

**Due Regard versus Undue Regard To Procedural Technicalities: The  
Civil Procedural Tug-Of-War**

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## **PRELIMINARIES**

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To my parents, I remain grateful for providing me with research tools in the name of office space, appliances and an enabling environment.


To my mates, your friendship and camaraderie has propelled me through ups and downs, ebbs and flows, peaks and valleys, wax and wanes and more so in unblocking a writer's biggest enemy, writer's block. Special cognizance is given to the Tripod and Miss Melissa Mungai.

### **Dedication**

To all the victims of the 'double-jeopardy' of procedural injustice who have had their cases suffer at the hand of technicalities in the very altars of justice they turn to for relief.  
Justice is nigh!

**DECLARATION**

I, **Musembi Emmanuel Nzaku**, 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: 31.1.2012 .....

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

Signed: .....

Date: .....

Wanjiru Ngige

### **Abstract**

Inasmuch as the undue regard principle now finds anchoring in the Constitution, it is unclear what this guiding principle fully entails. This is evinced by the fact that there exists neither rules nor judicial pronouncements on what due vis-à-vis undue application is and the modalities of application it demands. As a result, there is need for a proper delineation of what amounts to due regard to procedural technicalities. The aim of this research undertaking was to determine what due regard to procedural technicalities is vis-à-vis undue regard to procedural technicalities.

The author sought to analyze the effect of Article 159(2)(d) of the Constitution that establishes that administration of justice is to be done without undue regard to procedural technicalities; to probe if and how courts orchestrate undue regard to procedural technicalities in the conduct of their business and assess the effects of undue regard to procedural technicalities in the civil justice system.

The methodology adopted was desk-based research and the tools used were secondary data and included analysis of case law from the commonwealth, the Superior courts of Kenya, the Civil Procedure Rules and procedural law texts.

The chief discussion in the study was the need for predictable test by appraising the principle of Legal Certainty and a proposed test to guide the courts in determining what due regard to procedural technicalities is, aided by practice, legal principles and case law.

The main recommendation was interventions to reform policy and legislation for the cessation of undue regard to procedural technicalities by courts and tribunals in Kenya to guarantee civil justice.

## LIST OF CASES

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

*Combe v Edwards* (1878) LR 3 PD 142

*Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 Others* (2015) eKLR

*D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* (1980) eKLR

*Deepak Chamanlal Kamani & Another v Kenya Anti-Corruption Commission & 2 Others* Civil Appeal (Application) No. 152 of 2009

*Dupoto Group Limited v Kenya Airports Authority & Another* (2013) eKLR

*Elgeyo Marakwet Civil Society Organization Network v Ministry of Education, Science and Technology & 2 Others* (2016) eKLR

*Gcaba v Minister for Safety and Security*, 2010, South African Constitutional Court

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

*Henry JB Kendall & Others v Peter Hamilton* (1878) 4 AC 504

*Henry Njai v. Taita Ranching Co. Ltd*, Msa Civil Application No.255 of 2010 (UR)

*Housing Finance Company of Kenya v Rose Wangari Ndegwa R*, Mombasa CA (Application)83 of 2008 (U.R)

*Hunker Trading Company Limited v Elf Oil Kenya Limited*, Civil Application No. Nai 6 of 2010

*James Mangeli Musoo v Ezeetec Limited* (2014) eKLR

*James Muriithi Ngotho & 4 Others v Judicial Service Commission* (2012) eKLR

*Jones v University of Warwick* (2003) 1 WLR 954

*Kamani v Kenya Anti-corruption Commission* (2010) eKLR

*Kensilver Express Limited & 137 Others v Commissioner Insurance & 4 Others* (2014) eKLR

*Kita V. YMCA of Metropolitan Chicago*, Appellate Court of Illinois, First District. Fourth Division 47 Ill. App.2d 409 (Ill. App. Ct. 1964)

*Microsoft Corporation v Mitsumi Garage Ltd & Another* Nairobi (2001) 2 EA 460

*Nagle v Fielden* (1966) 2 QBD 651

*National Bank of Kenya Limited v Anaj Warehousing Limited* (2015) eKLR

*Paduraru v Romania*, ECtHR Judgment of 1 Dec 2005

*Pepco Construction Company Limited v Carter & Sons Limited* (2000) eKLR

*R v KPTC* (1999) (CAK) LLR 901

*Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission and 3 Others* (2013) eKLR

Reference for a preliminary ruling: *Unabhängiger Verwaltungssenat im Land Niederösterreich - Austria*, Judgment of the Court of Justice, ICJ Reports 2009,

*Republic v City County of Nairobi now County Government of Nairobi & Another Ex-parte Kepha O. Maobe & 365 Others on their behalf and of all residents of Kimathi Estate* (2017) eKLR

*Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* (2010) eKLR

*Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 Others* (2016) eKLR

*Stephen Boro Gititha v Family Finance Building Society & 3 Others* (2009) eKLR

*The Queen v The Minister for Agriculture, Fisheries and Food, ex parte Fedesa and Others*, ECtHR Judgement of 13 November 1990

## LIST OF LEGAL INSTRUMENTS

- Appellate Jurisdiction Act*, Cap 9, Laws of Kenya
- Civil Procedure Act*, 1997, 1997 Chapter 12, England and Wales
- Civil Procedure Act*, Cap 21, Laws of Kenya
- Civil Procedure Rules*, 1998 (SI 1998/3132), England and Wales
- Civil Procedure Rules*, No. 71-1 of 2014 under the Civil Procedure Act, Cap 71, Laws of Uganda
- Civil Procedure Rules*, Legal Notice No. 151 of 2010
- Constitution of Kenya*, 2010
- Constitution of Uganda*, 1995
- Court of Appeal Rules*, Legislative Supplement No. 43 of 2010
- International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNGA 171
- Judicature Act*, Cap 8, Laws of Kenya
- Supreme Court Act*, Act No. 7 of 2011
- Supreme Court Rules*, Legal Notice No. 141, 2011
- US Federal Rules of Civil Procedure*, 2016

“Wrong must not win by technicalities”

- Aeschylus, Eumenides

## CHAPTER I: INTRODUCTION

### 1.1 Background of the Problem

Access to justice is a fundamental freedom and right anchored in Article 48 of the Constitution of Kenya and establishes that the State shall ensure access to justice for all persons. The ambit of access to justice invoked in this inquiry is equality of access to legal services that aims to ensure that all persons, regardless of means, have access to high quality legal services and effective dispute resolution mechanisms necessary to protect their rights and interests.<sup>1</sup> Article 159 (2)(d) of the same constitution on exercise of judicial authority further asserts the right of access to justice by providing that in exercising judicial authority, courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

In conducting their core business of the adjudication of disputes, civil courts in Kenya are governed by the *Civil Procedure Act*,<sup>2</sup> *Civil Procedure Rules*,<sup>3</sup> *Appellate Jurisdiction Act*,<sup>4</sup> *Court of Appeal Rules*,<sup>5</sup> *Supreme Court Act*<sup>6</sup> and the *Supreme Court Rules*.<sup>7</sup> These rules are tailored with the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of civil disputes governed by the *Civil Procedure Act*.<sup>8</sup>

Be that as it may, there exists neither rules nor judicial pronouncements on what ‘undue’ vis-à-vis ‘due’ regard of procedural technicalities is and its scope of judicial application. To that extent, there exists a grave lacuna as courts engage in an

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<sup>1</sup> Access to Justice Advisory Committee, *Access to justice: An Action Plan*, AGPS, Canberra, 1994, p. xxx as cited by Louis Schetzer, Joanna Mullins, Roberto Buonamano in *Access to Justice & Legal Needs*, A project to identify legal needs, pathways and barriers for disadvantaged people in NSW (2002) 7.

<sup>2</sup> Cap 21, Laws of Kenya.

<sup>3</sup> *Civil Procedure Rules*, Under Section 81 of The Civil Procedure Act (Cap. 21), Legal Notice No. 151 of 2010.

<sup>4</sup> Cap 9, Laws of Kenya.

<sup>5</sup> Legislative Supplement No. 43, 2010.

<sup>6</sup> Act No. 7 of 2011.

<sup>7</sup> Legal Notice No. 141, 2011.

<sup>8</sup> S. 1A, Cap 21; S. 3A, Cap 9.

unchecked practice of ascertaining what undue regard to procedural technicalities is. This unbridled and one-off determination of undue regard to procedural technicalities is non-judicious as the discretionary application of undue regard at the call of a judge who deems it necessary ensures that procedural justice is only served to that particular case and not all cases in want.

## 1.2 Definition of Terms

The Dictionary for United States views the term “legal technicality” as a casual or colloquial phrase referring to a technical aspect of law and that it is not a term of art in the law, has no exact meaning and doesn’t have a legal definition.<sup>9</sup> That notwithstanding, the term implies that strict adherence to the letter of the law prevents the spirit of the law from being enforced and is often simply used to denote any portion of the law that interferes with the outcome desired by the user of the term.<sup>10</sup>

Justice Njagi Marete, on his part, in the case of *James Mangeli Musoo v Ezeetec Limited* had similar observations to make with regard to definition of legal technicalities.<sup>11</sup> He had the following to say:

“A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.”<sup>12</sup>

Lord Penzance, sitting at the House of Lords in *Henry JB Kendall & Others v Peter Hamilton* set out the point in the following words:

“Procedure is but the machinery of the law after all, the channel and means whereby law is administered and justice reached. It strangely

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<sup>9</sup> Technicality, *Dictionary for US*, <http://dict.us/technicality> on 29 January 2016.

<sup>10</sup> As above.

<sup>11</sup> (2014) eKLR.

<sup>12</sup> As above.

departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to sub serve”<sup>13</sup>

Indeed, from the above statement, it can be inferred that the rules of procedure, which are critical for the functioning of court, exist to aid the court in its functions but with the departure of procedure from their purpose being what amounts to undue regard to procedural technicalities.

Sir William Holdsworth, a British legal historian and Vinerian Professor of English law, set forth as follows:

“One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves.”<sup>14</sup>

By virtue of Sir Holdsworth’s appraisal, the workability of the two intertwined arms of the justice system: substantial justice claims and a workably rigid procedural system, is attained when a proper balance is struck. The proper balance is attained when there is due regard as opposed to undue regard to procedural technicalities that hampers substantive justice.

### **1.3 Problem Statement**

Undue regard to procedural technicalities can lead to the adjournment of proceedings, expunging of pleadings off the court record, striking out applications and dismissal of matters altogether (collectively ‘the halting of proceedings’). The element of delay introduced by the halting of proceedings results in temporal inefficiency that defeats the ends which civil justice is geared towards. Zuckerman, while adopting the aphorism ‘justice delayed is justice denied’ coined by William Gladstone, posits that a

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<sup>13</sup> *Henry JB Kendall & Others v Peter Hamilton* (1878) 4 AC 504.

<sup>14</sup> Holdsworth W, *History of English Law*, 3rd ed, Vol II, 251.

decision may be unjust not because it is incorrect, but because it comes too late to put things right and therefore defeats the ends of civil justice.<sup>15</sup>

The overarching problem to be addressed in this research is the extent which undue regard to procedural technicalities extinguishes the overriding objectives of the Civil Procedure Rules. Despite the embedding of the undue regard to procedural technicalities clause in the Constitution, it is unclear what this guiding principle fully entails.

#### **1.4 Aim of the Study**

The purpose of this study is to determine what due regard to procedural technicalities is as anticipated by Article 159 of the Constitution vis-à-vis undue regard to procedural technicalities.

#### **1.5 Statement of Objective(s)**

The objectives of this study are as follows:

- (a) To analyze the effect of Article 159(2)(d) of the Constitution that establishes that administration of justice is to be done without undue regard to procedural technicalities;
- (b) To probe if and how courts precipitate undue regard to procedural technicalities in the adjudication of civil disputes;
- (c) To evaluate the effects of undue regard to procedural technicalities in the civil justice system; and
- (d) To recommend a test to guide the courts in determining what due regard to procedural technicalities is aided by practice, legal principles and case law.

#### **1.6 Research Question (s)**

This research will seek to answer the following questions:

- (a) What is the effect of Article 159(2)(d) of the Constitution on procedural justice in the civil courts?
- (b) What are the effects of undue regard to procedural technicalities on substantive justice?

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<sup>15</sup>Zuckerman A, 'A Reform of Civil Procedure - Rationing Procedure Rather than Access to Justice', 22 *Journal of Law and Society*, 1995, 8.

(c) What are the elements of due regard to procedural technicalities?

### **1.7 Hypothesis**

There is need for a proper delineation of what amounts to due regard to procedural technicalities.

### **1.8 Research Design & Methodology**

The research design that will be used in this study will be correlational design to determine the correlation between two variables: the overriding objective and undue regard to procedural technicalities.

The methodology adopted will be desk-based and the tools to be used will be secondary data and will entail analysis of case law from the commonwealth, the Superior courts of Kenya, the Civil Procedure Rules and procedural law texts.

### **1.9 Limitations and Delimitations of the Study**

- I. The ingredients of this research will be statute, case reports and my subsequent reflections on these. Albeit authoritative, this 'inquiry' into the legal principle of undue regard to procedural technicalities will not get any support from social facts or values and thus the recommendations may be far from social reality.
- II. In this research, the author will emphasize on traditional sources of law such as statute and judicial pronouncements. The actual practice and attitude of subordinate courts and quasi-judicial tribunals, whose judgments remain unreported, will be left unexplored.
- III. This research does not involve a study of the extra-legal factors, interests and prejudices that may have directly or indirectly influenced the operation of the law. This may hamper the devising of appropriate legislative or policy-oriented measures to do away with the factors that are desisting/have desisted the law to be effective or to minimize their adverse effects on the law's performance.

### **1.10 Scope and Chapter Breakdown**

This first chapter of this dissertation is introductory in scope and content. The chapter titled 'Introduction' presents the Background of the Problem, the Aim of the study,

Statement of Objective(s), research questions, Hypothesis, Research Design & Methodology, Limitations and delimitations of the Study and the chapter breakdown.

Chapter Two titled 'Theoretical Framework and Literature Review' outlines the theoretical underpinnings of the study by examining the overriding objective of civil procedure. The chapter concludes with a comprehensive appraisal of scholars' and judicial application of the overriding objective.

Chapter Three titled 'Undue Regard to Procedural Technicalities in Action' examines the extent to which the Superior courts in Kenya apply the "undue regard" principle. The appraisal provides the foundation for Chapter Four, which consolidates the critical elements of the undue regard principle and presents a compelling case for reform.

Chapter Four titled 'Due Regard To Procedural Technicalities Test' outlines the need for a predictable test by discussing the principle of Legal Certainty and proposes a test as to what "undue regard" may be.

Chapter Five titled 'Conclusion & Recommendations' draws conclusions from the study and recommends interventions to reform in policy and legislation for the reduction of undue regard to procedural technicalities by courts and tribunals in Kenya in the administration of civil justice.

## CHAPTER II. THEORETICAL FRAMEWORK AND LITERATURE REVIEW

### 2.1 Introduction

The preceding introductory chapter sets out the main objective of the study and outlines the research problem. To understand the undue regard to procedural technicalities, one must appreciate the appurtenant notion of the overriding objective of civil procedure. A principle so critical it was aptly baptized the 'Oxygen principle' because like oxygen, the principle has the potential to re-energize the civil system of justice and give the courts the freedom to attain justice in each case in a manner that above all takes into account the special circumstances of each case and the best way of handling it.<sup>16</sup>

### 2.2 The Overriding Objective Principle

The overriding objective of the Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.<sup>17</sup> Courts are mandated to seek to give effect to the overriding objective in the exercise of its powers under the abovementioned Act or the interpretation of any of its provisions.<sup>18</sup> That does not mark the end of obligations as parties to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and by dint of that to participate in its processes and comply with its directions and orders.<sup>19</sup>

In furtherance of the overriding objective, courts are given duties to handle all matters presented before it for the purpose of attaining: the just determination of the proceedings; the efficient disposal of the business of the court ; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and the use of suitable technology.<sup>20</sup> This overriding objective not only binds the courts of first instance but also applies to appellate courts as discernible from the

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<sup>16</sup> *Hunker Trading Company Limited v Elf Oil Kenya Limited*, Civil Application No. Nai 6 of 2010.

<sup>17</sup> S. 1A(1), *Civil Procedure Act*, Cap 21, Laws of Kenya.

<sup>18</sup> S. 1A(2), *Civil Procedure Act*.

<sup>19</sup> S. 1A(3), *Civil Procedure Act*.

<sup>20</sup> S 1B, *Civil Procedure Act*.

provision of the Appellate Jurisdiction Act that provides for the just, expeditious, proportionate and affordable resolution of appeals.<sup>21</sup>

In the United Kingdom, the matriarch of our legal system, Zuckerman found that as found by Lord Woolf, the main defect of the old system (much like our present system) was that it allowed litigants to use as many of the court's resources as they desired; It tolerated litigant failure to comply with the rules, especially those concerning time limits; It encouraged procedural complexity that required practitioners to master an ever-growing volume of case law; It tolerated wasteful satellite litigation on matters of procedure rather than on substance; and not least, it created considerable scope for running up high and unpredictable litigation costs due to the protraction.<sup>22</sup> In his view, the CPR's overriding objective has been elaborated in order to guide the court in exercising both its case management powers and its traditional discretion in matters of procedure.<sup>23</sup> He states that the objective of the civil legal process remains the same: enabling the court to determine disputes on their merits and thereby assisting litigants to enforce their rights.<sup>24</sup> Also, it remains the case that a court must strive to determine the true facts and correctly apply the law to them in order to achieve substantive justice.<sup>25</sup>

Lest it be forgotten, the Civil Procedure Rules are founded on the recognition that a court can adequately dispense substantive justice only under a system of rules that is predictable, enforceable, well adapted to its purpose and which is consistently respected and enforced.<sup>26</sup> For this reason, the rules are overlaid with an overriding objective that establishes a procedural discipline designed to enable the court to do substantive justice by the use of no more than proportionate resources and within a reasonable time.<sup>27</sup>

Michael Howard rewords the Overriding Objective as a principle from the civil procedure rules whose purpose is for the civil litigation and dispute resolution process

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<sup>21</sup> S. 3A&B, *Appellate Jurisdiction Act*, Cap 9, Laws of Kenya.

<sup>22</sup> Zuckerman A, *Zuckerman on Civil Procedure: Principles of Practice*, Sweet & Maxwell, 2013, 1.

<sup>23</sup> Zuckerman A, *Zuckerman on Civil Procedure: Principles of Practice 2*.

<sup>24</sup> Zuckerman A, *Zuckerman on Civil Procedure: Principles of Practice 2*.

<sup>25</sup> Zuckerman A, *Zuckerman on Civil Procedure: Principles of Practice 2*.

<sup>26</sup> Zuckerman A, *Zuckerman on Civil Procedure: Principles of Practice 2*.

<sup>27</sup> Zuckerman A, *Zuckerman on Civil Procedure: Principles of Practice 2*.

to be fair, fast and inexpensive.<sup>28</sup> The postulate is that each case should be treated proportionally in relation to size, importance and complexity of the claim and the financial situation of the parties and that the court must consider the overriding objective when they make rulings, give directions and interpret the Civil Procedure Rules.<sup>29</sup> This definition concurs with the expediency and efficiency principles seen in the Overriding Objective in the Kenyan Civil Procedure Act.<sup>30</sup>

It is also paramount to evaluate how the principle has been construed in judicial interpretation. In *Biguzzi v Bank Leisure PLC*, Lord Woolf stated that under the English Civil Procedure Rules, the position is fundamentally different as the first rule makes clear the rules constitute a new procedural code with the overriding objective of enabling the court to deal with cases justly.<sup>31</sup> He went on to state that the problem with the position prior to the introduction of the new CPR was that often the court had to take harsh steps such as striking out the proceedings in claims where there had been a wholesale disregard of the rules amounting to an abuse of process.<sup>32</sup>

Lord Penzance as if echoing the words of Lord Woolf posited that the spirit of justice does not reside in formalities, or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all law is, or ought to be, but the handmaid of justice, and inflexibility, which is the most becoming robe of the latter, often serves to render the former grotesque.<sup>33</sup> Indeed, undue regard to technicalities erodes the quality of procedures.<sup>34</sup>

In *Republic v City County of Nairobi now County Government of Nairobi & another Ex-parte Keph O. Maobe & 365 others on their behalf and of all residents of Kimathi Estate*, Justice Odunga, in adopting the precedent set in the *Deepak Kamani case* appreciated that the Court of Appeal's holding that the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in

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<sup>28</sup>Howard M, *Civil Litigation and Dispute Resolution: Legal English Dictionary*, Legal English Books Publishers, 2013, 21.

<sup>29</sup>Howard M, *Civil Litigation and Dispute Resolution: Legal English Dictionary*, 22.

<sup>30</sup> S. 3, *Civil Procedure Act*, Cap 21, Laws of Kenya.

See also S. 1, *Appellate Jurisdiction Act*, Cap 9, Laws of Kenya.

<sup>31</sup>(1999) 1 Weekly Law Reports 1926.

<sup>32</sup>(1999)

<sup>33</sup>*Combe v Edwards* (1878), The Law Reports.

<sup>34</sup>Laibuta I, 'Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Frameworks', Unpublished LLD Thesis, University of Nairobi, Nairobi, 2012,358.

the legislation.<sup>35</sup>

If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are in consonance with the overriding objective than a striking out.<sup>36</sup>

This Study will therefore attempt to decipher to what extent undue regard to procedural technicalities by courts is a breach of the overriding objective of the CPR and also a breach of the court's duty to be guided by it, in exercise of their judicial functions. The Study will also examine whether the due to regard to procedural technicalities complies with the overriding objective of the CPR.

### **2.3 Literature Review**

The poring over and perusing of pertinent literature to examine the extent, if any, to which any of the aspects of this study has been previously undertaken indicated a lacuna in research. Despite there being a wide range of literature that had the potential to inform the study with respect to the conceptual, legal and theoretical frameworks on which this study is grounded, little has been accomplished in the specific area of undue regard to procedural justice.

The broad subject of the overriding objective has been popular among published theorists and jurists alike. Nevertheless, none have devoted their time and scholarship to the specific subject and constituent elements of undue regard to procedural technicalities, and even fewer to the narrower subject of undue regard to procedural technicalities in Kenya and thereby the necessity of this research endeavor.

Be that as it may, as regards judicial reforms in civil justice, England and Wales present the most influential comparative experience for Kenya due to the adoption of common law system through its transplantation in the context of colonial domination rather than organically.<sup>37</sup>

Professor Jolowicz tells of the English landscape in the twentieth century as follows:

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<sup>35</sup> (2017) eKLR.

See also *Deepak Chamanlal Kamani & Another v Kenya Anti-Corruption Commission & 2 Others*, Civil Appeal (Application) No. 152 of 2009.

<sup>36</sup>(2017)

<sup>37</sup>Joireman S, *The Evolution of the Common Law: Legal Development in Kenya and India*, Political Science Faculty Publications, 2006, 68.

“A few grumbles can, of course, be found in the literature of the time, but the general euphoria that prevailed at the end of the nineteenth and beginning of the twentieth century can be seen in an essay by Lord Bowen in 1887 and a lecture by Blake Odgers QC in 1901. Lord Bowen was prepared to assert ‘without fear of contradiction that it is not *possible* in the year 1887 for an honest litigant in her Majesty’s Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation’, and he considered that the county court legislation and those who carried out its provisions in the provinces had furnished the population of the country ‘at their very doors with justice, cheap, excellent, and expeditious’. Blake Odgers, while conceding that perfection had not yet been achieved, repeated Lord Bowen’s sentiments in words not very different and concluded, “Litigation in 1800 was dilatory and costly; now it is cheap and expeditious.” To borrow the language of Lord Brougham, the procedure of our courts was in 1800 “a two-edged sword in the hands of craft and oppression; it is now the staff of honesty and the shield of innocence.”<sup>38</sup>

The esteemed professor reminds us that the question of setback of matters in court due to technicalities and the hope for inexpensive, excellent and expeditious justice is no novelty.

Genn asks “Why procedural rules are so important and answers that the rules guarantee procedural fairness, and procedural fairness is important both in its own right and through its link with substantive justice.”<sup>39</sup> She goes on to acknowledge the challenge facing any civil justice system today is where to find the balance between efficiency and substantive justice.<sup>40</sup> The question then becomes, how much procedural justice is needed to achieve an appropriate degree of substantive justice.<sup>41</sup> The challenge, then, is to find the balance between procedures that are seen as fair, that contribute to substantive justice and that provide reasonable access to justice so that rights can be enforced, but are not so complicated or expensive as to make

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<sup>38</sup> Jolowicz J, *On Civil Procedure*, Cambridge University Press, 2000, 356.

<sup>39</sup> Genn H, *Judging Civil Justice*, Cambridge University Press, 2008, 13.

<sup>40</sup> Genn H, *Judging Civil Justice*, 15.

<sup>41</sup> Genn H, *Judging Civil Justice*, 15.

proceedings inaccessible.<sup>42</sup> She therefore establishes the thin line that courts ought to distinguish in the balance of substantive and procedural justice; this involves the tactful regard of procedural technicalities such that neither procedural nor substantive justice will be harmed in that process or by the outcome(s).<sup>43</sup>

Zuckerman has argued that measuring the success of procedures in doing justice is a complex judgment relating to rectitude of decision, time and cost. He states that there is no perfect rectitude of decision, justice cannot be dispensed instantly without some delay, and justice cannot be absolutely free of cost constraints. Each system has had to balance the competing demands and strike a compromise.<sup>44</sup> Therefore, the question of undue regard to procedural technicalities falls squarely within the perimeters of success of procedures in justice since it has negative implications as to time due to its effect of halting of proceedings and its requisite delays.

Sir Jack Jacob while lauding the supremacy of procedure states that the essential function of procedure is to infuse life into all other areas of the law, to bring into actual being and to give reality and effect to all the legal rights and duties of every person and body in society.<sup>45</sup> He also accedes to Bentham's characterization of procedural law as *adjective law* as compared to *substantive law* thereby stressing that the object and end of the code of procedural law is to give execution and effect to the rules of substantive law.<sup>46</sup> In essence, Sir Jack Jacob posits that procedure has been described as the servant not the master of justice, so that its rules should not compel any court to do what will cause injustice in any particular case.<sup>47</sup> Veritably, the undue regard to procedural technicalities is a voluntary act of the court to be subdued by rules which constitutes a perversion of the function of procedure.

In assessing the overriding objectives of CPR, Prof. Zuckerman states that the strength of the CPR lies precisely in confronting the inevitable tension between three

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<sup>42</sup> Genn H, *Judging Civil Justice*, 15.

<sup>43</sup> Genn H, *Judging Civil Justice*, 15.

<sup>44</sup> Zuckerman A, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, Oxford University Press, 1999, 11.

<sup>45</sup> Jacob J, *The Fabric of English Civil Justice*, Hamlyn Lecture Series 38(1987)63.

<sup>46</sup> Sir Jacob J, *The Fabric of English Civil Justice*, 64.

<sup>47</sup> Sir Jacob J, *The Fabric of English Civil Justice*, 64.

imperatives: the need for correct outcomes, the need for expeditious resolution, and the practical constraints of court and party resources.<sup>48</sup>

The now defunct Judges and Magistrates Vetting Board in its publication of the Fourth Announcement Determinations on Suitability and on Requests For Review conceded that sad Kenyan experience indicates why the undue regard principle was granted constitutional value by stating that:

“The raising of technical and procedural questions was a particularly strong weapon in the armory of those who sought to defend the powerful and the wealthy with the connivance of compliant judges. Substantive questions could be evaded and matters left to drift in the courts for so long that outcomes became irrelevant. Reliance on ultra-technicality was used to impede the work of agencies set up to investigate malfeasance by those in positions of authority. Far from furthering the rule of law, these narrow, technical rulings, issued in the name of legality, contributed massively to the prevalence of impunity. Indeed, they undermined the rule of law, promoting a spirit of lawlessness that proceeded from the highest in the land all the way down. The unhappy lesson for the country was that the emancipatory vision of the rule of law should not be confused with the tyranny of heartless legalism.”<sup>49</sup>

Hon. Lady Justice Byamugisha of the Court of Appeal of Uganda is also of the view that rules of procedure are supposed to help the courts expedite court business but are not supposed to be ironclad obstacles to all causes of action in all circumstances.<sup>50</sup> In her article she pegged her assertion on the case of *Kasirye Byaruhanga & Co Advocates v Uganda Development Bank* that came before the Court of Appeal of Uganda on an application for enlargement of time.<sup>51</sup> In rejecting the application, the Court considered Art 126(2)(e) of the Constitution of Uganda that mirrors Article 159(2)(d) of the Kenyan Constitution and stated that:

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<sup>48</sup> Zuckerman A, *Zuckerman on Civil Procedure: Principles of Practice*, Sweet & Maxwell, 16.

<sup>49</sup> (2012) eKLR.

<sup>50</sup> *Administering Justice Without Undue Regard to the Technicalities*, 2003, 3.

Cited by Justice Ngenye-Macharia in *Office of the Director of Public Prosecutions v Sylvester Mogela & another* (2017) eKLR.

<sup>51</sup> Civil Application No.2 of 97.

“A litigant who relies on the provisions of Article 126(2)(e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to pay undue regard to a relevant technicality. Article 126(2)(e) is not a magic wand in the hands of defaulting litigants.”<sup>52</sup>

The honorable judge goes on to state that:

“The right to be heard should always be a relevant consideration and therefore should be considered before such applications are rejected on technical grounds. In some instances there may be no injustices that would be caused to the opposite party. In any case, our judicial system should never permit a party to be driven from the judgment seat without the court considering his/her/its/ right to be heard except in cases where the cause of action is obviously and almost incontestably bad.”<sup>53</sup>

## 2.4 Conclusion

The discussion in this chapter of the broad concept of overriding objective in the context of civil justice outlines the essence of restraining procedure to its proper office and intended objectives. This chapter provides a sound theoretical background for Chapter three, which examines the historical development and the current status of the legal framework and the case law application of the overriding objective and the undue regard principle.

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<sup>52</sup> (1995)

<sup>53</sup> Byamugisha, *Administering Justice Without Undue Regard to the Technicalities*, 4.

## CHAPTER III: UNDUE REGARD TO PROCEDURAL TECHNICALITIES IN ACTION

### 3.1 Introduction

The undue regard principle is no novelty in Kenya. Before the promulgation of the Constitution of Kenya on 27<sup>th</sup> August 2010, S. 3(2) of the Judicature Act provided that the courts were to be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and all such cases were to be decided according to substantial justice without undue regard to technicalities of procedure and without undue delay.<sup>54</sup>

Inasmuch as the principle existed, courts were only directed to apply it in applying African customary law. Courts however numerous pronounced themselves on the same. As a result, two schools of thought that I label the “stern” and the “permissive” schools of thought emerged from the bench. The former is evinced in how in the past the courts were castigated for undue regard to procedural technicalities in discontinuing matters before them.<sup>55</sup>

### 3.3 Ante-2010 Jurisprudence

Conforming to the *stare decisis* principle, an abbreviation of the Latin phrase *stare decisis et non quieta movere* which translates to ‘stand by decided matters and not to disturb settled matters’, decisions of a higher court within the same jurisdiction acts as binding authority on a lower court within that same jurisdiction<sup>56</sup>. It is thus prudent to begin by appraising the decisions of the court of Appeal before those of those of the High Court.<sup>57</sup>

The Court of Appeal was infamous for being painfully resolute in their interpretation of, inter alia, rule 85 of the repealed Court of Appeal Rules with the result that Appeals continued to succumb to the already overflowing graveyard of struck-out appeals.<sup>58</sup> Prior to the embedding of the Overriding objective in the Appellate Jurisdiction Act, in *Pepco v Carter*, a party named ‘Pepco Construction Company

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<sup>54</sup> Cap 8, Laws of Kenya.

<sup>55</sup> Kanjama C, *Rule 85 of the Court of Appeal Rules*, Hot From the Bench, <http://www.lawafrica.co.ke/bench.php?hbid=7> on 28 August 2017.

<sup>56</sup> Gall G, *The Canadian Legal System*, Carswell Legal Publications, 1983, 220.

<sup>57</sup> Chapter 10, *Constitution of Kenya* (2010)

<sup>58</sup> Kanjama C, *Rule 85 of the Court of Appeal Rules*.

Limited' was mistakenly drawn in the Notice of Appeal as 'Pepco Construction & Transport Co Ltd', the name initially used in the case file.<sup>59</sup> Further, the title of the notice of appeal erroneously included the word 'Intended'.<sup>60</sup> In dismissing the matter, the court held that these defects were incurable.<sup>61</sup>

In *R v KPTC* the court held, *suo motu*, that a correctly dated order mistakenly attributed to Justice Khamoni instead of Justice Githinji was incurable by amendment.<sup>62</sup> Section 100 of the *Civil Procedure Act* conferred on the court general power to amend any defect in proceedings whereas section 3(2) of the *Appellate Jurisdiction Act* vests in the Court of Appeal the power of the High Court.<sup>63</sup> In spite of that, the court was not willing to allow these legislative provisions to stand on two feet in any way or defeat an amendment to Rule 85(2A) of the Rules, which subsists as delegated legislation.<sup>64</sup> To add insult to injury, Rule 1(2) bestowing inherent power on the court and Rule 44 granting it general power to amend was not allowed to subtract even a whit from the full force of Rule 85(2A).<sup>65</sup> It has been argued that the ratio was blunt: "Every rule, particularly one brought in by way of amendment, must be given effect."<sup>66</sup> This indisposition is seen in the Order granted in the case that neither set out particulars of the claim or relief sought nor properly described the parties. As was argued by Kanjama who I wholly concur with, the message was loud and clear: the Court of Appeal would not suffer any but the slightest deviation from procedure, and "shall" in the rules would be construed as "must".<sup>67</sup>

The courts were not however all rigid pre-2010, in *Kenya Commercial Bank Limited v Kenya Planters Co-operative Union*, Justice Nyamu (Judge of Appeal) in allowing an application to be filed out of time stated that allowing a delay of one day cannot by any standard be said to be inordinate and the two reasons given for the delay namely the need to undo the record so as to again bind it in acceptable colours and the

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<sup>59</sup> *Pepco Construction Company Limited v Carter & Sons Limited* (2000) eKLR.

<sup>60</sup> *Pepco Construction Company Limited v Carter & Sons Limited*.

<sup>61</sup> *Pepco Construction Company Limited v Carter & Sons Limited*.

<sup>62</sup> *R v KPTC* (1999) (CAK) LLR 901

<sup>63</sup> Kanjama C, *Rule 85 of the Court of Appeal Rules*.

<sup>64</sup> Kanjama C, *Rule 85 of the Court of Appeal Rules*.

<sup>65</sup> Kanjama C, *Rule 85 of the Court of Appeal Rules*.

<sup>66</sup> Kanjama C, *Rule 85 of the Court of Appeal Rules*.

<sup>67</sup> Kanjama C, *Rule 85 of the Court of Appeal Rules*.

intervening Easter holiday which delayed the taking of instructions cannot be said to be a frivolous reason and the two reasons were acceptable to the court.<sup>68</sup>

In the same lenient spirit, Justice Hancox in *Githere v Kimungu*, postulated 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 too far 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 in a particular case.”<sup>69</sup>

These two findings as judicious as they were, were the exception rather than the norm and would be the inception of the reform that resulted in the installation of the undue regard to technicalities principle in the Constitution.

### **3.3 Post-2010 Jurisprudence**

In *National Bank of Kenya Limited v Anaj Warehousing Limited*, the Supreme Court in determining that no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate premised their decision on the undue regard to procedural technicalities. They had the following to say:

“The Court’s obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010, Article 48), and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practising certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution: “justice shall be administered without undue regard to procedural technicalities”.<sup>70</sup>

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<sup>68</sup> (2010) eKLR.

<sup>69</sup> 1976-1985 EA 101.

<sup>70</sup> (2015) eKLR.

The Supreme Court in essence held that such invalidation of a document of conveyance only by the ground would be an undue regard to procedural technicalities as compared to documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates that are to be deemed void for all purposes.<sup>71</sup> It is to be read that the latter is what appeared to be due regard to procedural technicalities in the court's mind.

In *Raila Odinga & 5 others v IEBC and 3 others*, the Supreme Court in striking out an affidavit, which was filed out of time as stipulated in the Supreme Court Rules and without, leave of the court held that Article 159(2)(d) of the Constitution did not mean that procedural technicalities imposed by the law may be ignored.<sup>72</sup> The court went on to posit that:

“The essence of that provision is that 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. The timelines for the lodgment of evidence, in a case such as this, the scheme of which is well laid-out in the Constitution, were in our view, most material to the opportunity to accord the parties a fair hearing, and to dispose of the grievances in a judicial manner.”<sup>73</sup>

In my opinion, inasmuch as the undue regard principle bears no concise definition, it was the onus of the court to interpret the law and decipher its implications. Further, Article 159(2)(d) in its wording does not allude in any way to a case-by-case application of the principle but termed it as a guiding principle. By definition, a guiding principle is one that governs an organization throughout its life in all circumstances, irrespective of changes in its goals, strategies, type of work, or the top

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<sup>71</sup> (2015)

<sup>72</sup> (2013) eKLR.

<sup>73</sup> (2013)

management.<sup>74</sup> As so, a guiding principle is a mandatory guideline as compared to an *ad hoc* policy that would otherwise signify a solution designed for a specific problem or task, non-generalizable, and not intended to be able to be adapted to other purposes.<sup>75</sup> The court thus erred in its conceptualization of the undue regard principle and the consequent disallowing of evidence.

Further, in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others*, the Supreme Court held that it has had occasion to remind litigants that Article 159(2)(d) of the Constitution is not a panacea for all procedural shortfalls.<sup>76</sup> It further stated that, all that the Courts are obliged to do is to be guided by the undue regard to technicalities principle and that it was plain to the court that Article 159(2)(d) is applicable on a case-by-case basis.<sup>77</sup> A position challenged in the preceding paragraph.

In an atypical step, Supreme Court Justice Ibrahim in the Dissenting opinion in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* made an intriguing conceptualization of procedural technicalities.<sup>78</sup> In opining that the procedure towards the declaration of Section 14 of the Supreme Court Act to be unconstitutional is a substantive procedure that goes to the core of the constitutionality of a legislative activity, he posited that an issue touching on a procedure challenging the constitutionality of statutory law is not a matter of procedural technicality but is a matter of procedural substance.<sup>79</sup> However, in disagreeing with the honorable judge, all matters of procedure are normally not matters ending in themselves but are matters whose adjudication would have bearing on a substantive matter before the court. Therefore, the procedural substance categorization, albeit ingenious, is a superfluous one.

In *Board of Trustees of National Social Security Fund & 6 others v Meshack Owino*, the Court of Appeal in an application to strike out a Notice of Appeal for being filed out of the prescribed time stated:

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<sup>74</sup>Guiding Principles, The Law Dictionary, <https://thelawdictionary.org/guiding-principles/> on 16 January 2018.

<sup>75</sup>*Ad hoc*, Legal Dictionary <https://legal-dictionary.thefreedictionary.com/ad+hoc> on 16 January 2018.

<sup>76</sup>(2014) eKLR.

<sup>77</sup>(2014)

<sup>78</sup>(2013) eKLR.

<sup>79</sup>(2013)

“By article 159(2)(d) of the new Constitution of Kenya, the courts are now required to administer justice without undue regard to procedural technicalities. In addition, this Court is required to give effect to the overriding objective of civil litigation enshrined in the Appellate Jurisdiction Act which is, among other things, to facilitate the just and expeditious resolution of appeals. Thus, it would be against the policy of the law to strike out the appeal on a mere technicality raised in support of the application.”<sup>80</sup>

In *Deepak Chamanla Kamani and Another versus Kenya Anti-Corruption Commission and 3 Others*, the court of appeal concurred with Lord Woolf’s position in the *Biguzzi case* that:

The initial approach of the Courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objective set out in the legislation. If a way or ways alternative to a striking out are available, the Courts must consider those alternatives and see if they are more consonant with the overriding objectives than a striking out.”<sup>81</sup>

Again, while drawing inspiration from its own decision in *City Chemist (NRB) and Others v Oriental Commercial Bank Limited*, the court made the following annotations:

“The new thinking totally uproots well-established principles or precedent on the exercise of the discretion of the court, which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assist litigants and legal practitioners alike in determining with some measures of certainty the validity of the claims long before

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<sup>80</sup>Nairobi CA (Application), No.87 of 2007

See also *Kensilver Express Limited & 137 others v Commissioner Insurance & 4 others* (2014) eKLR  
See also *Henry Njai v. Taita Ranching Co. Ltd*, MSA Civil Application No.255 of 2010.

<sup>81</sup>(2010) eKLR.

they are instituted in court. It also guides the lower courts and maintains stability on the law and its application.”<sup>82</sup>

The High court has also on numerous occasions pronounced itself of procedural technicalities. In a restatement of the Githere case, the learned Justice Odunga in *Elgeyo Marakwet Civil Society Organization Network v Ministry of Education, Science And Technology & 2 others*, held that:

In human rights cases, public interest litigation matters and lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court or let justice bleed at the altar of technicality.<sup>83</sup>

He went on to state that the court had vast powers to do justice without technical restrictions and restraints; and procedures and reliefs have to be molded according to the facts and circumstances of each case and each situation.<sup>84</sup> To that effect, narrow pure legalism for the sake of legalism will not do and that technicality cannot be upheld only to allow a clandestine activity through the net of judicial vigilance in the garb of legality.<sup>85</sup>

Justice Thande in the probate matter of *INK v GGK & another* disagreed with the Applicant’s contention the court should do justice in total disregard to technicalities.<sup>86</sup> She went on to state that this was certainly not the intention of Article 159(2)(d) of the Constitution and that the Article does not do away with procedural technicalities but only reproves paying undue regard to procedural technicalities.<sup>87</sup>

In *James Muriithi Ngotho & 4 others v Judicial Service Commission*, Justice Githuain finding that the 6 months limitation period prescribed under Section 9(3) of the *Law Reform Act* is not a procedural technicality stated that Article 159(2)(d) did not come to overthrow the provisions of the law as it stands in the stature but was meant to

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<sup>82</sup>Nai Civil Application No. 302 of 2008.

See also *Housing Finance Company of Kenya v Rose Wangari Ndegwa R. Mombasa*, Court of Appeal Application 83 of 2008.

<sup>83</sup>(2016) eKLR.

<sup>84</sup>(2016) eKLR.

<sup>85</sup>(2016) eKLR.

<sup>86</sup>(2016) eKLR.

<sup>87</sup>(2016) eKLR.

avoid injustices to parties arising from failure to comply with minor procedural lapses or technicalities in the course of proceedings.<sup>88</sup> A Minor procedural lapse being one that is condonable if its substantial requirement is complied with.<sup>89</sup>

### **3.4 Conclusion**

The review in this chapter of the Pre and Post 2010 jurisprudence on the undue regard principle reveals the wide gap seen in the amorphous application of the principle, as there is no clear policy. This chapter demonstrates that the mere embedding of the undue regard principle without clear guidelines does not ensure its application and guarantee civil justice. The following chapter explores and recommends a guideline that seeks to establish the undue regard to procedural technicalities test.

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<sup>88</sup>(2012) eKLR

<sup>89</sup> Govindarajan M, *Procedural Lapse*, 2015

[https://www.taxmanagementindia.com/visitor/detail\\_article.asp?ArticleID=6379](https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=6379) on 22 November 2017.

## CHAPTER FOUR: DUE REGARD TO PROCEDURAL TECHNICALITIES TEST

### 4.1 Introduction

In spite of the embedding of the undue regard to procedural technicalities clause in the Constitution, it is unclear what this guiding principle fully entails as there exists no rules nor judicial pronouncements on what due vis-à-vis undue application would be and the modalities of application it commands. The findings in chapter three confirmed the inaptness of the undue regard principle as undefined and undelineated yields an amorphous application of the principle as compared to a uniform test that would give parties greater certainty as to their potential rights and obligations.

As a result, there is need for a proper delineation of what amounts to due regard to procedural technicalities in a bid to prevent courts from engaging in an uncontrolled practice of ascertaining what undue regard to procedural technicalities is. This chapter proposes a legal mechanism in the form of a test to address this lacuna.

### 4.2 The Principle of Legal Certainty

The need for a definite legal test is underwritten by the principle of Legal Certainty. The principle stipulates that law must be precise, predictable and calculable by those subject to it.<sup>90</sup> Also known as maximum predictability of an administration's behavior, legal certainty postulates that citizens must be protected against a threat that comes just from the law, against an insecurity created by law or which the law risks to create.<sup>91</sup> It requires that there be no doubt about the law applicable at a given time in a given area and, consequently, as to the lawful or unlawful nature of certain acts or conduct.<sup>92</sup> A more elaborate definition states that community rules enable those concerned to know precisely the extent of the obligations that are imposed on them; individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.<sup>93</sup>

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<sup>90</sup> Raitio, J, *The Principle Of Legal Certainty In EC Law*, Springer, 2003, 16

<sup>91</sup> Predescu I & Safta M, *The Principle of Legal Certainty*, Basis For The Rule of Law Landmark Case-Law, 7.

<sup>92</sup> *The Queen v The Minister for Agriculture, Fisheries and Food*, ex parte Fedesa and Others, ECtHR Judgement of 13 November 1990, para. 8.

<sup>93</sup> Reference for a preliminary ruling: Unabhängiger Verwaltungssenat im Land Niederösterreich - Austria, Judgment of the Court of Justice, ICJ Reports 2009, 44.

Two requirements of the Legal Certainty stand out for emphasis: accessibility and foresee ability of the law and assurance of the unitary interpretation of the law. The former posits that in order for an existing law to have legal effect, its recipients must know effects of the law bringing it to public attention and after its entry into force.<sup>94</sup> The former's essence is espoused by the European Court of Human Rights' holding in *Paduraru v Romania* that:

“The absence of a mechanism which ensures consistency in the practice of the national courts, such profound and long-standing differences in approach in the case-law, concerning a matter of considerable importance to society, are such as to create continual uncertainty and to reduce the public's confidence in the judicial system, which is one of the essential components of a State based on the rule of law.”<sup>95</sup>

As noted by the Victorian Law Reform Commission, inconsistency and unpredictability in the civil justice system are highly undesirable for a variety of obvious reasons and that conduct in the community generally, by individuals, entities and governments, is regulated according to perceptions of the applicable law and predictions about the likely outcome of litigation.<sup>96</sup>

Accordingly, the legal certainty principle goes to bat for a uniform test in a bid to avoid inconsistent interpretation that frustrates the goal of uniformity in the law. In the words of the Constitutional Court of South Africa, legal certainty is essential for the rule of law and law cannot ‘rule’ unless it is reasonably predictable.<sup>97</sup> In view of the foregoing, a uniform legal test of what constitutes undue regard to procedural technicalities is of quintessential import.

### **4.3 Undue regard to Procedural Technicalities Test**

#### **4.3.1 Overriding Objective Contravention**

The starting post in actuating undue regard to procedural technicalities is the very object on which civil procedure was tailored for. Needless to say, the object of a

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<sup>94</sup> Predescu I & Safta M, *The Principle of Legal Certainty*, 2009, 7.

<sup>95</sup> ECtHR Judgment of 1 Dec 2005, para 794.

<sup>96</sup> Victorian Law Reform Commission, *Civil Justice Review: Report 14* (2008), 94.

<sup>97</sup> *Gcaba v Minister for Safety and Security*, (2010) South Africa Constitutional Court.

statute is its aim or purpose; the end or design that it is meant to accomplish.<sup>98</sup> The object of procedural technicalities is laid out by the overriding objective of the civil procedure rules. As laid out earlier in Chapter two, the overriding objective of the CPR is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes.

The object of the Civil Procedure Rules is the provenance of the test given that it portrays a clear and unambiguous legislative intent. An application of civil procedure rules in a manner that violates the overriding objective principle amounts to procedural abuse, the very mischief that the principle was enacted to remedy.<sup>99</sup> It then becomes pressing to appraise the four elements of the overriding objective against regard to procedural technicalities.

The first element of the just resolution of civil disputes entails their just disposition. The English Civil Procedure Rules used by the English Court of Appeal, High Court of Justice and County Courts in civil cases in England and Wales after which the Kenyan overriding objective is modeled after, defines dealing with a case justly to include so far as is practicable: ensuring that the parties are on an equal footing; saving expense; ensuring that it is dealt with expeditiously and fairly; allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; enforcing compliance with rules, practice directions and orders; dealing with the case in ways which are proportionate – to the amount of money involved; to the importance of the case; to the complexity of the issues; and to the financial position of each party. Undue regard to procedural technicalities violates the just disposition requirement as it increases expense by driving up Advocate litigation costs; defeats expediency by imposing a delay to the determination of the dispute, allots a superfluous share of the courts resources at the expense of future cases; and enforces a rigid compliance rules, practice directions and orders.

In addition to the definition of proportionality given in the foregoing paragraph, the element of proportionality takes on varying meanings including the following namely, proportionality as requiring:

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<sup>98</sup> B|acks Law Dictionary, 8<sup>th</sup> ed.

<sup>99</sup> Heydon's Case (1584) EWHC Exch J36, 76 ER 637.

- a) Litigation costs to bear a reasonably proportionate relationship with the amount at stake in the dispute;
- b) Procedures to be appropriately matched to the case, that is, ensuring that elaborate procedures (which may be appropriate for big and complex cases) are not used unnecessarily in ordinary cases;
- c) Applications for drastic forms of relief, such as *Anton Piller* orders or orders for committal for contempt, to be avoided where such relief would be disproportionate in the circumstances;
- d) Procedural sanctions and orders to be issued in a manner proportionate to the requirements of procedural and substantive justice, for instance, not striking out the entire claim when a lesser sanction would suffice, and not ordering extensive particulars or further discovery where the benefits are likely to be slight and would not justify the expense and effort involved;
- e) Cases to be instituted in the correct tribunal, avoiding the High Court where the simpler procedures of a lower court or tribunal would suffice; and
- f) Procedural orders to be made which are proportionate to the financial position of each party.<sup>100</sup>

Undue regard to technicalities breaches the proportionality requirement of the overriding objective in copious ways: It increases litigation costs, which cumulatively lessen the fruits of litigation to be enjoyed from the initial amount at stake in the dispute; Calls for drastic forms of relief even though such relief would be disproportionate in the circumstances; invites procedural sanctions which are disproportionate to the requirements of procedural and substantive justice like dismissal even when a lesser corrective sanction would suffice.

The next element, expediency, entails the expeditious disposal of matters before the court. It is defined to mean that, in any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the

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<sup>100</sup>Civil Justice Reform, *Final Report of the Chief Justice's Working Party On Civil Justice Reform*, 2003, 56 [Http://Www.Legco.Gov.Hk/Yr06-07/English/Bc/Bc57/Papers/Bc570611cb2-1960-E.Pdf](http://www.Legco.Gov.Hk/Yr06-07/English/Bc/Bc57/Papers/Bc570611cb2-1960-E.Pdf) On 23 December 2017.

case for trial.<sup>101</sup> At the hand of that, undue regard to procedural technicalities violates the expediency requirement by increasing the lapse of time between the commencement of the proceedings and their final determination by entertaining superfluous applications, adjournments and delays.

Finally, the affordability proviso is closely tied to the proportionality in cost clause and provides that the cost of litigation ought to be more affordable, more predictable, and more proportionate to the value and complexity of individual cases.<sup>102</sup> Accordingly, undue regard to procedural technicalities violates the affordability requirement by increasing the cost of litigation such that it becomes expensive, unpredictable and disproportionate to the value and complexity of individual cases.

#### **4.3.2 Obstruction and Extinguishing of Legal Rights**

The second tine of the “undue regard” principle is spurred by the holding of Lord Penzance that:

“Procedure strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to sub serve.”<sup>103</sup>

This implores an examination of what legal rights are up for such obstruction or extinguishing. The principal legal right at issue is the right to a fair trial that is extended to civil proceedings by attracting equal treatment of all persons before courts and tribunals in the determination of their rights and obligations in a suit at law.<sup>104</sup> A fair trial obligates expedition, proportionality and fairness of process.<sup>105</sup> As a result, the applicant must have a real opportunity to present his or her case or challenge the

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<sup>101</sup> The Law Society of New South Wales, *Civil Procedure Themes and Case Management*, <https://nexusnotes-media.s3-ap-southeast-2.amazonaws.com/wp-content/uploads/edd/2015/03/Civil-Procedure-Law170315-copy1.pdf> on 20 December 2017.

<sup>102</sup> Todd M, Doerries C, Fancourt T, Moriarty S, Bowdery M & Clark G, *Reforming Civil Litigation*, Recommendations by the Bar Council of England and Wales, (2016) 7.

<sup>103</sup> *Henry JB Kendall & Others v Peter Hamilton* (1878) 4 Appeal Cases 504.

<sup>104</sup> Art 14, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNGA 171.

<sup>105</sup> Imaana L, *Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Frameworks*, 24.

case against them requiring procedural equality.<sup>106</sup> For the Victorian Law Reform Commission, fairness is a fundamental requirement of civil justice

; civil justice requires not only 'fair' results but also outcomes arrived at by fair procedures.<sup>107</sup> Further, as Justice Gaudron observed (albeit in the context of the criminal trial), 'The requirement of fairness is not only independent, it is intrinsic and inherent.'<sup>108</sup>

The right to access justice

follows for consideration. Access to justice is much more than improving an individual's access to courts, or guaranteeing legal representation.<sup>109</sup> It is rightly defined in terms of ensuring that legal and judicial outcomes are just and equitable.<sup>110</sup> It may be understood as to include the ability to realize the right to full and equal access to protection of one's entitlements by the law enforcement agencies without undue delay, expense or technicalities. This presupposes less resource intensive pre-trial protocols and civil process of claim adjudication.

Tied to the right to access justice is the related principle of equity and efficiency.<sup>111</sup> Pursuant to this principle, the civil justice system has critical goals of timeliness;<sup>112</sup> ensuring a case is dealt with as expeditiously as is reasonably practicable and that the resources of the court are distributed fairly;<sup>113</sup> and cases are dealt with reasonable speed.<sup>114</sup>

In addition to the right to a fair trial and access to justice, there are other legal rights affected by undue regard to procedural technicalities. These are the rights claimed in

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<sup>106</sup>Liberty, *Article 6 Right to a fair trial*,

<https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-6-right-fair-trial> on 21 December 2017.

<sup>107</sup> Australian Law Reform Commission, *Framework for Reform*, [https://www.alrc.gov.au/publications/2-framework-reform/principles-reform#\\_ftn77](https://www.alrc.gov.au/publications/2-framework-reform/principles-reform#_ftn77) on 21 December 2017.

<sup>108</sup>Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 94.

<sup>109</sup> United States Institute of Peace, *Necessary Condition: Access to Justice*, <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice> on 22 Dec 2017.

<sup>110</sup>United Nations Development Programme, *Access to Justice* (2004) 6.

<sup>111</sup> Imaana L, *Access to Civil Justice in Kenya: An Appraisal of the Policy and Legal Frameworks*, 24.

<sup>112</sup>Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 92.

<sup>113</sup>Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: An Overview—Judiciary*, 2009, 2.

<sup>114</sup>Lord Woolf, *Access to Justice: Final Report*, 1996, 1.

the substance of the causes of action before a court or tribunal. Justice Nyamweya shrewdly canvassed this question in *Dupoto Group Limited v Kenya Airports Authority & Another*

where he held that the overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. This is because a pleading that raises triable issues confirms the existence of a reasonable cause of action that merits a hearing.<sup>115</sup> Examples of such rights claimed in the determination of civil rights and obligations are inter alia: property rights, the right to practice a profession, family rights, the right to compensation, the right to engage in commercial activities, some employment decisions, control orders and anti-social behaviour orders etc.<sup>116</sup>

Salmon LJ in *Nagle V Field* cited by the court of Appeal in *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* held that it is trite law that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unlitigable.<sup>117</sup> Accordingly, it is necessary to consider whether or not this plaintiff has an arguable case.

In *Microsoft Corporation v Mitsumi Garage Ltd & Another*, it was appreciated that:

“Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a claim but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the suit. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those

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<sup>115</sup>(2013) eKLR.

<sup>116</sup>*Liberty, Article 6 Right to a fair trial*,

<https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-6-right-fair-trial> on 21 December 2017.

<sup>117</sup>(1966) 2 Queens Bench Division 651; (1980) eKLR.

instances the court should rise to its calling to do justice by saving the proceedings in issue.”<sup>118</sup>

The Court of Appeal in *Stephen Boro Gitiha v Family Finance Building Society & 3 others* held that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it, and whatever is in conflict with it must give way. Further, if the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.<sup>119</sup> Lord Woolf C.J in *Jones v University of Warwick* as if to echo the Kenyan Court of Appeal held that a judge’s responsibility today, in the course of properly managing litigation requires him when exercising his discretion in accordance with the overriding objective to consider the effect of his decision upon litigation broadly. He further stated that proactive management of civil proceedings, which is at the heart of the CPR, is not only concerned with an individual piece of litigation that is before the Court, it is also concerned with litigation as a whole.<sup>120</sup> The undue regard to technicalities in one case fails to consider the effect of that decision upon litigation generally by dint of the doctrine of precedence that will bind other courts to follow the errant precedent.

Accordingly, undue regard to procedural technicalities occurs when in place of facilitating, it is permitted to obstruct and even extinguish legal rights by denying the applicant a real opportunity to present his or her case despite it raising triable issues.

#### **4.3.3 Procedural Justice**

The final precinct of the larger undue regard to procedural technicalities test is informed by the notion of procedural justice. A procedurally just system is defined as one that must strike the appropriate balance among three potentially competing ends: accuracy, cost, and meaningful participation rights in order to foster substantive equality within civil litigation.<sup>121</sup>

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<sup>118</sup>Nairobi HCCC No. 810 of 2001;(2001) 2 EA 460.

<sup>119</sup>(2009) eKLR.

<sup>120</sup>(2003) 1 Wales Law Reports 954.

<sup>121</sup>Stancil P, ‘Substantive Equality and Procedural Justice’, 102(4) *Iowa Law Review*, 2017, 1633.

In his Southern California Law Review procedural justice appraisal, Solum defines three competing ends in his postulation that a procedural regime is only just when it strikes the appropriate balance between accurate application of law to facts, cost minimization, and meaningful participation rights.<sup>122</sup>

To begin with, the Cost of Adjudication Principle provides that the systemic costs of adjudication are not excessive in relation to the interests at stake in the proceeding or type of proceeding as to exceed its benefits.<sup>123</sup>

Under the Participation Principle, the arrangements for the resolution of civil disputes should be structured to provide each interested party with a right to meaningful participation, as specified by the following conditions and provisos:

- (a) The Interest Condition that the right to participation should extend to all persons who will be the subject of final binding adjudication and to all other persons with a substantial interest that, as a practical matter, will be finally determined;
- (b) The Scope Condition that the right of participation should include advance notice to the individuals specified in the interest condition and an equal and meaningful opportunity to present evidence and arguments that are relevant to the dispute at a minimum;
- (c) The Impracticability Proviso that in the event that actual notice or an opportunity to be heard is impracticable, the absent interested individual shall be provided with an adequate legal representative and the proceeding shall be structured so as to give full and fair consideration to the interests of the absent individual; and
- (d) The Fair Value of Procedural Justice Proviso that such arrangements shall ensure the fair value of the basic liberties, including the right to reasonable Advocates' fees in suits for relief from violation of such liberties.<sup>124</sup>

Finally, the Accuracy Principle posits that the arrangements for the resolution of civil disputes should be structured to maximize the likelihood of achieving the legally correct outcome in each proceeding. He went on to create exceptions by stating that a

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<sup>122</sup>Lawrence B. Solum, *Procedural Justice*, 78 S. Cal. L. Rev, 2004, 181-183.

<sup>123</sup>Lawrence B. Solum, *Procedural Justice*, 252.

<sup>124</sup>Lawrence B. Solum, *Procedural Justice*, 252.

procedure may depart from the maximization of accuracy only for the following reasons:

- (a) The Substantive Rights proviso that ensures the process of adjudication does not unfairly infringe on the substantive rights guaranteed by the basic liberties, such as the rights of privacy and freedom of speech;
- (b) Fair Distribution of the Risk of Inaccurate Adjudication Proviso in a bid to provide for a fair distribution of the risk of inaccurate adjudication; and
- (c) The Systemic Accuracy Proviso that provides that procedures may also be arranged to maximize systemic accuracy where the arrangement will not result in inaccuracy in particular cases, in order to maximize systemic accuracy, so long as the procedures are announced in advance and create general rules with which parties can comply by making a reasonable good faith effort.

Tyler takes a different approach by stating that there are four key procedural justice principles: voice, neutrality, respect, and trust. Voice is connoted by litigants wanting to have the opportunity to tell their side of the story in their own words before decisions are made about how to handle the dispute or problem, thus feeling that the authority sincerely considered their arguments before making their decision.<sup>125</sup> Neutrality refers to the judges being viewed as principled decision makers who make decisions based upon rules and not personal opinions and who apply legal rules consistently across people and over cases. Respect refers to litigants perceiving that they are viewed as important and valuable and that when they have concerns and problems both they and their problems will be taken seriously by the legal system. Finally, trust is inferred when litigants feel that judges are listening to and considering their views; are being honest and open about the basis for their actions; are trying to do what is right for everyone involved; and are acting in the interests of the parties, not out of personal prejudices.

Meares & Tyler simplify these principles by classifying them as two elements to procedural justice: quality of decision making and quality of treatment.<sup>126</sup> Effectively, procedural justice is only served when procedure and its application guarantees the

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<sup>125</sup> R Tyler, *Procedural Justice and the Courts*, <http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/Tyler.ashx> on 6 January 2018.

<sup>126</sup> Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice* *The Yale Law Journal Forum*, *The Jurisprudence of Procedural Justice*, 2014, 537.

quality of decision making by guaranteeing accuracy and courts making objectively just substantive decisions vis-à-vis the quality of the treatment that people experience when dealing with societal authorities conveying social messages of inclusion of its high quality and vice versa, with undue regard to procedural technicalities violating its guarantees.<sup>127</sup>

Accordingly, undue regard to procedural technicalities violates procedural justice when procedure and its application fails to guarantee the quality of decision making seen in the absence of a structure that maximizes the likelihood of achieving the legally correct outcome in each proceeding and courts making objectively just substantive decisions; and when litigants feel that judges are neither listening to and considering their views, being honest and open about the basis for their actions; trying to do what is right for everyone involved nor and acting in the interests of the parties.

#### **4.4 Conclusion**

The proposed test states as follows: Undue regard to procedural technicalities occurs when a court or tribunal deals and direct itself with injudicious consideration of any laws, rules and procedures in a manner that:

- a) Violates the Overriding objective;
- b) Obstructs and even extinguishes legal rights, in place of facilitating; and
- c) Is procedurally unjust.

The discussion in this chapter has presented a compelling case for reforms in policy and legislation in the adoption of the undue regard to procedural technicalities test. The chapter sets the stage for specific recommendations in chapter five intended to facilitate the attaining of the overriding objective principle by guaranteeing due regard to procedural technicalities and by and large civil justice.

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<sup>127</sup> As above. 536.

## CHAPTER FIVE: CONCLUSION & RECOMMENDATIONS

### 5.1 Introduction

In line with the theoretical framework, the literature review and the research findings in Chapter three, Chapter four made a compelling case for reform in policy and legislation towards effective delivery of civil justice by establishing an undue regard to procedural technicalities test. By the agency of these findings, this Chapter makes recommendations and suggests the way forward by prescribing strategic reform measures to ensure due regard to procedural technicalities.

To adequately address the problem highlighted in Part 1.3 of Chapter one that outlines the problem statement. Chapters Two, Three and Four evaluated the need for an undue regard to procedural technicalities legal test. This appraisal meets the aims of the inquiry, namely: (a) to analyze the postulates of Article 159(2)(d) of the Constitution that establishes that administration of justice is to be done without undue regard to procedural technicalities; (b) to probe if courts orchestrate undue regard to procedural technicalities in the conduct of their business; (c) to evaluate the effects of undue regard to procedural technicalities in the civil justice system; and (d) to recommend a test to guide the courts in determining what due regard to procedural technicalities is.

The study was based on the hypothesis set out in part 1.7 of chapter one, namely “There is need for a proper delineation of what amounts to due regard to procedural technicalities.” This was ascertained by the findings in Chapters Two, Three and four. To wit, the absence of a defined and established legal test has resulted in an equivocal legal provision that does not effectively aid the civil justice system. The recommendations in this Chapter outline the necessary steps for inculcation of this legal test in the pursuit of civil justice.

Pursuant to appraisal of texts, various legal principles and case law, a progressive test was forged. The submitted test provides that undue regard to procedural technicalities occurs when a court or tribunal deals and directs itself with injudicious consideration of any laws, rules and procedures in a manner that: violates the Overriding objective; obstructs and even extinguishes legal rights, in place of facilitating; and is procedurally unjust.

## 5.2 Recommended Policy and Legislation Reforms

Drawing from the discourse in Chapter four, the need for statutory intervention to improve the application of the undue regard of procedural technicalities in the administration of civil justice cannot be emphasized enough. At the hand of that, this study recommends reform in policy and legislation by proposing the test which states as follows: Undue regard to procedural technicalities occurs when a court or tribunal deals and direct itself with injudicious consideration of any laws, rules and procedures in a manner that: violates the Overriding objective; in place of facilitating obstructs and even extinguishes legal rights; and is procedurally unjust.

The Rules committee established under the Civil Procedure Act ought to review, consider and assimilate the proposed undue to procedural technicalities test into law pursuant to its the power to make rules for any matters relating to the procedure of civil courts inconsistent with the Act.<sup>128</sup>

Alternatively, the Chief Justice may, by the power vested in him to issue practice notes or directions to resolve procedural difficulties arising under the Act in order to facilitate the attainment of the overriding objective of the Act in consultation with the Rules Committee.<sup>129</sup> As outlined in the appraisal in the preceding chapters, undue regard to procedural technicalities directly affects the overriding objective as it has implications on the resolution of civil disputes in terms of justice, expediency, proportionality and their affordability.

The final recommendation emanates from the Chief Justice's Working Party on Civil Justice Reform in the United Kingdom Chief Justice Reform that proposed the 'Underlying objective' to assist in the interpretation and application of rules of court, practice directions and procedural jurisprudence and to serve as a statement of the legitimate aims of judicial case management, in lieu of the conventional and arguably ineffective overriding objective. The Report outlined the underlying objective of civil procedure as:

- (i) Increasing cost- effectiveness in the court's procedures;
- (ii) The expeditious disposal of cases;

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<sup>128</sup> Section 81, Cap 21, Laws of Kenya.

<sup>129</sup> As above, § 3.

- (i) Promoting a sense of reasonable proportion and procedural economy in respect of how cases are litigated;
- (ii) Promoting greater equality between parties;
- (iii) Facilitating settlement; and
- (iv) Distributing the court's resources fairly, always recognizing that the primary aim of judicial case management should be to secure the just resolution of the parties' dispute in accordance with their substantive rights.<sup>130</sup>

This breakdown takes cognizance of express and elaborate legitimate aims of judicial case management thus providing a more comprehensive test as compared to the vital but basal overriding objective.

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<sup>130</sup> Civil Justice Reform, *Final Report of the Chief Justice's Working Party On Civil Justice Reform*, (2003) 56.

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