition was incompetent because it had not been signed by petitioner himself as required<sup>68</sup>. The respondent's objection was rejected and he appealed.

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<sup>66</sup> [1994] KLR.

<sup>67</sup> [1994] 1 KLR.

<sup>68</sup> Rule 4(3), *Election Petition Rules* of 1993. The rules states that the petition shall be signed by all the petitioners. The respondent argued that the petitioner's wife could not sign the petition on his behalf.

The petitioner filed a notice of motion asking the Court of Appeal to strike out the respondent's notice of appeal arguing it did not have jurisdiction<sup>69</sup> over decisions made by the Election Court, and therefore no appeal lies against the decision of the Election Court. The applicant's notice of motion was dismissed by the court and the notice of appeal was allowed.

The Court of Appeal argued that signing of the petition by the petitioner's wife was wrong and that the decision of the election court to allow the petition was against rule 4(3) of the Election Petition Rules. The Court of Appeal allowed the appeal and struck out the petition on the following grounds:

- a) The words "signed by the party" in a statutory provision must be given their natural meaning and that it is only that party, in this case Matiba, who must affix his signature in the petition.
- b) The words used in the rules were mandatory and did not allow anyone else to sign on behalf of the petitioner.

The decision of the appellate court as noted above was draconian and a violation of the basic human rights and the rules of natural justice. Based on the condition of the appellant, he could not have signed the petition, something that called for the invocation of the power of attorney to his wife. Clearly, the court did not come to the aid of the physically challenged petitioners then and in the future by failing to outline how the said petitioners could proceed when filing petitions.

The case of *Anarita Karimi Njeru v Attorney General*,<sup>70</sup> established the principle, that in matters concerning enforcement of fundamental rights and freedoms, a petitioner must plead with particularity that of which he complains, the provision said to be infringed and the manner in which the particular right is violated.

This rule has been criticized and rightly so, for hindering the enforcement of the Bill of Rights and the constitution. The efficacy of Bill of Rights was impeded by the rules of constitutional interpretation established in *Anarita*, which makes it difficult if not impossible to enforce the Bill.

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<sup>69</sup> Section 44, *Constitution of Kenya* (1963) [Repealed], the Court of Appeal did not have jurisdiction to entertain appeals from the High Court sitting as the election court. The high court decision on election petitions was not to be subjected to appeal.

<sup>70</sup> [1979] KLR.

It had been held that for the court to assume jurisdiction to enforce the Bill, the litigant must specify the constitutional provision which has been violated and the manner in which it has been violated<sup>71</sup>.

This rule limited the access to justice especially for the poor who could not afford the services of an advocate. In such instances, the said person would in mostly fail to outline with clarity the provisions of the law they allege to have been violated and the manner of the violation.

The case laid down an important rule of constitutional adjudication that a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the court from embarrassment of adjudicating on issues that are not properly phrased as justiciable controversies. It however failed to qualify its application to cases where the petitioner has been represented by an advocate. Strict application of the rule meant that cases were dismissed on the basis of not outlining the constitutional provision that has been violated. At the end of the day, the court drew its attention on the drafting precision of the petitions and not the issues being raised by the petitioners.

It imperative to note that the courts are the custodian of the law ought to take judicial notice of all laws of the land. The rule in *Anarita* requires mathematical precision in drawing petitions and identifying the specific constitutional provision which is alleged to have been violated. The petition should be fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case. The courts should not be in a hurry to declare petitions fatally defective. Attempts to ensure that the ends of justice are met.

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<sup>71</sup> Kuria GK, 'Litigating Kenya's Bill of Rights' *Human Rights and Democracy in East Africa* 1997.

## **2.5 Conclusion**

It clear from the above analysis that the courts paid undue attention to technicalities at the expense of justice. As the custodian of the law, the courts failed to advance the rule of law and protect the rights of litigants. This resulted in the lack of confidence in the judiciary system. Being the decisions of the superior courts, their opinions were binding to all subordinate courts.

This resulted in the agitation for a new constitution and the reenactment of the rules of procedure guiding the courts. It became clear that there was need to expressly state in the laws that the overriding objective of the courts was to dispense justice to all.

## CHAPTER THREE: THE CONSTITUTION OF KENYA 2010 AND THE NEW APPROACH ON THE DISPENSATION OF JUSTICE

### 3.1 Introduction

The state is under a constitutional obligation to ensure access to justice for its people<sup>72</sup>. In fulfilling this constitutional mandate, and as one of the tripartite arms of government and the custodian of justice, the judiciary is expected *inter alia* to simplify court procedures so that all litigants can understand and effectively participate in court processes.<sup>73</sup>

The existence of an independent judiciary is at the heart of a judicial system that guarantees human rights in full conformity with constitutional standards. It is the obligation of the state to safeguard the independence of the judiciary as an arm of government.<sup>74</sup> A trial can only be fair if the judiciary itself, and the presiding judge are independent.<sup>75</sup> When deciding cases, the court are called upon to analyze the facts and the law that pertains to that case and in so doing, exercise their discretion judiciously in order to develop our own jurisprudence.

The courts are at the centre of controversies. The constitution has placed the justice system in the public eye on a daily basis.<sup>76</sup> They have the tools and resources to adjudicate and determine the causes of actions. Therefore, the courts should not fail to honour their call to dispense justice.

The constitution has removed the doctrine of *locus standi*.<sup>77</sup> Its removal has enhanced the access to justice. The application of the doctrine had effectively restricted accessibility of courts, prematurely curtailing the right to be heard before the courts. Strict interpretation of this doctrine

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<sup>72</sup> Article 48, *Constitution of Kenya* (2010).

<sup>73</sup> Justice Kihara K, "Procedural Reforms/Innovations that enhance Access to Justice and Ensure Protection of Rights in Kenya" Second African Union Judicial Dialogue, Arusha Tanzania, November 2015.

<sup>74</sup> UNGA, *Declaration on Basic Principle on the Judiciary in accordance with the Universal Declaration of Human Rights*, UN A/Res/40/32 (1985) 29 November 1985.

<sup>75</sup> The Kenya Section of the International Commission of Jurists; *Strengthening Judicial Reforms in Kenya: Administrative Reforms*, 2005.

<sup>76</sup> Justice Byamugusha CK, 'Administering of Justice without undue regard to the technicalities in Uganda 2015.' Justice Byamugusha is a judge of the Court Appeal of Uganda.

<sup>77</sup> This doctrine, strictly interpreted means that only those litigants who have sufficient interest, who directly suffer harm or whose rights are threatened with infringement can approach the courts.

had seen numerous suits dismissed on preliminary objections rather than on merit.<sup>78</sup> Article 22<sup>79</sup> departs from the repealed constitutional approach and it is categorical that, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

The constitution at article 22 and 159 embraced a shift towards a liberal & informal approach to pleadings. Subject to article 22, the *Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013*, were made by the then Chief Justice Willy Mutunga. The rules make provision for a simplified procedure in constitutional petitions<sup>80</sup>. Unheard of previously, a court may now accept an informally-filled application, including oral applications, letters or any other informal documentation, so long as it discloses the denial, violation, infringement or threat to a right or fundamental freedom. In place though, and perhaps due to ignorance, petitioners, majority of who are represented, still insist on strict forms of filling petitions<sup>81</sup>.

Subsequently, the courts in post-2010 dispensation have embraced this transformative vision and developed a progressive approach. Pleadings are to be struck out only where they are so imprecise that the respondent could not know the case he is facing.

### **3.2 The alignment of statutory provisions to the constitution**

Laws have been drafted and/or amended to align with the constitution<sup>82</sup>. The constitution had set the bar, by stating that justice shall be administered without undue regard to procedural technicalities.<sup>83</sup> The phrase, ‘undue regard to technicalities has been subject of determination in

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<sup>78</sup> *Maathai v Kenya Times Media Trust Ltd (1989) eKLR*. The Court upheld the principle and the provisions of the Civil Procedure Act that only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs. Further that private individual is able to sue on behalf of the public where he has sustained particular injury as a result of a public wrong.

<sup>79</sup> *Constitution of Kenya (2010)*.

<sup>80</sup> This progressive stance is buttressed in Rule 10(3) & (4) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules of 2013*, (popularly referred to as the ‘Mutunga Rules’).

<sup>81</sup> Justice Kihara Kariuki; *Procedural Reforms/Innovations that enhance Access to Justice and Ensure Protection of Rights in Kenya 2015*.

<sup>82</sup> Article 2(4), *Constitution of Kenya (2010)*. The constitution is the supreme law of the land and all other laws have to be in conformity with it. All law in force before the promulgation of the constitution are to be construed by the court with such modification, adaptations qualifications and exceptions as may be necessary to bring it into conformity with the constitution.

<sup>83</sup> Article 159 (2) (d), *Constitution of Kenya (2010)*.

several court cases, throughout the hierarchical court system.<sup>84</sup> The statutes emphasize on the cardinal duty of the court to do inherent justice in every case before it.

The judiciary, through the Rules Committee<sup>85</sup>, has endeavored to simplify the various procedures for approaching the court contained in different pieces of legislation. The Chief Justice gazetted various rules and practice directions aimed at streamlining the process. These include the Supreme Court Presidential Election Petitions Rules<sup>86</sup>, the Supreme Court Rules<sup>87</sup>, the Sexual Offences Rules<sup>88</sup>, the Court of Appeal Rules<sup>89</sup>, the Civil Procedure Rules<sup>90</sup>, and the Criminal Procedure Code.<sup>91</sup>

Justice Ojwang' JB, in *Luka Kitumbi and 8 others v Commissioner of Mines and Geology and another*<sup>92</sup>, observed that a new obligation is placed upon the judge, who, though beginning from the established judicial practice and known principles of interpretation, must assess any cause coming up before him or her in relation to the **imperative terms of the new constitution**. He noted that the court must rethink the relationship between the old statute law and the requirement of the new constitution. Judges are no longer judicial robots, mechanically deciding cases and dismissing them on technical grounds<sup>93</sup>. They are called upon to exercise their minds taking all factors into consideration when presiding and deciding over a matter. This will spearhead the development of our indigenous jurisprudence and the dispensation of justice.

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<sup>84</sup> *Raila Odinga and Others v IEBC and Others* [2013] eKLR. The Supreme Court has expounded on this phrase thus, 'a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.'

<sup>85</sup> Section 81, *Civil Procedure Act*, (chapter 21 Revised in 2010). The mandate of the Committee is to make rules providing for any matter relating to the procedure of civil courts. It comprises two judges of the Court of Appeal, two judges of the High Court, the Attorney General and two advocates.

<sup>86</sup> *The Supreme Court Presidential Election Petitions Rules* [2013].

<sup>87</sup> *The Supreme Court Rules of 2012* [Revised 2016].

<sup>88</sup> Sexual Offences Act (*Rules of the Court*) Legal Notice No. 101 of 2016.

<sup>89</sup> Appellate Jurisdiction Act, (*Court of Appeal Rules*); Legal Notice No. 152 of 2010.

<sup>90</sup> The Civil Procedure Act (*Civil Procedure Rules, 2010*) Legal Notice No. 151 of 2010.

<sup>91</sup> *Criminal Procedure Code*, [chapter 75 of the laws of Kenya], Revised in 2015.

<sup>92</sup> [2010] eKLR.

<sup>93</sup> Justice Kihara Kariuki, '*Procedural Reforms/Innovations that enhance Access to Justice and Ensure Protection of Rights in Kenya* 2015.'

The overriding objectives<sup>94</sup> under the Civil Procedure Act<sup>95</sup> and the corresponding sections 3A and 3B of the Appellate Jurisdiction Act<sup>96</sup> now emphasize on just, expeditious, proportionate and affordable resolution of disputes as the overriding objective.<sup>97</sup> These principle are similar to what is contained in the Civil Procedure Rules of 1998 in England.

The Woolf reforms of 1998, introduced the overriding objective provisions by way of Civil Procedure Rules in England. In case of *Biguzzi v Bank Leisure*<sup>98</sup> in which Lord Woolf himself talked about the concept of overriding objective that ‘under the Civil Procedure Rules, the position is fundamentally different. As rule 1.1 makes clear the rules is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the rules was that often the court had to take draconian steps such as striking out the proceedings.’ The principle is made of two terminologies; *overriding* defined as taking precedence and *objective* refers to something that one’s effort is intended to attain or accomplish. Therefore what takes precedence in the courts’ undertaking should be the intention to dispense justice.

### **3.3 The rationale behind the Introduction of Overriding Objective Principle**

The enactment of the overriding objective has be seen to settle the long running contest in Kenyan jurisprudence between form and substance. The principle clearly directs the court to follow the latter. In the case of *Philip Chemwolo & another v Augustine Kubende*<sup>99</sup>, the Court of Appeal held that the primary concern of the court is to do justice.

The overriding objective principle was introduced in Kenya following the legal atrocities that, for far too long, had been perpetrated by the judges. It was brought into place to cure the problem of dismissal of cases based on procedural technicalities. When parties approach the court with a

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<sup>94</sup> *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR. The Court of Appeal has expounded this doctrine thus, the overriding objective was aptly baptized the “O<sub>2</sub>” (the Oxygen Principle) because like oxygen, the principle has the potential to re-energize the civil system of justice and give the courts freedom to attain justice in each case in a manner that is just, quick and cheap and above all in a manner which takes into account the special circumstances of each of each case or appeal and the best way of handling it.

<sup>95</sup> Sections 1A & 1B, *Civil Procedure Act*, [chapter 21, Revised 2010].

<sup>96</sup> *Appellate Jurisdiction Act*, [chapter 9 Laws of Kenya].

<sup>97</sup> The overriding objective is a principle of law which was first introduced to the Kenyan legal system vide the amendment done on the Civil Procedure Act and the Appellate Jurisdiction Act in 2009. It is a principle of law aimed at delivering substantive justice without undue regard to technicalities. The principle is aimed at dealing with cases justly, expeditiously placing litigants at equal footing. It aims at ensuring that the ends of justice is met in the trial process.

<sup>98</sup> *Biguzzi v Bank Leisure PLC* (1999) 1 WLR 1926.

<sup>99</sup> [1986] eKLR.

dispute, they do so acknowledging the fact that the court is the proper forum for amicable dispute resolution based on the laws of the land<sup>100</sup>. The aspiration of the litigants is that they will always have the courts as a resort for the enforcement and protection of their rights. Therefore, when cases were dismissed on technicalities of procedure, the litigant were driven from the judgement seat before their complaint were investigated.<sup>101</sup> As the custodian of the law, it is incumbent upon the court to ensure at all times that justice is served to all who come before it.

As a matter of fact, the civil procedure and the rules made thereunder are meant to aid the court deliver justice to the litigants and not meant to obstruct the course of justice. This is why the rules have been referred to as hand maiden of justice, not a mistress thereof<sup>102</sup>. The rules of procedure are put in place to enable the court conduct the case in a proper manner, they are not, at all circumstances to be seen as a hindrance or an obstruction to the course of justice<sup>103</sup>.

### **3.4 Courts active role in furthering substantive justice**

It is now a settled point of law that courts have to consider and be aware of the oxygen principle in the determination of cases before them. In *Kamani v Kenya Anti-Corruption Commission*,<sup>104</sup> Kamani, the respondent in the appeal, had applied for the appeal to be struck out on a technicality. He raised an objection that some primary documents, including the hand-written notes of two trial judges, had been omitted from the appeal record. He therefore argued that the appeal was invalid and should be struck out.

Before the amendments<sup>105</sup>, the court had consistently ruled that the omission of primary documents in the appeal record was fatal to an appeal, which would have to be struck out as a result. However, the court considered the new amendments which introduced the oxygen principle.

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<sup>100</sup> Article 1(1), *Constitution of Kenya* (2010) vests all sovereign power (judicial power included) in the people of Kenya. This is further consolidated by Article 159 which reiterates that, 'judicial authority is derived from the people and vests in, and shall be exercised by or under this Constitution'. For the first time in Kenya's history, judicial power was expressly and exclusively vested in the judiciary, effectively providing the requisite grounding for an assertive, independent and responsive arm.

<sup>101</sup> Justice Byamugisha CK, '*Administering Justice Without undue Regard to the Technicalities: The case for Uganda*'.

<sup>102</sup> *Re Coles* [1907] 1 K.B. 1, 4 Justice M.R Collins recognized that *the courts are not strictly bound by the rules of procedure, which are generally meant to assist the court in delivering justice. They are not compelled to do that which will amount to injustice.*

<sup>103</sup> Calistus Mboya: '*The Principle of the Overriding Objective: The Case of Kenya, 2015*'.

<sup>104</sup> [2010] eKLR.

<sup>105</sup> The amendment that introduced sections 3A and 3B of the Appellate Jurisdiction Act chapter 9 of the laws of Kenya in 2009. The overriding objective of the court being to do justice.

The court went on to consider what was likely to happen if it proceeded to strike out the appeal, and found that the common experience was that whenever an appeal was struck out, the appellant would invariably seek leave to file a fresh appeal. This would lead to an increase in the cost pertaining to litigation, as well as a waste of judicial time and resources. The court found that this wrong must be what parliament intended to remedy by making the amendments. The court therefore found that the approach that it must now take was not to strike out the appeal automatically, but first examine whether the striking out will be in line with the oxygen principle. The court therefore declined to strike out the appeal, and granted the appellant leave to file a supplementary record of appeal to include the omitted documents.

In *Trusted Society of Human Rights Alliance v Attorney General & 2 others*,<sup>106</sup> the High Court pointed out that the rule *Anarita Karimi Njeru v Republic*<sup>107</sup> was decided under the old constitution. The court noted that it was upon the court to bring the said decision into consonance with the provision of the new constitution on access to justice and the framing of constitutional pleadings. It was the court's position that, with regard to the admissibility of petitions seeking to enforce the constitution, it must not be at the epitome of drafting precision. The courts, while exercising judicial authority pursuant to article 159 of the constitution, must abhor procedural technicalities and in this case, requiring extreme clarity in framing constitutional issues amounted to procedural technicalities.

It must be noted that the above High Court decision did not purport to overrule *Anarita Karimi Njeru* as it laid down an important rule of constitutional adjudication. A person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare and save the court the embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, the court was of the opinion that the proper test under the new constitution is whether a petition as stated raises issues that are so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

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<sup>106</sup> *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2010] eKLR.

<sup>107</sup> [1976-1980] 1 KLR.

In *Teachers Service Commission v Kenya National Union of Teachers & 3 others*<sup>108</sup>, the trial judge had assumed a much active role as a ‘facilitator’ to engineer resolution of a protracted dispute. The judge directed the matter to proceed under section 15 of the Industrial Court Act which provide for alternative dispute resolutions. This was a step in the right direction as the court caught grip of the matter and ended up amicably deciding the dispute. It must be noted as earlier pointed out that such move by the trial judge is what Willy Mutunga referred to as the development of competent and indigenous jurisprudence. This approach breaks away from the norm and is not tied in any way by the limited traditional remedies provided for by the law. It allows the judge to be creative and apply his mind within the four corners of the law and come up with a remedy that is tailored towards a particular dispute.

In the case of *Uchumi Services Limited v Chengo Katana Koi & 4 others*<sup>109</sup> the applicant sought to have the defendant’s defence and counter claim filled by an unqualified person<sup>110</sup> to act as an advocate struck out as they cannot stand having been drawn by a non-existent firm of Advocates. The court in its findings, struck out the defence and the counter-claim for having been drawn by an unqualified person but was quick to point out that that will result in an injustice on the part of the defendant. The court noted that it is the right of everyone to access the justice and have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court.

The court was of the view that in as much as it has found in favour of the applicant, justice would be served if only it exercises its inherent jurisdiction under section 3A of the Civil Procedure Act to allow such a party to file a valid pleadings. The court looked beyond the dry letters of the law and exercised its powers by provided a remedy that serves the purpose of advancing justice.

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<sup>108</sup> [2015] eKLR.

<sup>109</sup> [2008] eKLR.

<sup>110</sup> Section 2, *Advocates Act* defines the term ‘unqualified person’ as a person not qualified under Section 9 as an advocate. Section 9 of the Act provides as follows:

Subject to this Act, no person shall be qualified to act as an advocate unless;

- a) He has been admitted as an advocate; and
- b) His name is for the time being on the Roll; and
- c) He has I force a practising certificate and for the purpose of this Act a practicing certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60(4).

In the case of *Mechanical Engineering Plant & 2 others v Standard Chartered Bank Kenya Ltd*<sup>111</sup> the court dealt with an application for extension of time to file a record of appeal which had been struck out for having been drawn by an unqualified advocate as follows: ‘It is now well settled that a party whose appeal has been struck out as being incompetent may apply for an extension of time within which to file and serve not only a fresh notice of appeal but also a fresh record of appeal.’

### **3.5 Conclusion**

The amendments have ushered in a new era of case management, aimed at achieving the just and expeditious determination of disputes, while ensuring the efficient use of judicial resources. The trend nowadays is for the courts to strive to maintain pleadings rather than to strike them out.

However, the amendments should not be viewed as a magic cure to any situation. As was rightly noted in *Kamani’s case*, the court warned that a litigant who takes six months to file a notice of appeal which ordinarily should be done within 14 days of the decision cannot simply rely on the oxygen principle. Indeed, the overriding objective is not meant to help the indolent but to ensure inherent justice is served to all. It should not be applied to cause delay or obstruction of justice. It must be taken as a double edged sword meant to facilitate justice while at the same time eliminating further obstruction and delay of justice by lazy litigants.<sup>112</sup>

The court must strive to, as much as possible, deliver substantive justice. In doing so, the judge must caution himself on the utility of the rules of procedure in litigation. The rules of procedure are very critical in the court proceedings as they guide the court on how to approach a dispute. The court must not depart from the procedural rules unless it is absolutely necessary in serving the ends of justice.

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<sup>111</sup> [2009] eKLR.

<sup>112</sup> Calistus Mboya: *The Principle of the Overriding Objective: The Case of Kenya*, 2015.

## **CHAPTER FOUR: NEW WINE IN THE OLD WINE SKINS: THE CHALLENGE OF REALIZING EQUAL ACCESS TO JUSTICE IN THE WAKE OF A CONTINUED RESTRICTIVE INTERPRETATIONAL APPROACH BY THE COURT**

### **4.1 Introduction**

The dream and aspirations of the people of Kenya as enunciated in the constitution of having an effective judiciary, one that abhors procedural technicalities and dispenses justice might remain as aspirations if the courts fail to honour the call to dispense justice. The judiciary occupies a vantage point in not only living by the set values and principles but also in promoting and protecting them. However, there are instances where the judiciary has failed to capitalize on its position as the custodian of the law and further the interest of justice.

The courts are duty bound to compare the professed ideals and principles contained in the 2010 constitution and its core values with legal doctrines and concepts as they had been developed until the passing of the constitution<sup>113</sup>. This demands a conceptual legal change in order to facilitate the emergence of the new state envisaged by the constitution. The constitution demands the establishment of a society based on the essential values of human rights, equality, democracy, social justice and the rule of law<sup>114</sup>.

The constitution embodies the idea that Kenya seeks to be a democratic, egalitarian and accountable state<sup>115</sup>. This calls for full implementation of the constitution by allowing its entry into all spheres of the legal system to effect the intended changes<sup>116</sup>. It is not always that the courts will give life and proper interpretation to the constitutional provisions. The courts are called upon to always give effect to the imperative transformation but sometimes can fail to do<sup>117</sup>.

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<sup>113</sup> Justice J.B. Ojwang' in *Luka Kitumbi and 8 others v Commissioner of Mines and Geology and Another* [2010] eKLR.

<sup>114</sup> *The Constitution of Kenya 2010*, the Preamble.

<sup>115</sup> Walter Khobe, 'The Court of Appeal is failing to give effect to Constitutional Aspirations.' *The Platform Legal Magazine 2016*. The author is an advocate of the High Court of Kenya.

<sup>116</sup> Walter Khobe, 'The Court of Appeal is failing to give effect to Constitutional Aspirations.' *The Platform Legal Magazine 2016*.

<sup>117</sup> The judges exercise their judicial discretion and independence when deciding cases before them. However, if they do so capriciously without taking into account the legal doctrines and the social, economic and political realities of the country, they are likely to negatively affect the jurisprudential development in the country.

Kenya's legal culture and the approach of law is steeped in the legalistic approach to law as this is the way Kenyan lawyers, law scholars and judges have been trained and have traditionally approached law<sup>118</sup>. The courts, often operating under the influence of the legal culture of the rejected past, can prove to be the stumbling block to the imperative change. However, the constitution<sup>119</sup> demands a break from the chain of this legalistic mentality. Judges should go beyond the traditional notion of adjudication associated with the liberal legalism and embrace non-traditional approaches to resolution of disputes.

#### **4.2 The re-awakening of the rejected past**

The courts have not hesitated on several occasions to pronounce themselves in a rather retrogressive manner, thus reviving the old constitutional legacy. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*<sup>120</sup>, threw out the gains and admirable approach the High Court had developed in the area of our jurisprudence and re-introduced the principle of *Anarita Karimi Njeru*<sup>121</sup> and its mechanical application ignoring the dictates of the constitution.

The court, in deciding the case, stated that the principle in *Anarita* underscores the importance of defining the dispute to be decided by the court. It further said that it was a misconception to claim that compliance with rules of procedure is adversative to article 159 of the constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act and section 3A and 3B of the Appellate Jurisdiction Act. It observed the importance of procedure as a handmaiden of just determination of cases. On pleadings, the court noted that cases cannot be dealt with justly unless the parties and the court know the issues in controversy and that pleadings assist in that regard. Therefore, the court noted that the principle in *Anarita* that established the rule that requires reasonable precision in framing of issues in constitutional petitions as a principle of substantive justice<sup>122</sup>.

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<sup>118</sup> Walter Khobe, 'The Court of Appeal is failing to give effect to Constitutional Aspirations.' *The Platform Legal Magazine* 2016.

<sup>119</sup> *The Constitution of Kenya* (2010).

<sup>120</sup> [2012] eKLR.

<sup>121</sup> *Anarita Karimi Njeru v Attorney General* [1979] KLR.

<sup>122</sup> *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2012] eKLR.

Based on the above approach, it is difficult to ascertain what the court would say on the rights-driven boldness, which includes embracing epistolary jurisdiction in India<sup>123</sup> and *tutela action* in Colombia<sup>124</sup>, approaches that have been celebrated and hailed across the globe. The judges in these countries did not have the aid of clear constitutional provisions like our article 22 and 159<sup>125</sup>, but by eschewing formalism, those judges have revolutionized constitutional litigations in their jurisdictions<sup>126</sup>. In the new dispensation, form is supposed to give way to substance; obsession about form is a betrayal of the transformative vision of the constitution<sup>127</sup>. The constitution demands procedural flexibility thus courts should use this permission for radical procedural innovation that is valuable in expanding access to courts<sup>128</sup>. The constitution embodies a hope that the permission granted by the constitution would see courts taking a wide range of non-traditional steps to accept informally-drafted petitions, discharge the evidentiary burden where parties cannot, and seek to develop non-traditional innovative remedies<sup>129</sup>.

In *Teachers Service Commission v Kenya National Union of Teachers & 3 others*<sup>130</sup>, the Court of Appeal was faced with a situation where the trial Court had proceeded in a manner that breaks away from the traditional passive role of a judge in resolving a complex teachers' pay dispute. The judge had acted as a 'facilitator' to engineer resolution of a protracted dispute. One of the questions before the court was that the trial judge lacked jurisdiction when he directed the matter to proceed

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<sup>123</sup> Epistolary Jurisdiction extended by the apex court of India is one of the most significant procedural innovations to secure justice for all. Encouraging letter petitions is based on the idea of easy and effective access to all without any procedural burden.

<sup>124</sup> Patrick Delaney, 'Legislating for Equality in Colombia: Constitutional Jurisprudence, Tutelas and Social Reforms' *The Equal Rights Review* (2008). Columbia is said to be home of progressive constitutional system, the product of a relatively recent constitution. Tutela is a mechanism for the protection of equality in Colombia, which is an easily accessible and quickly resolved writ for the satisfaction of fundamental rights. As such, it has become a popular mechanism for ordinary Colombian citizens to claim their constitutionally protected rights has been violated.

<sup>125</sup> *Constitution of Kenya* 2010.

<sup>126</sup> Justice A.F.M. Rahman Bangladesh Supreme Court, in his article, "Upholding Human Rights of the Poor: Epistolary Jurisdiction Could be Instrumental", discusses the progressive steps taken by the supreme court in exercising its inherent powers manifested through Epistolary Jurisdiction to uphold Human Rights for the poor. These judicial steps had not been enshrined or contemplated by the Bangladesh Constitution and it was thus seen as an innovative move by the Supreme Court.

<sup>127</sup> Article 159(2) (d), *Constitution of Kenya* (2010). The courts are supposed to dispense justice without undue regard to technicalities.

<sup>128</sup> Walter Khobe; 'The Court of Appeal is failing to give effect to Constitutional Aspirations.' *The Platform Legal Magazine* 2016.

<sup>129</sup> Walter Khobe; 'The Court of Appeal is failing to give effect to Constitutional Aspirations.' *The Platform Legal Magazine* 2016.

<sup>130</sup> [2015] eKLR.

under section 15 of the Industrial Court Act<sup>131</sup> which provide for alternative dispute resolutions. Counsels for the appellants contested on whether the judge had jurisdiction to conduct conciliation proceeding and adjudication at the same time. The appellants argued that alternative dispute resolution denotes a proceeding that is outside of the court and could not be conducted by a judge.

The court of Appeal adopted a legalistic approach and held that the proceedings before the trial court were a nullity. It held unanimously that, ‘as a general principle, a judge of the Employment and labour Relations Court has no jurisdiction to conduct conciliation under section 15 of the Industrial Court Act as read with article 159(2) (c) of the constitution. The constitution allows judges to carve the niche for themselves as mediators and facilitators in the resolution of disputes.

This legalistic approach means that judges cannot go out of their way and develop innovative solutions to problems facing society provided the said remedy is in line with the aspirations of the people as espoused in the constitution. The courts should aim at delivering justice by all legal and innovative means.

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<sup>131</sup> Section 15 (1) of the *Industrial Court Act* (Act No. 20 of 2011) states that “*nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution.*”

## **CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS**

### **5.1 Introduction**

The new constitution has revolutionized litigation and access to justice in Kenya. Indeed, the clear constitutional provisions that facilitate the expeditious resolution of disputes by the courts and the various statutory provisions have proved adequate in positioning the judiciary as an able arbiter in the disputes that arise in this country.

However, these legal provisions shall not see the light of the day if the courts fail to actualize them through a purposive interpretation that is in line with the wishes of the people of Kenya. The courts have demonstrated their ability and willingness to abide by these provisions and ensure that the ultimate goal of substantive justice is achieved.

### **5.2 Procedural Justice versus Substantive Justice**

The study notes the need to strike a balance between procedural justice and substantive justice. Procedure ensures that substantive justice is achieved. In this regard, not a single one of them exists in isolation. Procedural justice is of great importance in the dispensation of justice and the court should not be quick to sacrifice procedural justice on the altar of substantive fairness.

A judge must always direct his mind towards the attainment of justice. He must strive to deliver substantive justice. In doing so, the judge must caution himself on the utility of the rules of procedure in litigation. The courts are to adhere to the procedural rules at all times unless doing so would result in an injustice. The overriding objective principle is meant to facilitate the expeditious delivery of justice. At no point in time should it be applied to cause delay and miscarriage of justice, as it well known that justice delayed is justice denied. It must be taken as a double edged sword meant to facilitate justice while at the same time eliminating further obstruction and delay of justice by lazy litigants.

The above success has not been without challenges. There has been instances where the courts have failed to give life to these provisions. These isolated instances need not take the centre stage of our progression as they are likely to dissuade us from our main goal and aim of furthering substantive justice.

With the enhanced constitutional access to courts, we need to caution ourselves against the tendency of rushing directly to court without firstly exhausting other possible avenues of dispute resolution. This is so as to avoid busy bodies from wasting courts time and end up clogging the

justice system. The court should be the last resort in many instances unless grave injustice is likely to occur if the court's intervention is not sought early enough.

Where there is a remedy in civil law then parties should pursue that remedy. It is important to note that not all ills in society should attract a constitutional sanction. Constitutional sanctions should be reserved for appropriate and really serious occasions. It is impermissible to directly rely on fundamental rights as contained in the constitution when the right in issue is regulated by legislation. A litigant should not be seen to by-pass the legislations guiding a particular dispute. When a legislation is enacted to give effect to a constitutional right, a litigant cannot by pass the legislation and rely directly on the constitution without challenging that legislation as falling short of the constitutional standard.

An important element of the concept of access to justice is the need not to clog the judicial system by lodging frivolous claims, as this amounts to waste of the court's time and resources. Therefore, litigants should only institute proceedings that are justiciable and based on a particular set of laws to enable the court determine the matter amicably.

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