Breaking the Chains of Tradition: An argument for the introduction of a dispensing power in Kenya's Law of Succession

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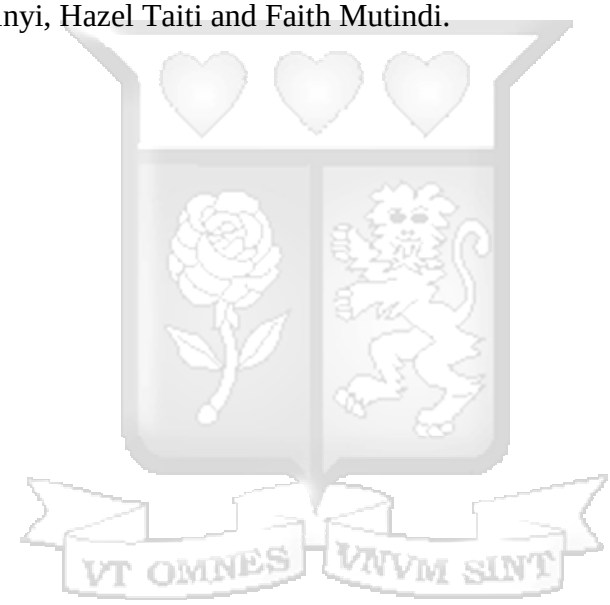

DECLARATION

I, KINYANJUI JOY WANJIKU, 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:.....
James Nyiha

ABSTRACT

This research project aims to critically examine Kenya's succession system, with a specific focus on the formalities within its legal framework. The study explores these formalities in the contemporary context and seeks to understand the historical evolution, emphasising the need for amendments to the Law of Succession Act. The Law of Succession governs the intricate process of property devolution after ones demise. Focused on the mechanisms outlined in the Law of Succession Act, this paper delves into the complexities of testate and intestate succession. It goes ahead to argue that the current legislation and its interpretation which prioritises formalities over substance, frustrates the deceased's intention, creating injustice.

Exploring Kenyan precedent on the same, the paper highlights cases where well intentioned wills are deemed invalid due to procedural missteps, frustrating the testator's intention and well as the beneficiaries of the same. Courts, mandated to interpret rather than remake wills, face challenges in ensuring fairness amidst rigid adherence to formalities. Drawing from Kenyan and international case law, this paper underscores instances where the insistence on formalities undermines the very purpose of succession law: ensuring rightful distribution of property according to the deceased's desires. This paper examines the tension between strict adherence to formal will requirements and respecting the testator's true testamentary intentions in Kenya's law of succession.

As a solution, the paper proposes introducing a "dispensing power" in Kenyan courts. This power would allow judges to disregard minor, harmless errors in will formalities while upholding the testator's true testamentary intentions. The study concludes with a proposed framework for incorporating dispensing authority within Kenya's Law of Succession Act. This framework calls for defined criteria, anti-misuse measures, an equitable approach, strong authentication, virtual witnessing norms, and specified technical requirements. The goal is to provide a nuanced method that adheres to testamentary formality while allowing those suffering compliance issues.

LIST OF CASES

Banks v Goodfellow (1870) LR 5 QB 549.

Beth Wambui & another v Gathoni Gikonyo & 3 others (1988) eKLR.

*Estate of Grant Patrick Carrigan (*2018) The Supreme Court of Queensland.

In the matter of the Estate of James Ngengi Muigai (1996)

In re Estate of Jackson Sakwa Chakongo (Deceased) [2019] eKLR.

*In re Estate of John Karabu Gichuru (*Deceased) [2013] eKLR.

*In re Estate of Kevin John Ombajo (*Deceased) [2021] eKLR.

In re Estate of Leslie Wayne Quinn (2019) The Supreme Court of Queensland.

In re Knibbs (1962) 1 WLR 852, 855-856.

In re Pengilly (1992) Supreme Court of South Australia (unreported).

*In re Wilden (*deceased) (2015) Supreme Court of South Australia.

In re Yu (2013) Supreme Court of Queensland (unreported).

Karioko Muruatetu & Wilson Thirimbu Mwangi v Kenya (2016) eKLR.

Pavlinko v Pavlinko (1959) Supreme Court of Pennsylvania

*Re Zauls (*1995) Supreme Court of South Australia (unreported).

LIST OF LEGAL INSTRUMENTS

Age of Majority Act (1974).

Children Act (2022).

Constitution of Kenya (2010).

Interpretations Act (1901) (Australia).

Law of Succession Act (1986).

Memorandum, The Law of Succession (Amendment) Bill, (2021).

The Law of Succession (Amendment) Act (2021).

The Probate and Administration Rules, 1980.

Wills Act (1968) (Australia).

Wills Act (1968) (New Zealand).

Wills Act (1968) (South Australia).

CHAPTER ONE: INTRODUCTION

1.1 Background

Succession deals with the devolution of a deceased person's property to their beneficiaries or rightful claimants.[1] The Law of Succession handles the mechanisms and processes through which property is distributed following someone's passing. This is governed by the Law of Succession Act as well as its subsidiary legislations.[2] The core instrument of succession is the will, which refers to a record of a deceased person's wishes and intentions pertaining to the devolution of a person's estate upon their death.[3] Upon one's death, when it comes to will-making, one is named either testate or intestate upon their death. Intestate succession occurs where there is no will at all, or the will has been written but is deemed invalid by the courts for one reason or the other. On the other hand, testate succession involves the disposal of property according to a will or testament. This paper will focus on testate succession as well as intestate succession whereby the will has been deemed invalid on the grounds of formalities.

Two types of wills legal in Kenya's succession legislation are highlighted in the Law of Succession Act as being oral wills and written wills.[4] Oral wills are wills made verbally in the presence of two or more competent witnesses with the intent of ensuring that the wishes are carried out.[5] Written wills on the other hand are covered in section 11 of the Law of Succession Act. The formalities of such wills include: that it should be signed by the testator or they must affix a mark on the same, that the mark made by the testator should appear to have intent to give effect to the will, the signature or mark is made before two or more competent witnesses and that each witness must attest and sign the will in the presence of the testator.[6] For testate succession,[7] courts are very stringent on the formalities of written wills. As a consequence of the same, the intended means to

[1] Merriam Webster Dictionary, 4th ed.
[2] The *Probate and Administration Rules*, 1980; The *Law of Succession (Amendment) Act* 2021.
[3] Musyoka W, *Law of Succession*, 1st ed, Law Africa Publishing, Nairobi, 2010, 31.
[4] Section 8, *Law of Succession Act*, (1981).
[5] —<When is an Oral Will Valid? - HG.org> on 11th February 2023.
[6] Musyoka W, *Law of Succession*, 60.
[7] For testate succession to occur, the deceased must have written a valid will. Here, the estate of the deceased, after satisfying all existing obligations, is distributed in the manner set out in the will.

an end (formalities as a means of preventing fraud) have become ends in themselves resulting in several substantively valid wills being sacrificed on the altar of formalities.[8] In such cases, the deceased will be stated as having passed intestate despite having written a will.[9] This often frustrates the testator's intentions as well as the intended beneficiaries down the line.[10]

In Kenya, the duty of the court is to construe wills, not remake them. Meaning that the courts interpret the words as used by the testator in the will regardless of whether they produce an unfair result. Such a mechanical application of this principle can sometimes produce absurd results and obvious injustice.[11] The goal of this rule, however, is to prevent the inclination to give meaning to a will that the testator never intended, despite the obvious injustice that can ensue from its mechanical execution. It also serves as a warning against sloppy drafters.[12]

As is in the case of ***Re Estate of John Karabu (2013)***,[13] the deceased had made 3 documents purporting to be his will. The first one was made on 12th January 2010, the second one on 8th February 2011, and the third one on 20th September 2011. The first and last one had the name of the testator and fingerprint; it did not indicate whose though. There was also no evidence of it having been attested to. These were therefore held to be invalid under the Law of Succession Act. The document made on 8th February 2011 bears the names of persons described as witnesses whose names appear just after that of the writers which satisfied the requirements of Section 11(c) of the Law of Succession Act.[14] However, Section 11(c) further requires that the witnesses, apart from being witnesses to the testator signing the document or acknowledging his signature on the document, should append their signatures to the document to authenticate the signatures of the maker.[15] The purported witnesses in this matter did not affix their signatures to the document, it was therefore not a valid testamentary instrument. The deceased was declared to have died intestate

[8] Johnson R. J, 'Dispensing with Wills Act Formalities for substantively valid wills' Richmond School of Law, 1992, 10 —<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2007&context=law-faculty-publications > on 12th February 2023.
[9] Musyoka W, *Law of Succession*, 89.
[10]Oosterhoff A, 'The usefulness of a validating power' WEL Blog, 2020, 1, —<https://pure.port.ac.uk/ws/portalfiles/portal/12149460/Dispensing_Powers_Clean.pdf > on 12th February 2023.
[11] Musyoka W, *Law of Succession*, 90.
[12] Musyoka W, *Law of Succession*, 90
[13] In re Estate of John Karabu Gichuru (Deceased) [2013] eKLR.
[14] That the document is signed by the maker in the presence of two or more witnesses.
[15] In re Estate of John Karabu Gichuru (Deceased) [2013] eKLR.

as his will was not properly attested. His property would therefore be subject to intestate succession.

Similarly, in the matter of ***Beth Wambui & Another V Gathoni Gikonyo & 3 Others***[16], the Court of Appeal took into account two testamentary documents left behind by the deceased. The one marked "B" was written by a witness at the deceased's instruction or dictation and affirmed his preferences with regard to a specific piece of property. Even while the court determined that the aforementioned document was ineligible to be considered a written will, it added, "*The document is not witnessed as necessary. But it conveys the wishes of the deceased. Is it possible to consider that an oral will was made as nothing prevents a person from disposing of his possessions in an oral will*?" As seen, the insistence of courts on formalities such as witnesses and attestation of signatures tends to be frustrating. The deceased's ability to freely distribute their property upon death is founded upon social welfare considerations.[17] The courts and the justice system, therefore, forgo this, and justice, by failing to accommodate the deceased's final wishes by reason of mere formality.

A possible solution to this may be the introduction of a dispensing power also referred to as the harmless error rule[18] or the validating power[19] to Kenyan Courts. The dispensing power of a court refers to the right to recognize as legally valid a document that reflects the deceased's true testamentary intentions but does not satisfy the form requirements of a valid will.[20] This concept is presented as a balance between the legal requirements of a valid will and the need to protect the genuine testamentary wishes of a deceased person. This power operates on intention where the court must be satisfied that the informal will does indeed represent the testator's final wishes.[21] The intention-based dispensing power has the advantage of allowing courts some discretion to

[16] Beth Wambui & another v Gathoni Gikonyo & 3 others [1988] eKLR.
[17] Glover M, 'A social welfare theory of inheritance regulation' 2 (1) *Utah Law Review,* 2018, 455.
[18] The harmless error rule states that if there is a harmless error made in the execution of a will, the will can still be considered valid and offered to probate. The harmless error rule will occasionally excuse errors on the signature and attestation requirement of the execution ceremony.
[19] Such a power permits the court to make an order declaring a document to be effective as a will even though it has not fully complied with the requirements on formalities if the court is satisfied that the document embodies the deceased's testamentary intentions.
[20] Hedlund R, 'Introducing a dispensing power in English succession law' Trusts and Trustees, *Oxford University Press,* Volume 25, (No 7), 2019, 722.
[21] Hedlund R, 'Introducing a dispensing power in English succession law' 724.

validate documents that would otherwise fail based on legal technicalities.[22] This power also allows for electronic wills (text messages, videos, as well as documents saved on computers) to be granted probate.[23] A grant of probate is a legal document that authorises an executor to manage the estate of a deceased person in accordance with the provisions of the deceased's will. This power applies when such documents purport to be someone's final wishes on the distribution of their estate.[24] Such as in ***re Estate of Kevin John Ombajo*** where the main issue of whether an audio-visual recording, meant to revoke a written will, met the legal requirements of a valid oral will and could revoke a written will.[25] Thus, while the law must insist on a range of requirements to prevent laissez-faire approaches to making wills or the accidental making of wills, a measure of discretion would help save wills that would otherwise be valid if not for formal technicalities. One may think that the will maker is to blame, but perhaps this may be a testament to how pedantic our legal system can be.[26]

By introducing a dispensing power in succession matters in court, the legal system can ensure that the wishes of the testator are respected while also ensuring that the rights of potential beneficiaries are protected. It can also provide a means of addressing any concerns or disputes that may arise after the testator's death.

1.2 Statement of the problem

Section 11 of the Law of Succession Act provides that for a will to be valid and properly executed it must be signed by the testator or by someone else in the presence of and by the direction of the testator. With the court's insistence on the requirements of a valid will as per Section 11, there comes an injustice as seen in the matter of ***Re Estate of John Karabu***, where the court's decision can be seen as a grievance. This can also be seen as inequitable as equity looks at intent rather than

[22] Langbein H, 'Excusing Harmless Errors in the execution of wills: A report on Australia's tranquil revolution on probate law' 81 (1) *Columbia Law Review*, 1987, 5.
[23] Probate is the legal process through which the authenticity of a will is established. Silvana, 'Wills in Kenya' Silvana and Associates Advocates, 2021, 1, _<https://swkadvocates.com/2021/04/12/wills-in-kenya/ > on 19th February 2023.
[24] Langbein H, 'Excusing Harmless Errors in the execution of wills: A report on Australia's tranquil revolution on probate law' 81 (1) *Columbia Law Review*, 1987, 4.
[25] In re Estate of Kevin John Ombajo (Deceased) [2021] eKLR
[26]'The Frightening Statistics for the Validity of Wills', ILSPA's *Legal Secretary Journal*, 2011, 1—<https://www.legalsecretaryjournal.com/validity_of_wills> on 19th February 2023.

form. As dispensing power is intention-based, this study therefore looks at whether Kenya's Law of Succession Act should be amended to provide for a dispensing power as an equitable remedy.

1.3 Purpose of the study

The purpose of this study is to contribute to inheritance and succession studies on the introduction of a dispensing power in Kenya. Previous studies in Kenya regarding succession have been focused on providing gender equity as well as making more provisions for children.[27] This study intends to show that Kenya has moved past that and is ready for a new system of will-making. Furthermore, this study proposes to observe the law through the lens of formalities and investigate their role within an inheritance system. This study will be unique in so far as it involves an analysis of Kenya's interpretation of the Law of Succession Act specifically section 11 and recommend how the courts can be lenient on the same. The specifics of this study will be explained in the problem statement, research objectives and the research questions.

1.4 Hypothesis

On formalities, Kenya's application of Section 11 of the Law of Succession Act is too stringent. This is when compared with the provisions of the overriding principles and Article 159 (c) of the Constitution of Kenya. Article 159 states that justice shall be administered without undue regard to procedural technicalities. The insistence of Kenyan courts on formalities goes against this constitutional right. This can also be looked at through the lens of equity, specifically, the maxim that states equity looks at intent rather than form, which is exactly what the dispensing power does. The introduction of a dispensing power to the Law of Succession Act would be beneficial as it addresses the issue of the notoriously rigorous nature of probate law which has proven to work against the idea that justice should change and evolve over time as well as providing what the proper course of action should be.

1.5 Research Objectives

1. To investigate the importance of formalities within Kenya's succession system and whether they still serve the same purpose in this day and age.

[27] Memorandum, *The Law of Succession (Amendment) Bill*, 2021.

2. To assess the evolution of the current law of succession in Kenya and the circumstances surrounding its creation as well as the changes in time and circumstances that necessitate amendment of Kenya's Law of Succession Act.
3. To examine other jurisdictions, in this case, the country of Australia and its application of the dispensing power in court to ascertain what lessons we as Kenya can learn from them.
4. To investigate the way forward on the amendment of the Law of Succession Act to allow for a dispensing power that is proportionate to its aim of fairly distributing the estate of the deceased.

1.6 Research Questions

1. How important are formalities within a succession system and should the courts be strict on the application of the same?
2. What is the current approach of Kenyan law to succession with regards to formalities of a will and why should it be amended?
3. Can a comparative analysis of dispensing powers in the succession laws of Australia effectively highlight gaps in Kenya's legislation, propose solutions, and offer valuable insights?
4. What will the way forward be following the amendment of Kenya's Law of Succession Act to provide for a dispensing power?

1.7 Importance of the study

As seen in the decided cases of ***Beth Wambui & Another V Gathoni Gikonyo & 3 Others*** and ***John Karabu***, harsh interpretation of the law affects the heirs, intended beneficiaries as well as rightful claimants of the estate of the deceased. The introduction of a dispensing power in succession within Kenyan law would provide necessary flexibility in certain cases where the strict application of the law could lead to unjust or unintended outcomes. The introduction of this power will mitigate potential injustices for example a surviving spouse or children may be left without adequate support or assets due to the way the law is structured. A dispensing power would give judges the ability to make decisions that take into account the specific needs of each case. Furthermore, in adapting to changing societal norms, a dispensing power would allow the law to adapt to these changes and ensure that the principles of fairness and justice are upheld.

With the proposal of introducing a dispensing power, my study will be useful to lawmakers, adjudicators, and the testator's intended beneficiaries. It will be important for lawmakers to consider the questions involving the formalities of a will. This will be useful to them by providing a guide on how they can amend the law of succession to make it equitable, and to adjudicators when deciding on whether the requirements on formalities of a will are necessary when the testator's intention is clear. Most importantly, this problem affects intended beneficiaries through frustrating the testator's intentions which happens through the insistence on formalities. My study will be favourable in so far as it will try to address the said problem by allowing for a dispensing power in succession matters.

1.8 Literature Review

So far, the only discussion on dispensing power in Kenya was focused on whether the courts of Kenya dispense power on a will made in the United Kingdom purporting to devolve property and estates in Kenya. The issue here was whether Kenya would grant probate to a will that was made following the formalities required in the United Kingdom. The will was therefore valid under the succession laws of the United Kingdom but not Kenya. There have been no further discussions on granting the validating power to Kenyan laws on succession.

1.8.1 Dispensing power

The law of Australia is known to have introduced the dispensing power to the law with the Wills Amendment Act of 1975.[28] It went ahead to amend section 11A of the Wills Act which allows the Supreme Court to validate a will in which there has been some failure to comply with the requirements of the Wills Act.[29] This power was introduced to remedy the Wills Act formalities being too strict and frequently frustrating the intent of the testator rather than fulfilling it and subjecting the deceased estate to an intestate distribution scheme.[30] As much as the courts will grant probate to informal wills, the other requirements of will writing must be followed. These

[28] Langbein H, 'Excusing Harmless Errors in the execution of wills: A report on Australia's tranquil revolution on probate law' 81 (1) *Columbia Law Review*, 1987, 1.
[29] Langbein H, 'Excusing Harmless Errors in the execution of wills: A report on Australia's tranquil revolution on probate law' 81 (1) *Columbia Law Review*, 1987, 1.
[30]—< Modern Trend in Wills Act Formalities: Substantial Compliance and Harmless Error Doctrines.)> on 27th February 2023.

include capacity and knowledge, and approval.[31] On capacity, there is the requirement of age and mental capacity. To make a valid will, one must have attained the majority age of 18 years. This is also the same in Kenya where a person is of full age and ceases to be under any disability because of age upon attaining the age of eighteen years.[32]

Secondly, the testator must have testamentary capacity also known as mental capacity. The four-part test of the same is contained in the locus classicus matter of ***Banks v Goodfellow*** by Cockburn CJ as "*he must have a sound understanding and disposing mind and memory. In other words, he ought to be capable of making his will and an understanding of the nature of the businesses in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and how it is to be distributed amongst them*"[33] The same is reflected in Kenyan case law where this holding was used to determine matters on testamentary capacity as is in the matter of ***the Estate of James Ngengi Muigai***.[34] This test is only used where there are doubts about the testator's testamentary capacity at the time of the making of the will. Such is reflected in the Law of Succession Act which creates the presumption that a person making a will of sound mind unless the contrary is proved.[35]

As per Hedlund, testamentary capacity must be considered even when granting probate to informal wills[36] as per the recent Australian case of ***Re Nichol***[37] where the deceased composed a text message which was never sent as his final will and the court was deliberating on whether to grant probate to the text message or grant a letter of administration of intestacy to his widow. The question of his testamentary capacity was raised given that the text was composed shortly before he committed suicide.[38] Furthermore, it must be established that the testator knew and approved of the contents of the will. This can be shown by proving that the will was read out loud to the testator. These are the legal requirements of making a will that must be met for a will to be granted

[31] Musyoka W, *Law of Succession*, 45.
[32] Section 2, *Age of Majority Act*, 1974.
[33] *Banks v Goodfellow* (1870) LR 5 QB 549.
[34] In the matter of the Estate of James Ngengi Muigai Nairobi High Court succession cause number 523 of 1996 (Koome J).
[35] Section 5 (3), *Law of Succession Act*, 1982.
[36] Hedlund R, 'Introducing a dispensing power in English succession law' 724.
[37] Re Nichol; Nichol v Nichol (2017).
[38] What constitutes a will? —<https://www.newnhams.com.au/re-nichol-what-constitutes-a-will/>.

probate even when it does not comply with formality requirements. The requirements on formalities as per the dispensing power, can be overlooked as long as the legal requirements are met. The dispensing power is mainly concerned with the intent of the will-maker in that the court must be satisfied that the informal will truly represents the testator's testamentary intention.[39] Summarily, there must be a document, the document should contain the testamentary intentions of the deceased and the deceased and that the deceased intended the document to constitute his or her will.

Propounders of the substantial compliance rule have criticized the concept of dispensing power. Substantial compliance means actual compliance with respect to the substance essential to every reasonable objective of the statute.[40] Regarding succession and will making, this means that for a document to be granted probate, there must be clear and convincing evidence that the testator intended the document to be his last will and testament and that the will substantially complies with the Wills Act formalities.[41] This concept was first advocated by Langbein in 1975 who then later described it as a flop. This is because the application of the substantial compliance did not prove to be successful and yielded very few results. Years later, he wrote his paper 'Excusing harmless errors in the execution of wills: A report on Australia's Tranquil Revolution in Probate Law', defending the introduction of a dispensing power. These two papers have been used by countless scholars in defending either position.

Furthermore, in applying this dispensing power, it is important that the scope and the extent of these powers be considered carefully.[42] Firstly, the question of what a document is arises. In New Zealand, the word document is confined to written records[43] but this has been interpreted to include audio recordings. Australia on the other hand sees documents as including both hard and soft copy documents therefore admitting video and audio recording to probate among others.[44] The Law

[39] Hedlund R, 'Introducing a dispensing power in English succession law' 724.
[40] Govindarajan M, 'Doctrine of substantial compliance and 'intended use' '*Tax Management India.com* , 2011, 1 — <DOCTRINE OF SUBSTANTIAL COMPLIANCE AND INTENDED USE >- on 2nd March 2023.
[41] Langbein H, 'Substantial Compliance with the Wills Act' 88 *Harvard Law Review* (1975).
[42] Brook J, 'To dispense or not to dispense; A comparison of Dispensing Powers and their Judicial Application', University of Portsmouth 2018, 1— <https://pure.port.ac.uk/ws/portalfiles/portal/12149460/Dispensing_Powers_Clean.pdf> on 1st March 2023.
[43]Section 6, *Wills Act*, as read with Section 29, *Acts Interpretations Act* (1901).
[44] Brook J, 'To dispense or not to dispense; A comparison of Dispensing Powers and their Judicial Application', University of Portsmouth 2018, 5.

Commission takes this into consideration and proposes a dispensing power that would apply to 'records demonstrating testamentary intention'.[45] However, Brooke states that the definition provided by the commission does not give further details of testamentary intention which she addresses.

She claims that testamentary intention has received little analysis to date as it is relatively simple to infer testamentary intention from any document purporting to be a will.[46] Courts have distinguished between mere statements of information (for example the deceased describing what he believed to be the case) and those intended as a request to be acted on (instructions for a will).[47] Unfortunately, the differentiation is easier to achieve in theory than in practice especially when the statements are made casually.[48] This goes to show that the dispensing power, as useful as it is, still has some kinks to be worked through.

1.8.2 Evolution of the current law of succession and the needs for reform.

The current law of succession in Kenya came about as a result of the findings and recommendations of the Report of the Commission on the Law of Succession of 1966.[49] The commission was one assigned by the first president, his Excellency Mzee Jomo Kenyatta, with the mandate of considering the existing laws on marriage, divorce and succession.[50] Seeing as the main goal was to consolidate and harmonise all the existing laws, the commission was successful in doing the same and as a result, repealing all the previous statute such as the East Africa Order in Council, the Indian Succession Act, the Mohammedian Divorce and Hindu Succession Act as well as the ones contained in the eighth schedule of the Law of Succession Act,[51] in order to pave

[45] Law Commission. *Making a will,* Consultation Paper 231, 102.
[46] Brook J, 'To dispense or not to dispense; A comparison of Dispensing Powers and their Judicial Application', University of Portsmouth 2018, 6.
[47] Re Knibbs [1962] 1 WLR 852, 855-856.
[48] Sloan B, '*Borkowski's Law of Succession*' 4th ed., Cambridge, London, 2017, 84-85.
[49] Report of the Commission on the Law of Succession.
[50] "To consider the existing law on succession to property on death, the making and proving of wills and the administration of estates; to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform code applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, the Indian Applied Acts and the relevant Acts of Parliament including those governing Muslim and Hindu succession; to prepare a draft of the new law in accordance with the commissioners' recommendations".
[51] The Hindu Wills Act of India; The Probate and Administration Act of India; The Hindu Succession Act; The Administration of Estates by Corporations Act; The Commonwealth Probates Act; The Africans Wills Act; The Colonial Probates Act 1882 of England (as applied to Kenya).

way for one that would provide for African, Hindus, and Muslims. This was necessary in that each group had its own governing laws or cultural norms and succession. This was necessary at the time because the existence within Kenya of this variety of succession laws created numerous conflicts.[52] The report provided for formalities by directly lifting from Section 50 of the Indian Succession Act[53] which states that all wills made under the Indian Succession Act must be in writing and that the testator shall sign or affix his mark to the will, or it shall be signed by some other person in his presence and by his direction; the signature of the testator or of the person signing for him shall be placed in that it shall appear that it was intended thereby to give effect to the writing as a will and that the will shall be attested by two or more witnesses each of whom must have seen the testator sign or affix his mark to the will.[54]

In light of the challenges and changes of the modern society we live in, more flexible approaches must be adopted regarding testamentary procedures given that the law is somewhat fixed and new issues and concerns that can emerge over time may not be adequately addressed by existing laws. Crawford addresses this in her paper with her prominent claim being that current formalism leads both to false positives (grant of probate to a document not intended by the deceased as their will) as well as false negatives (denial of probate of a document clearly intended as the deceased's will).[55] She proposes an intent- based rule to make the validation of wills written by low income individuals more likely as well as those written by middle class individuals who cannot afford an attorney, let alone consulting one.[56] The standard she proposed also lays the foundation for electronic wills. She fully agrees with the 'creating' a curative doctrine to forgive or pardon any

[52] Cotran E, 'Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?' 40 (2), *Journal of African Law*, Cambridge University Press, 1996, 196.
[53] Report on the commission on the Law of Succession, 17th March 1967, 86.
[54] Section 50, *Indian Succession Act*, (1925).
[55] Crawford B, 'Will Formalities in the Twenty- First Century' *2019 Wisconsin Law Review* , 2018, 269 — <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683> on 22nd February 2023.
[56] Crawford B, 'Will Formalities in the Twenty- First Century' *2019 Wisconsin Law Review* , 2018, 269 — <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683> on 22nd February 2023.

failure of meeting any statutory formalities.[57] Crawford further notes that formalities are meant to serve an evidentiary, channelling, cautionary as well as protective function.[58]

In reference to the Wills Act, Langbein states the purposes of the formalities as being the written terms force the testator to leave permanent evidence of the substance of his wishes.[59] On signatures and attestation, he states that they provide evidence of the genuineness of the instrument and that the attestors serve the purpose of protecting the testator from crooks and fraud. This serves the evidentiary, cautionary, and protective functions highlighted by Crawford.[60] The evidentiary function involves proving what the testator intended. The channelling function on the other hand makes it easier for probate courts to determine a person's will at death if they are channelled into a will with standardised formalities.[61] When addressed along with the protective function which seeks to prevent undue influence, unconscionable conduct, fraud, forgery or impropriety, the traditional functions of formalities can be seen clear as day. Crawford claims that given how the majority of states have adopted varying rules regarding formalities, the formalities never served a meaningful purpose in the first place.[62] She also goes ahead to question the need for continued reliance on the same.[63]

Purser and Cockburn in response to Crawford examine these traditional functions and comment that there are two main approaches: formalist and functionalist. [64] Formalists adhere strictly to the

[57] See for example, the *Montana Code Annotated* 2021, Title 72, Chapter 2, Part 5; 72-5-523 on writings intended as wills; Although a document or writing added upon a document was not executed in compliance with 72-5-522, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute; their will, a partial or complete revocation of the will. An addition to or an alteration of the will or a partial or complete revival of the decedents formerly revoked will or of a formerly revoked portion of the will.

[58] Crawford B, 'Will Formalities in the Twenty- First Century' *2019 Wisconsin Law Review* , 2018, 271, — <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683> on 22nd February 2023.

[59] Langbein H, 'Excusing Harmless Errors in the execution of wills: A report on Australia's tranquil revolution on probate law' 81 (1) *Columbia Law Review*, 1987, 3.

[60] Langbein H, 'Excusing Harmless Errors in the execution of wills: A report on Australia's tranquil revolution on probate law' 81 (1) *Columbia Law Review*, 1987, 3.

[61] Glover M, 'Decoupling the law of will-execution' 88 (3) *St. John's Law Review,2014, 629.*

[62] Crawford B, 'Will Formalities in the Twenty- First Century' *2019 Wisconsin Law Review* , 2018, 271, — <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683> on 22nd February 2023.

[63] Purser K, Cockburn T, 'Will formalities in the twenty-first century- promoting testamentary intention in the face of societal change and advancements in technology: An Australian response to Professor Crawford' Semantic Scholar, 2019, 58.

[64] Purser K, Cockburn T, 'Will formalities in the twenty-first century- promoting testamentary intention in the face of societal change and advancements in technology: An Australian response to Professor Crawford' Semantic Scholar, 2019, 59.

formal requirements while functionalists focus more on an intention-based devolution of property. They praise Crawford's article as being incredibly timely given the anecdotal evidence indicating an increase of informal wills. Crawford also addresses the possibility of electronic wills[65] which is discussed in detail by Đurđić-Milošević who breaks down the concept of electronic wills as offline electronic wills, online electronic wills, and qualified custodian electronic wills. She goes ahead to look at each of them and analyse if they are able to serve formal functions. In summary, she concludes that it is important to extend to new testamentary forms and to new tools for estate planning.[66] Zalucki suggests that research needs to be conducted to examine what consequences in this field of law follow, inter alia, from the wide availability of audio and video digital recorders, and what are the legal consequences of registering one's last testament using such equipment.[67]

In addition to this being the twenty-first century, the introduction of a dispensing power would be beneficial in extenuating circumstances. The recent COVID-19 pandemic is an example of such mitigating factors as it was a public health crisis. As a result of the pandemic, the fulfilment of testamentary requirements such as attestation by witnesses was made quite difficult and impossible in some situations especially with the stay at home rule enforced.[68] This is addressed by several authors as the surge of deaths during the pandemic made it highly difficult and nearly impossible to comply with the formalities of executing wills.[69] In collaboration, Crawford, Purser and Cockburn discuss how as much as the law provided for will-execution during the pandemic, those provisions are likely to disappear in the near future. They advocate for the elimination or relaxation of will formalities to include the permanent adoption of the pandemic era emergency orders.[70] The orders given mid pandemic on will execution have proven to be desirable from a practical

[65] Crawford B, 'Will Formalities in the Twenty- First Century' *2019 Wisconsin Law Review* , 2018, 269, —<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683> on 22nd February 2023.
[66] Đurđić-Milošević T, 'Testamentary formalities in the time of the pandemic' (5) *EU and Comparative Law Issues and Challenges Series (ECLIC) 2021*, 437.
[67] Zalucki M, 'Testamentary Succession, New Technologies, and Recodification: On the Research That Needs to be Conducted 2 (2) *Societas Et Jursiprudentia*, 2014, 19.
[68] Đurđić-Milošević T, 'Testamentary formalities in the time of the pandemic' (5) *EU and Comparative Law Issues and Challenges Series (ECLIC) 2021*, 424.
[69] Crawford B, Purser K, Cockburn T, 'Will Formalities in a Post- Pandemic World: A Research Agenda' *The University of Chicago Legal Forum*, 2021, 93 —<https://deliverypdf.ssrn.com/delivery.php? > on 6th March 2023.
[70] Crawford B, Purser K, Cockburn T, 'Will Formalities in a Post- Pandemic World: A Research Agenda' *The University of Chicago Legal Forum*, 2021, 95 —<https://deliverypdf.ssrn.com/delivery.php? > on 6th March 2023.

standpoint and are also consistent with critiques that traditional will formalities do not necessarily serve their intended purposes.[71]

1.9 Scope and Limitations of the study

Geographically, the scope of this study will be limited to critically looking at and analysing the law of succession in Kenya as well as the jurisdictions where a dispensing power has been introduced such as Australia.

Historically, this study will discuss the evolution of the Law of Succession in Kenya as well as a doctrinal analysis of the dispensing power. This study will look at the circumstances behind its introduction and said jurisdictions and reasons behind its successes and failures. This will involve studying the evolution of policies that allowed it to thrive in its introduction and application. This will go hand in hand with the legal framework and regulations associated with the introduction of the dispensing power.

The limitations of this study fall into the complexity of succession law, jurisdictional variations as well as limited precedent and data availability. The intricate nature of succession law is woven with layers upon layers of statute, case law and historical foundations. Attempting to introduce a new aspect into something that has such a rich history may prove to be limiting in a legal system such as Kenya. Due to jurisdictional variations of social, political, legal, and cultural aspects, the law of succession varies from country to country which might affect the introduction of a dispensing power.

Finally, there is a scarcity of authoritative case law and data surrounding dispensing power, hindering a comprehensive analysis of an issue which can be seen as a somewhat novel introduction to law.

[71] Crawford B, 'Will Formalities in the Twenty- First Century' *2019 Wisconsin Law Review* , 2018, 269, 276-277 — <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683> on 22nd February 2023.

1.10 Definition of terms

Attest: Signing of a document by a qualified witness.

Beneficiary: a person (or entity) who is designated to receive the benefits of property owned by someone else.

Deceased: the recently dead person in question.

Estate: means the free property of a deceased person.

Executor: means the free property of a deceased person.

Heir: a person legally entitled to the property or rank of another on that person's death

Intestacy: Intestacy is the state of dying without a will. If a person dies without a will they are said to have "died intestate.

Dispensing power: the right to grant probate over a document that reflects the testator's true testamentary intentions, but which does not satisfy the formality requirements.

Law of Succession Act: An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.

Probate: means the certificate of a court of competent jurisdiction, that a will, of which a certified copy is attached in the case of a written will, has been proved a valid will, with a grant of representation to the executor in respect of the estate.

Testator: Testator is the legal term for an individual who creates a will.

Will: means the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II of the Law of Succession Act and includes a codicil.

1.11 Chapter Breakdown

Chapter one: It contains details of the study in the background as well as the hypothesis and justification. Among others, it also contains the research questions and research objectives of this study therefore setting the foundation for the subsequent chapters.

Chapter two: This chapter will provide the lens through which the matter of the introduction of a dispensing power in Kenya will be viewed (conceptual framework) as well as the methodology that will be used to research on the topic.

Chapter three: This chapter will investigate the need of formalities within an inheritance system specifically on witnessing and attestation. I will evaluate the background of these formalities as well as what mischief was being aimed at the time of their making. With this I will assess whether the formalities were effective in dealing with them and whether that mischief still exists today. It will make the argument that the use of these formalities is bringing more harm than good.

Chapter four: This chapter will examine the country of Australia and its application of the dispensing power in their succession laws. The aim here is to identify and suggest methods to enhance our own laws based on practice in other jurisdictions as well as identifying lessons Kenya can learn from the same. Furthermore, this chapter will offer recommendations on what can be done to Kenyan legislation on succession based on looking at Australia's laws on the same.

Chapter five: This chapter will conclude the research done.

CHAPTER TWO: CONCEPTUAL FRAMEWORK AND METHODOLOGY

2.1 The Concept of Equity and Dynamic Justice

The development of the concept of equity and dynamic justice was a necessity in that existing theories do not adequately address the specific needs and challenges of the Kenyan context. Firstly, existing legal and theoretical frameworks have limitations in addressing the unique complexities of Kenya's succession system as well as its deep culture and socio-economic history. Secondly, Kenya is a diverse country with numerous ethnic groups which all have distinct cultural norms and practices relating to succession and inheritance. Existing theories may not be compatible with this diversity. There is therefore the need to develop a conceptual framework that respects and adapts to this all while maintaining equity. This also ties into the fact that Kenya has a dual legal system- customary and statutory laws. The existing frameworks might not be equipped to effectively integrate these two systems.

The concept of equity and social justice is designed to ensure not only fairness in the distribution of the deceased estate and take into account changes in circumstances and societal values. Developing a new conceptual framework, as mentioned earlier, can help bridge the gaps left by these inadequate theories and provide a more contextually relevant approach to succession and inheritance in Kenya.

As separate concepts, justice refers to concepts of fairness, equality, moral behaviour, lawfulness, and order.[72] The concept of dynamic justice emphasises the importance of adapting the law to changing social and cultural circumstances, to ensure that justice is always being served. This concept takes into account the fact that laws that were once considered just may become outdated and therefore unjust as new information and perspectives emerge with time. It recognizes that the law is not fixed and that it needs to be flexible enough to address emerging issues and concerns.
Equity on the other hand is concerned with creating a level playing field for everyone. This refers to fairness and justice and it often involves looking beyond the strict application of legal rules to consider the intent of the parties involved. It is based on the idea that the law cannot always provide

[72] Human Rights Careers —<https://www.humanrightscareers.com/issues/what-is-justice/ > on 6th March 2023.

a just outcome, especially in cases where there are mitigating circumstances or unique individual situations. Specifically, the maxim: equity looks at intent rather than form will be used. In pursuit of equity, it is important to look beyond the form of policies, practices, and systems and consider the individual's intent. When equity is approached through the lens of intent, it helps us identify systemic inequities that may exist. From this, we can also acknowledge, investigate, and address the historical and structural barriers that have contributed to inequalities. Focusing on intent rather than form is crucial in achieving actual equity. In the succession realm.

Together, the concept of equity and dynamic justice aims at creating a more just society. This is done by constantly evaluating and updating the law and ensuring that it remains effective in promoting fairness and equality. This concept can help in eliminating systemic inequities and barriers that prevent certain groups from accessing relief. The two complement each other by addressing the evolving nature of the law and the inequalities leading to certain groups of individuals being disadvantaged.

The concepts of equity and dynamic justice have found application not only within Kenya but also internationally. Within Kenya, the evolution of these principles has resulted in the identification of outdated laws that have been deemed unconstitutional due to their inconsistency with contemporary legal standards.[73]

For example, Section 2(b) of the Children's Act of 2001 was found to be inconsistent with the 2010 Constitution of Kenya. The provision of the Children's Act granted the father of a child the authority to unilaterally determine the child's status as his own,[74] leading to an automatic right of relationship for children born within wedlock, while those born outside of wedlock lacked such recognition unless the alleged father acknowledged them.[75] This differentiation violated the fundamental right to equal treatment before the law for children born outside wedlock, contravening Article 53 of the Constitution of Kenya by going against the best interests of the child

[73] <http://www.kenyalaw.org/kl/index.php?id=8662>_
[74] Section 2 (b) *Children Act* (2001).
[75] NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another [2019] eKLR, High Court at Kakamega.

as articulated in the same article.[76] It also contravenes Article 27(4) of the Constitution of Kenya, which prohibits discrimination based on birth.[77]

In summary, the case of NSA & another v Cabinet Secretary for the Ministry of Interior and Coordination of National Government & another [2019] eKLR underscored the unconstitutionality of several provisions, including Sections 2(b), 27(2), 94(1), 102(1), 158(4)(b) & (c) of the Children's Act, as well as Section 3(2) of the Law of Succession Act and Section 12 of the Births and Deaths Registration Act.[78] These legal developments reflect the ongoing refinement of Kenya's legal framework to align with evolving principles of equity and justice. Most notably, however, the Supreme Court of Kenya rendered the mandatory death sentence unconstitutional in the landmark 2017 case ***Karioko Muruatetu & Wilson Thirimbu Mwangi v Kenya***. The Court ruled that the compulsory application of the death penalty in murder cases, as mandated by Section 204 of the Penal Code, was unconstitutional.[79]

The evolution of equity and dynamic justice can also be seen in the lifting of discriminatory and segregation laws such as the Jim Crow laws in the United States or the apartheid laws in South Africa.[80] Apartheid began as a social project for the government based on a series of laws that eventually made it legal.[81] Through the endless bloodshed and demonstrations in South Africa the birth of a new constitution, which enfranchised Black citizens and other racial groups, took effect in 1994, and elections that year led to a coalition government with a non-white majority, marking the official end of the apartheid system.[82]

The recent COVID-19 pandemic serves as a stark illustration of the application of the concept of equity and dynamic justice in the law of succession. This concept's primary goal is to respond to the ever-evolving nature of the law in light of changing times and mitigating circumstances.

[76] Article 53. *Constitution of Kenya* (2010).
[77] Article 27(4) *Constitution of Kenya* (2010).
[78] NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another [2019] eKLR, High Court at Kakamega.
[79] Karioko Muruatetu & Wilson Thirimbu Mwangi v Kenya (2016) eKLR.
[80] Apartheid (Afrikaans; apartness) is the name of the policy that governed relations between the white minority and the non-white majority of South Africa during the 20th Century.
[81] — <AUHRM Project Focus Area: The Apartheid | African Union >
[82] —< https://www.history.com/topics/africa/apartheid >

Consequently, it strives to counteract the potential for the law to discriminate against certain groups of people, thus emphasising the urgent need for change. The pandemic brought into sharp focus the main problem with the Wills Act of the United States: it makes will-making inaccessible.[83]

In the height of the pandemic, the fulfilment of some testamentary requirements such as attestation was made quite difficult and almost impossible with the social distancing orders as well as the stay-at-home rules.[84] Some states in the United States addressed this by advocating for the introduction of a statutory dispensing power that allowed courts to admit documents to probate that would have otherwise failed as valid wills, including digital documents and recordings.[85] Courts have been reluctant to accept audio-visual recordings as valid wills due to lack of statutes and regulations surrounding the same. This was the contentious issue in the matter in ***re Estate of Kevin John Ombajo (Deceased)***.[86] In this matter, the deceased left behind an audio-visual recording with the intention of this recording revoking his previously written will. The witness to this recording was to reduce it into writing under the deceased's supervision, but the deceased passed before this could take place. The court, however, used the provisions of Section 18(2) of the Law of Succession Act which provides that an oral will cannot revoke a written will.

The pandemic situation prompted the legal community to explore the necessity of creating new types of wills, as seen in Spain. They also considered modernising specific components of the will form, including digitalization. This included the possibility of creating electronic wills and allowing witnesses to participate in the online will-making process through audio-video links, heralding a new era of testamentary law.[87] These harrowing times underscored the significance of incorporating equity and dynamic justice into the law of succession to ensure that it remains fair and responsive to the evolving needs and challenges of society.

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[83] Horton D, Kress R, 'Covid-19 and Formal Wills' *Stanford Law Review Online*,2020,19-<https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/05/73-Stan.-L.-Rev.-Online-Horton-Weisbord.pdf > on 1st October 2023.

[84] Crawford B, Purser K, Cockburn T, 'Will Formalities in a Post- Pandemic World: A Research Agenda' *The University of Chicago Legal Forum*, 2021, 93 —<https://deliverypdf.ssrn.com/delivery.php? > on 6th March 2023.

[85] Crawford B, Purser K, Cockburn T, 'Will Formalities in a Post- Pandemic World: A Research Agenda' *The University of Chicago Legal Forum*, 2021, 93 —<https://deliverypdf.ssrn.com/delivery.php? > on 6th March 2023.

[86] In re Estate of Kevin John Ombajo (Deceased) [2021] eKLR

[87] Đurđić-Milošević T, 'Testamentary formalities in the time of the pandemic' (5) *EU and Comparative Law Issues and Challenges Series (ECLIC) 2021*, 423.

Introducing a dispensing power to Kenya's law of succession using the concept of equity and dynamic justice can be justified considering the evolving nature of society and technology as well as social norms and the need to ensure fairness and justice. With the evolution of technology, the introduction of a dispensing power can allow for audio/visual recordings to serve as wills or even text messages are seen in the matter of ***Re Nichol***. This can also allow for individuals without access to legal will-making services or those who live in remote areas to still have some testamentary control over their assets.

A dispensing power in courts would allow judges to exercise discretion in certain cases and to deviate from the strict application of the law to achieve a fair and just outcome. By using the concept of equity and dynamic justice, courts would be more equipped to respond to the changing needs of society and ensure justice is served in a just and equitable manner in that it would allow for flexibility of the law.

This concept of equity and dynamic justice will be used to critique Kenya's approach, interpretation, and application of Section 11 of the Law of Succession Act by looking at whether the formalities as set out in Section 11 still serve their traditional intended purpose and whether it is following the provisions of equity and dynamic justice.

2.2 Methodology

This study will use secondary research including both primary and secondary sources. These will include statutes of Kenya, Australia, and South African case law, self-published articles, books, and chapters in books, journals, dissertations, and other online internet sources. This paper will further delve into the history of the Law of Succession and the origin of the requirements of formalities and investigate the need of the same within an inheritance system to study the background of formalities and the mischief being aimed at. From this, the existence of said mischief then versus now will be examined. A comparative analysis will also be used in order to assess the adoption of a dispensing power in other jurisdictions within and outside of Africa.

2.2.1 Using Hard Resources and Doctrinal Analysis

The second chapter of this study seeks to investigate the need for formalities within an inheritance system. To achieve this, the study will rely on secondary sources such as books, journals, case law, and articles as there are infused opinions on the same. From there, the questions of why the formalities were created back then and what mischief they were being aimed at will be answered. Additionally, the doctrinal analysis will investigate the existence of said mischief then versus now. The study will also make use of primary sources such as the Law of Succession Act, Law of Succession (Amendment) Act as well as the Probate and Administrative Law Act. The doctrinal analysis will be used to look at Section 11 of the Law of Succession Act and criticize its interpretation so far and recommend that it be interpreted on an intentional basis.

2.2.2 Historical analysis

I will begin by assessing the current law of succession in Kenya where historical analysis will be used to look at its evolution. With that, the study aims to demonstrate that social and cultural circumstances have changed, and the law should adapt to the same to ensure justice is served. A doctrinal analysis will also be used to answer the same question.

2.2.3 Comparative Analysis

A comparative analysis with the country of Australia will be used to assess their adoption of a dispensing power with their law of succession. Australia was the first country to introduce a dispensing power within its laws of succession in 1975 setting itself as a blueprint from which other countries could set their own.[88] Similar to Kenya, Australia has a history of being a British colonial legacy with both countries were formerly colonies, therefore inheriting common law systems heavily influenced by English legal principles.[89] Additionally, both Kenya and Australia operate as multi-party democracy states with enshrined fundamental rights with legal frameworks emphasizing individual rights and dues process.[90] Analysing their respective succession legislations through this lens could reveal similarities and differences from which we as Kenya

[88] Goldsmith J, 'The frustration of genuine wills' *Trust Quarterly Review*, 2013, —<The frustration of genuine wills | STEP > on 20th November 2023.
[89] Kaunda K, 'Intestacy Laws and the influences of colonialism- The case of Kenya in comparison with the English and Australian Laws of Succession' Zbornik Pravnog Fakulteta u Zagrebu— <https://heinonline.org/HOL/P?h=hein.journals/zboprvfaz71&i=1>
[90] <https://www.homeaffairs.gov.au/mca/Statements/english-multicultural-statement.pdf>

could borrow from. Thirdly, both countries are members of the commonwealth and are therefore governed by common law.[91]

Furthermore, the succession laws of Kenya and Australia are both similar in terms of the formalities required for a will to be granted probate. They both state the Requirements for the validity of wills specifically on formalities in section 11 of Kenya's Law of Succession Act as well as Section as well as Section 11A of Australia's Wills Act as being: (1) A will must be in writing. (2)A will must be signed and witnessed. (3) The will-maker must—sign the document; or direct another person to sign the document on his or her behalf in his or her presence. (4) At least 2 witnesses must—be together in the will-maker's presence when the will-maker—complies with subsection (3); or acknowledges that- he or she signed the document earlier and that the signature on the document is his or her own; another person directed by him or her signed the document earlier on his or her behalf in his or her presence; and each sign the document in the will-maker's presence.

The main difference comes in Section 11A of their Wills Act providing that "a document or part of a document containing a deceased persons testamentary intentions is considered valid even if it was not executed properly and in accordance with the formal requirements of this Act."[92] This section further highlights that if the Supreme Court is satisfied that the deceased person intended the document or part of it to constitute his or her will, the court will declare it as valid.[93]

[91] —< https://thecommonwealth.org/our-member-countries >
[92] Section 11A, *Wills Act*, 1968 (New Zealand).
[93] Section 11A, *Wills Act*, 1968 (New Zealand).

CHAPTER THREE: CASE STUDY

3.1 Introduction

Kenya's current approach to the interpretation of Section 11 of the Law of Succession Act which provides for written wills has been stringent, not allowing for any testamentary freedom as alluded by Section 5 of the same act. Section 5 provides that any person who is of sound mind and not a minor may dispose of all or any of his free property by will and may thereby make any disposition by reference to any secular or religious law that he chooses.[94] Section 5 essentially embodies the principle of testamentary freedom by providing that any person is capable of disposing of all or any of his property as he deems fit as long as he is of sound mind and legal age (18 years old)[95]. The rationale for this freedom is that the testator is free to do what he wants with his property by way of will just as he would have during his lifetime. However, this freedom is not absolute as seen with the rigid interpretation of Section 11 of the Law of Succession Act.

3.2 Case Law

The court's insistence on adhering to the formalities provided in Section 11 has proven to be detrimental to the intentions of the deceased. This matter was realized in the matter of ***Beth Wambui & another v Gathoni Gikonyo*** where the Court Of Appeal considered two testamentary documents by the deceased, one of which was written by a witness upon the direction of the deceased and confirmed his wishes concerning how his property was to be distributed to his family and kin upon his death.[96] While the court found that the said document did not qualify as a written will, the court stated the following: "*The document is not witnessed as required. But it expresses the deceased's wishes. Couldn't it be regarded as an oral will? There is nothing to prevent a person from making an oral will disposing of his property.*" In this instance, the court was willing to look at the document provided as an oral will as opposed to a written will owing to the fact that the document expressed the deceased's intentions and wishes. This can be compared to what Lord Langdale MR said before the House of Lords when introducing the Wills Act "*It is so important to the welfare of families, and to the general interests of the community, that men should be able*

[94] Section 5, *Law of Succession Act* (Act No 11 of 2021).
[95] Section 5, *Law of Succession Act* (Act No 11 of 2021).
[96] Beth Wambui & another v Gathoni Gikonyo 1988 (eKLR).

to dispose of their property by will, and that their lawful intentions should be faithfully carried into execution after their deaths, and the laws under which these objects are to be effected are now attended with so much doubt and perplexity…"[97]

Similarly, in the matter of the ***Estate of Jackson Sakwa Chakongo***,[98] the opposing advocate questioned the validity of the deceased's will, seeing as it did not meet the requirements of formal validity as set out in Section 11 of the Law of Succession Act as it was not attested by at least two witnesses as required. The document submitted to the court had a thumbprint above the name of the deceased. As per Section 11, the written will must be signed by the testator and his signature must be attested by at least two witnesses.[99] This means that the testator ought to affix his signature on the will in the presence of two or more witnesses who should also affix their signatures, similarly witnessed by the testator. The purported will presented to the court bore one signature which was that of the deceased, lacking the signatures of two or more witnesses as prescribed by the law.[100] The court therefore claimed that if the document before them was intended to be a will, then it was not properly attested and cannot be deemed a valid will. The purported will was therefore deemed invalid and its contents unable to form the basis for distribution of the estate of the deceased.

In the context of this case, where the validity of the will was challenged due to noncompliance with formalism requirements, a notable parallel arises with the problems raised by Crawford in her assessment of the implications of formalism.[101] The case serves as a tangible example illustrating the practical implications of Section 11 of the Law of Succession Act, emphasizing the need for two witnesses to attest to the testator's signature.[102] The court's decision, deeming the will invalid, reflects the repercussions of a strict adherence to formalities. This echoes Crawford's concerns about false negatives in probate decisions, where a document clearly intended as a will is denied recognition due to technical shortcomings.

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[97] Goldsmith J, 'The frustration of genuine wills' *Trust Quarterly Review*, 2013, —<The frustration of genuine wills | STEP > on 20th November 2023.
[98] In re Estate of Jackson Sakwa Chakongo (Deceased) [2019] eKLR.
[99] Section 11, *Law of Succession Act* (Act No 11 of 2021).
[100] In re Estate of Jackson Sakwa Chakongo (Deceased) [2019] eKLR.
[101] Crawford B, 'Will Formalities in the Twenty- First Century' *2019 Wisconsin Law Review* , 2018, 269 —<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683> on 22nd November 2023.
[102] Section 11, *Law of Succession Act* (Act No 11 of 2021).

Crawford refers to the consequences of current formalism as false positives and false negatives.[103] The former meaning the granting of probate to a document not intended by the deceased to be their will and the latter being false negatives where denial of probate to a document clearly intended to be the deceased will.[104] The above cases are indications of the false negatives she alludes to. She goes ahead to propose an intent-based rule as a solution to the same, echoing Lord Langdale. The introduction of this intention based rule will also give way to electronic wills which are slowly being recognised as valid wills.[105] This would include electronically stored wills, even if they could not be printed, as long as they could be seen on a screen.[106] A text message could qualify as a document, and so could a film, video or CD on which a will had been written.[107]

Although not formally recognised in many jurisdictions including Kenya, electronic wills and the use of technology as a medium of documenting evidence is on the rise.[108] As a result of the COVID-19 pandemic they are more relevant than ever.[109] The matter of electronic wills in Kenya was first brought up in the matter ***of re Estate of Kevin John Ombajo*** where the point of contention revolved around the admissibility of an audio-visual recording.[110] In this matter, the deceased made his last will and testament in a recorded audio visual medium which was meant to revoke his previously written will. The court therefore had to contend on whether the audio-visual recording could be admissible as an oral will. The petitioner's counsel posited that the recording firstly failed to meet the criteria of an oral will as outlined in Section 9 of the Law of Succession Act.[111] The argument hinged on the timing of the deceased's demise in relation to the recording, contending that, despite the deceased creating the audio-visual document in the presence of three witnesses, more than six months elapsed between the recording and the demise. Moreover, it was emphasized

[103] Crawford B, 'Will Formalities in the Twenty- First Century' *2019 Wisconsin Law Review* , 2018, 269 — <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683> on 22nd November 2023.
[104] Crawford B, 'Will Formalities in the Twenty- First Century' *2019 Wisconsin Law Review* , 2018, 269 — <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683> on 22nd November 2023.
[105] Crawford B, 'Will Formalities in the Twenty- First Century' *2019 Wisconsin Law Review* , 2018, 269 — <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683> on 22nd November 2023.
[106] In Re Trethewey (2002) 4 VR 406 [A computer file on a hard drive was admitted as a will] The Supreme Court of Victoria.
[107] Peart N, 'Where There Is a Will, There Is a Way- A New Wills Act for New Zealand', *Waikato Law Review* 26, 2007, 32.
[108] In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018).
[109] *COVID-19 Omnibus (Emergency Measures) Act* 2020 (No 11 of 2020) (The Parliament of Victoria).
[110] In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018).
[111] No oral will shall be valid unless it is made before two or more competent witnesses; and the testator dies within a period of three months from the date of making the will.

that the deceased did not fall under the categories of armed forces or merchant marine, essential for the exception stipulated in Section 9(1) to be applicable.

In support of this stance, counsel referenced the precedent set in the case of ***Estate of Elizabeth Wanjiku Munge***[112] where the court underscored the pivotal significance of the date of making an oral will. The argument posited that the temporal validity of an oral will is restricted to three months unless it pertains to a mariner. Therefore, an electronic will made in audio visual form does not fall in either category of written or oral wills, which are the only forms of wills accepted by the law.

Additionally, the assertion was made that the audio-visual recording does not qualify as a codicil[113] within the purview of Section 3(1) of the Act[114]. Furthermore, it was argued that none of the actions prescribed by Section 18 which provides for the revocation of a will transpire.[115] Counsel contended that Section 18(2) of the Act explicitly stipulates that a recording cannot serve as a means to revoke a written will of the deceased.[116] This nuanced legal analysis forms a critical facet of the broader discourse on the probate proceedings, encapsulating the intricate interplay between statutory provisions and case law jurisprudence. Despite this, counsel for the respondent (the deceased) urged the court to focus on the deceased testamentary intentions rather than the form of the will.[117] To support this argument, they cited the holding in the matter of the ***Estate of Grant Patrick Carrigan.***[118] In this matter, the court stated the conditions necessary for a document to form part of a will as: the existence of the document; the document purports to embody the testamentary intentions of the deceased; and that the deceased by some words demonstrated that it was his intention that the document operate as his last will.[119] To further this argument, it was stated that the deceased, nearing the time of his death, was blind and could not therefore not write or authenticate anything that was written on his behalf, therefore highlighting the need for the

[112] Estate of Elizabeth Wanjiku Munge (deceased) [2015] eKLR.
[113]A codicil is an addition or supplement that explains, modifies, or revokes a will or part of one.
[114] Section 11, Law of Succession Act (Act No 11 of 2021).
[115] No will or codicil, or any part thereof, shall be revoked than by another will or codicil declaring an intention to revoke it, or by the burning, tearing or otherwise destroying of the will with the intention of revoking it by the testator, or by some other person at his direction.
[116] A written will shall not be revoked by an oral will.
[117] In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018).
[118] Estate of Grant Patrick Carrigan (2018) The Supreme Court of Queensland.
[119] Estate of Grant Patrick Carrigan (2018) The Supreme Court of Queensland.

audio-visual recording. The only difference between a written will and the audio-visual recording was the medium used to capture the wishes of the testator and both can be used to memorialize the wishes of the testator.

The court highlighted the fact that audio-visual recordings have not been recognised in the Law of Succession. The court therefore turned to the Evidence Act, specifically sections 78A, 106A and 106B to gauge the conditions upon which electronic records are admissible in court.[120] The court found that the audio-visual recording met the threshold of subsection 106B of the evidence act and could be admissible as evidence. Regarding this, it was however noted that the audio-visual recording must also be tested with regards to the already established principles of wills and will making. The deceased was of age and had possessed clarity of thought at the time of his death, therefore meeting the legal requirements for will making. Despite the presence of several factors pointing towards the need to admit the audio-visual recording as a valid will and debates on whether to admit it as an oral will, the court still deemed this audio-visual recording as invalid and the written will which he intended to revoke was executed as the testator's final wishes.

Kenya's law of succession system has failed to provide for the execution of electronic wills given that there is no statute or regulations directly addressing them. The law requires that a will be signed by the deceased and to be attested to at least two witnesses who are also to append their signatures on the will in the presence of the deceased. With the introduction of electronic wills, how will the issue of validity be addressed if not through attestation by witnesses? This was addressed in the matter of the ***estate of Leslie Wayne Quinn*** who made a video on his iPhone explaining how he wanted his estate to be distributed in a video entitled "Will" before committing suicide.[121] This video was backed up on his computer as well as on a CD. The court in this matter was satisfied that the video recording was a document and used the dispensing power to admit the video recording to probate. It was a document that Leslie Quinn intended to be their final will.[122] Of course, the court emphasized that the other requirements for a valid will must be met. Therefore, for such a document to be granted probate, testamentary capacity must be proved or inferred by

[120] In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018).
[121] In the estate of Leslie Wayne Quinn (2019) The Supreme Court of Queensland.
[122] In the estate of Leslie Wayne Quinn (2019) The Supreme Court of Queensland.

the court. The court will also have to consider the nature of the document and the circumstances under which it was made- whether the language is clear and rational and whether the deceased appear to speak calmly and rationally.

As stated by Justice Achode in the matter of ***re Estate of Kevin John Ombajo*** "*Just like conducting court sessions virtually, there is a need to have policies and regulations in place to ensure that these processes are guarded against the challenges that are already there such as cyber security, obligations to assess capacity, understanding, undue influence and duress*."[123] The Law of Succession Act definitely needs to be changed to accommodate the vast majority of Kenyans who have embraced technology and are eager to create a wealth and succession plan. Given the significance or impact of a will, it is critical that regulations be in place to direct the creation of electronic wills and specify the conditions under which they can be deemed genuine. [124]

One could argue that the recommendations of the dispensing power could lead to people deliberately making erroneous wills knowing that their errors will be overlooked by the court.[125] However, it should be noted that the dispensing power has to be the exception, not the rule of law. This way, this power will be used to save purported wills where it is clear that the document represents the deceased's testamentary wishes.[126]

3.3 Conclusion

In conclusion, as evinced by the above case law, the strict interpretation of Section 11 of the Law of Succession Act on the formalities of written wills has proven to be detrimental to the wishes of the deceased as well as the intended beneficiaries. A possible solution to this may be to follow the example of Australia's Wills Act which not only provides for documents that are wills to be

[123] In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018).
[124] Walubengo T, Beverly T, 'Rethinking Succession Practices in Kenya: The Feasibility of Electronic Wills' CM Advocates LLP, 2022,1—<Rethinking Succession Practices in Kenya: The Feasibility of Electronic Wills - CM Advocates LLP > on 23rd November 2023.
[125] Hedlund R, 'Introducing a dispensing power in English succession law' Trusts and Trustees, *Oxford University Press,* Volume 25, (No 7), 2019, 722.
[126] Hedlund R, 'Introducing a dispensing power in English succession law' Trusts and Trustees, *Oxford University Press,* Volume 25, (No 7), 2019, 722.

granted probate but also for documents that appear to be wills.[127] The document must therefore purport to do all or any of the things described in the definition of a will.[128] Furthermore, the fact that it must appear to be a will suggests some finality about the document that could be used to exclude drafts, notes or instructions.[129]

[127] Peart N, 'Where There Is a Will, There Is a Way- A New Wills Act for New Zealand', *Waikato Law Review* 26, 2007, 34.
[128] Section 14, *Wills Act* (New Zealand).
[129] Peart N, 'Where There Is a Will, There Is a Way- A New Wills Act for New Zealand', *Waikato Law Review* 26, 2007, 34.

CHAPTER 4: COMPARATIVE ANALYSIS

4.1 Introduction

This chapter explores in detail the possible benefits of adding a dispensing power to Kenya's Law of Succession Act. It is essential for governments and law makers to critically evaluate their succession laws and make the necessary adjustments as the global landscape shifts. A comparative analysis with Australia's laws of succession, specifically relating to formalities, provides a useful lens through which we can identify potential solutions, draw parallels as well as extract insights in this setting. This chapter will navigate into the intricacies of the Australian dispensing power, dissecting its historical roots, legal framework and practical application as well as looking at the legal instruments used to justify its existence. Ultimately, by drawing from the Australian experience, this chapter shall carefully weigh the potential advantages and risks of ensuring Kenyan Courts with this discretionary power.

4.1.1 A brief overview of Kenyan Law of Succession

Section 11 (a) of the Law of Succession Act states that no written will shall be valid unless the testator has signed or affixed his mark to the will, that the signature or mark is so placed that it shall appear that it was intended to thereby give effect to the writing as a will and that the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will.[130]

As seen in the provided case law, this has proved challenging, especially with the court's stringent interpretation and application of the same. It has proved to be frustrating to the intentions of the deceased as well as to their intended beneficiaries when the court fails to acknowledge a written will due to some lacking formality that could easily be overlooked.

4.1.2 An overview of Australia's law of Succession

Since 1975, Australia has been at the very center of shaping influence in the common law world with the introduction of a discretionary power which allows the Supreme Court to validate a will

[130]Section 11, *Law of Succession Act*, (1981).

in which there has been some failure to comply with the formal requirements set out in the Wills Act.[131] This power came to be known in scholarly literature as the dispensing power.[132] The introduction of the dispensing power can be traced back to a formality known as strict compliance which created a conclusive presumption of invalidity for an imperfectly executed will therefore unless every statutory formality is complied with, the instrument is denied probate even if there is compelling evidence that the deceased intended the instrument to be his will.[133] The formalities being referred to are as per the Wills Act where the exercise of testamentary power required that a will be written, signed by the testator and attested by two witnesses where in some states, the witnesses must be each other's presence whilst attesting to the will.[134] This bears a striking resemblance to those in Kenya's Law of Succession Act.[135] These formalities serve the important functions of preventing fraud, giving the testator an impression of the seriousness of the process as well as improving reliability and recognition of the most recent will.[136] Therefore, compliance with these rules was the only proof of testamentary intent that the court would recognize.

In ***re Estate of Pavlinko***, an immigrant couple from Eastern Europe, highlights the strict enforcement of formalities in will execution.[137] Despite their limited understanding of English and the laws surrounding wills, Hellen and Vasil sought to establish identical estate plans. In the event of either spouse's death, the surviving partner would inherit the property, and upon both spouses' demise, the remaining assets were to go to Hellen's brother. Consulting an attorney who spoke their native language, the couple followed legal guidance to draft and sign their wills. However, after Hellen's death, it was discovered that a crucial error had occurred – each had mistakenly signed the other's will. Despite clear evidence of their intended wishes, the court, prioritizing strict compliance, deemed neither will valid, preventing Hellen's brother from inheriting the property as intended.

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[131] Langbein H, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, resistance, expansion' <https://law.adelaide.edu.au/ua/media/415/alr-38-1-ch01-langbein.pdf > on 18th December 2023.
[132] Langbein H, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, resistance, expansion' <https://law.adelaide.edu.au/ua/media/415/alr-38-1-ch01-langbein.pdf > on 18th December 2023.
[133] Glover M, 'Decoupling the law of will-execution' 88 (3) *St. John's Law Review, 2014, 599.*
[134] Section 12(2), *Wills Act* (South Australia).
[135] Section 11(2), *Law of Succession Act*, (1981).
[136] Lester S, 'Admitting defective wills to probate, twenty years later: New evidence for the adoption of the harmless error rule' 42, *Real Property, Probate and Trust Journal* 3, 2007, 578.
[137] *Pavlinko v Pavlinko* (1959) Supreme Court of Pennsylvania.

The Pavlinko case exemplifies instances where courts invalidate wills, even when the decedent's intent is evident, due to failure to strictly adhere to formalities. Despite acknowledging an honest mistake in the execution process, the court emphasized the precedence of form over intent, rendering Vasil's will invalid and underscoring the importance of meticulous adherence to prescribed legal formalities in will creation. This decision, along with many others, sparked a lot of criticism of the courts for being too interested in the formalities of the law over the substance of the wills brought to them. The Court recognized the injustice in the Pavlinko judgement and went as far as saying that the deceased may have thought he made a will, but the statute says he has not.

With this began the scholarly conflict between the form of a will and the testator's intent. The reforms introduced to combat this included: having lesser formalities, substantial compliance as well as the harmless error rule, also known as dispensing power. The harmless error rule, with time, became the better option for Australian Courts to adapt. The South Australian reform of dispensing power empowers courts to excuse non-compliance with the formalities laid out in the Wills Act where in such cases, the court determines that the deceased intended the document to constitute his or her will.[138] This power has been applied vastly as seen in ***In re Pengilly*** where a signed, unattested will was riddled with uninitialized deletions and alterations. Here, the judge looking at the document as well as extrinsic evidence as a whole, was convinced that the deceased did indeed intend the altered document to constitute her will and ordered it to probate.[139] By contrast, a purported will in ***In re Zauls*** was denied probate owing to the fact that the evidence pointed to the possibility of fraud in that they found that the handwriting and signature on the purported will may not have been that of the testator.[140]

Following similar judgements over the years, the Australian government officially introduced the Wills (Miscellaneous) Amendment Act in 1994 which resulted in a number of changed to the Wills Act of 1936 which included changing the context of section 12(2) to read "*Subject to this Act, if*

[138] Langbein H, ' Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, resistance, expansion' <https://law.adelaide.edu.au/ua/media/415/alr-38-1-ch01-langbein.pdf > on 18th December 2023.
[139] *In re Pengilly* (1992) Supreme Court of South Australia (unreported).
[140] *In re Zauls* (1995) Supreme Court of South Australia (unreported).

the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses testamentary intentions of a deceased person, the document will be admitted to probate as a will of the deceased person"[141] Looking at recent Australian case law, courts using the harmless error rule have generally had great success differentiating between situations where the decedent hesitated to finalize his intentions or where the will was the subject of fraud from those where he accidentally or mistakenly failed to comply with Wills Act formalities.[142]

With the passage of time, more questions surrounding will-making began to surface, one of the most prominent beings will-making using technological means. This involves will-making using videos or on one's phone or computer. Australian courts have even used their dispensing power to validate audio and visual wills.[143] In 2013, in the matter of ***In re Yu***, a series of documents created on the testator's iPhone was regarded as a valid will.[144] Here, the deceased took his own life and shortly before he did, he created a series of documents on his iPhone where he declared that the document was to be seen as his will. Upon an examination of said document, it was clear that it set out the testamentary intentions of the deceased in that it dealt with the whole of the deceased's property.[145] In other decisions, the court has decided that a DVD containing the video recording of the deceased were regarded as documents.[146]

Similar circumstances can be found in the matter of ***re Estate of Kevin John Ombajo*** which involved the admissibility of an audio-visual recording as a will. Here, it was held that an electronic will does not fall in either criterion of written or oral wills which are the only forms of wills accepted by the law, leading to an obvious injustice. Society is progressing and so is technology. This should be well adapted into the current laws to accommodate the slow but sure move into a technology-led era.

[141] Section 12(2), *Wills Act* (South Australia).
[142] Langbein H, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, resistance, expansion' <https://law.adelaide.edu.au/ua/media/415/alr-38-1-ch01-langbein.pdf > on 18th December 2023.
[143] Aksoy Huseyin, "Audiovisual wills: A contemporary approach to testamentary formalities" <https://www.bjutijdschriften.nl/tijdschrift/ELR/2022/1/ELR-D-22-00028.pdf > on 23rd December 2023.
[144] *In re Yu* (2013) Supreme Court of Queensland (unreported).
[145] *In re Yu (*2013) Supreme Court of Queensland (unreported).
[146] *In the Estate of Wilden* (deceased) (2015) Supreme Court of South Australia.

4.1.3 Advocacy for the introduction of a dispensing power as well as electronic wills to Kenya's succession legislation

Australia, before the introduction of the dispensing power, had similar instances to Kenya where the court's insistence on strict compliance with the law led to unjust outcomes. The lack of a dispensing power in Kenyan succession legislation creates important legal and social issues that need to be carefully considered and addressed. As seen, the existing legal structure results in injustice and frustrations as a result of rigorous adherence to procedure.

The dispensing power, as observed in Australia, aligns with fundamental principles of justice, fairness, and equity by allowing the court to consider the overall intent of the testator rather than being strictly bound by formalities. Kenya, in reference to these principles, should implement the maxims under the law of Equity and Trusts especially looking at the maxim that states "*equity looks at the intent, not at the form*."[147] This is to say that equity looks at the reality of what was intended rather than the way in which it is expressed. This, in relation to wills, would mean that the courts would look at whether the purported will was intended to be the testator's final will and testament, therefore adopting dispensing power.

Furthermore, the introduction of a dispensing power in Kenya's succession legislation will align with the proper interpretation of Article 159(2) (d) of the Constitution of Kenya which states that justice shall be administered without undue regard to procedural technicalities.[148] Interpreted, this article implies that proceedings and decisions should focus on delivering fair and unjust outcomes rather than getting overly caught up in strict adherence to procedural formalities. It suggests that the administration of justice should priorities fairness, equity and should not be excessively hindered by minor procedural technicalities that don't substantially affect the matter at hand.[149]

[147] Maxims of equity,Oxford reference <Maxims of equity - Oxford Reference> on23rd December 2023.
[148] Article 159 (2) (d), Constitution of Kenya (2010).
[149] Musembi E, "Due regard vs undue regard to procedural technicalities: The civil procedural tug-of-war" Unpublished LLB Thesis, Strathmore University, Nairobi, 2018,3.

4.2 Proposed Framework

The proposed framework for introducing a dispensing power in Kenya's law of succession involves the following criteria:

1. **Clear criterion:** This involves having a clear and concise criterion that outlines the situations in which the dispensing power can be invoked. This could involve individuals with limited capacity or those in unavoidable circumstances where they could not possibly adhere to the formalities of will making, therefore avoiding circumstances where the stringent application and interpretation of the laws would lead to unjust outcomes.
2. **Safeguards:** Here, safeguards are to be placed in the law to avoid misuse and ensure that only legitimate cases where the application of the dispensing power is warranted are considered for the same. Walubengo addressed this by stating that the dispensing power should be seen as an exception, not as the rule of law.[150] This also applies to electronic wills when it comes to the protection of vulnerable individuals such as the elderly or sickly to ensure that they are not coerced or influenced into making certain decisions when creating their will.
3. **Equitable approach:** It should be recognized that dispensing power can contribute to not only a constitutional approach, but also an equitable one which acknowledges various circumstances that may be responsible for some issues to do with formalities. This approach could be borrowed from the overriding objectives used in civil procedure law. This principle is enshrined in Article 159(2) (d) of the Constitution of Kenya. This has also been underpinned in Annex 2 of the Judiciary Transformation Framework 2012which emphasizes the importance of delivering justice expeditiously without undue regard to justice.[151] Additionally, this is provided for in Section 1A (1) of the Civil Procedure Act which states that the overriding objective of the Act is to facilitate the just, expeditious and proportionate resolution of the civil disputes governed by the Act.[152] This could be translated to the Law of Succession Act to aid in the equitable interpretation of the Law of Succession Act and the just devolution of the deceased's property.

[150] Walubengo T, Beverly T, 'Rethinking Succession Practices in Kenya: The Feasibility of Electronic Wills' CM Advocates LLP, 2022,1—<Rethinking Succession Practices in Kenya: The Feasibility of Electronic Wills - CM Advocates LLP > on 3rd January 2024.
[151] Annex 2.2, *Judiciary Transformation Framework*, 2012-2016.
[152] Section 1A (1) *Civil Procedure Act* (Act No 3 of1924).

4. **Authentication and identification verification:** This applies to electronic or audio-visual wills in that there needs to be robust means of verifying the identity of the testator in order to avoid fraud.
5. **Attestation requirements:** Specifically on witnessing, there should be guidelines for virtual witnessing which may include video conferencing tools to enable remote witnessing. Witnesses will also aid in verifying the identity of the testator as well as their understanding of the will.
6. **Technical formalities:** In order to avoid ambiguity, the law should clearly articulate the type of format required for the making of electronic wills.

The framework for introducing the dispensing power therefore requires a thoughtful and nuanced approach which takes into account the need to uphold testamentary formalities while also accommodating individuals who might not have the opportunity to fully comply.

CHAPTER 5: CONCLUSION

In conclusion, this dissertation has delved into the intricate yet crucial realm of testamentary formalities in Kenya's succession system. The analysis revealed crucial issues surrounding the current rigid interpretation of the provisions of the law, resulting in injustices through the denial of probate, particularly when minor procedural errors overshadow the testator's clear intentions. This calls for a paradigm shift towards a more balanced approach that prioritises both the sanctity of formalities and the testator's testamentary freedom. In looking at the importance of said formalities, it is clear that they served a purpose at the time of their creation, but with the progression of times, case studies show the need for a mechanism that allows flexibility without compromising the integrity of the process.

The current legal framework of Section 11 of the Law of Succession Act tends to prioritise formalities over the substance of the testator's intentions, leading to potential injustices as well as denial of probate. One potential solution would be to implement a dispensing power, akin to those seen in other jurisdictions. As an exception to the rule of law, the dispensing power would enable the court to ignore or put aside small procedural errors in situations where the purported will accurately reflect the deceased's testamentary intentions.

One model worth taking into consideration is Australia's Wills Act, which expands its scope beyond strict formal standards by allowing purported but unattested wills to be granted probate. The experience of South Australia supports the idea that a more expansive formulation of a dispensing power that concentrates on the intentions of the testator is preferable to a more restrictive approach based on the legislature's attempts to predict the scope and nature of the testator's most likely errors or the degree of their attempts to comply.

However, simply adopting a dispensing power is not a panacea. Careful consideration must be given to its scope and safeguards to prevent misuse and maintain legal certainty. Striking a balance between flexibility and accountability is paramount. Implementing clear guidelines for exercising the power, emphasizing judicial discretion guided by established principles, and incorporating mechanisms for review and accountability are crucial to ensure its responsible application.

Keeping in line with the theory of equity and dynamic justice which emphasises the need for the laws to adapt to changing societal and cultural circumstances, in the context of testamentary laws, a dynamic approach would advocate for a legal framework that recognises the fluidity of human expression. As demonstrated by the Estate of Kevin John Ombajo, the noted inadequacies in allowing electronic wills pinpoint a gap between the rigidity of the current legal system and the fluidity of modern life. In embracing an equitable system that aligns with dynamic justice, the legal framework should be seen as a living entity capable of growth and change.

This dissertation serves not as a definitive answer but rather as an invitation to further dialogue and collaborative action. Moving forward, stakeholders, including policymakers, legal practitioners, and academic scholars, must engage in constructive discussions to shape a succession system that reflects Kenya's unique socio-cultural context and embraces the dynamic currents of our times. Only through continued debate, informed by research and grounded in the principles of justice and equity, can we create a legal framework that navigates the ever-changing tides of life and legacy, ensuring the sanctity of both form and testamentary freedom in Kenya's evolving succession landscape.

This dissertation proposes that Kenya’s succession laws be amended to include a dispensing power in order to remedy these deficiencies. With this revision of the legislation, the courts will no longer be strictly constrained by formalities and may instead evaluate the document based on its content and the testator's intent. Therefore, dispensing power is a useful and important reform in this day and age where there is non-compliance with the formality requirements as well as changes in technology.

BIBLIOGRAPHY

Books

Musyoka W, *Law of Succession*, 1st ed, Law Africa Publishing, Nairobi, 2010, 31.

Sloan B, '*Borkowski's Law of Succession*' 4th ed, Cambridge, London, 2017, 84-85.

Journals

Cotran E, 'Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?' 40 (2), Journal of African Law, Cambridge University Press, 1996, 196.

Đurđić-Milošević T, 'Testamentary formalities in the time of the pandemic' (5) EU and Comparative Law Issues And Challenges Series (ECLIC) 2021, 437.

Glover M, 'Decoupling the law of will-execution' 88 (3) St. John's Law Review, 2014, 629.

Goldsmith J, 'The frustration of genuine wills' Trust Quarterly Review, 2013.

Hedlund R, 'Introducing a dispensing power in English succession law' Trusts and Trustees, Oxford University Press, Volume 25,(No 7), 2019, 722.

Langbein H, 'Excusing Harmless Errors in the execution of wills: A report on Australia's tranquil revolution on probate law' 81 (1) Columbia Law Review, 1987, 5.

Lester S, 'Admitting defective wills to probate, twenty years later: New evidence for the adoption of the harmless error rule' 42, Real Property, Probate and Trust Journal 3,2007, 578.

Peart N, 'Where There Is A Will, There Is A Way- A New Wills Act For New Zealand', Waikato Law Review 26, 2007, 32.

Purser K, Cockburn T, 'Will formalities in the twenty-first century- promoting testamentary intention in the face of societal change and advancements in technology: An Australian response to Professor Crawford' Semantic Scholar, 2019, 58.

Walubengo T, Beverly T, 'Rethinking Succession Practices in Kenya: The Feasibility of Electronic Wills' CM Advocates LLP, 2022,1—<Rethinking Succession Practices in Kenya: The Feasibility of Electronic Wills - CM Advocates LLP >.

Research Papers

New Zealand Law Commission, 'Maori Custom and Values in New Zealand Law' Study Paper 9.

Musembi E, "Due regard vs. undue regard to procedural technicalities: The civil procedural tug-of-war" Unpublished LLB Thesis, Strathmore University, Nairobi.

Online Sources

Aksoy Huseyin, "Audiovisual wills: A contemporary approach to testamentary formalities" <https://www.bjutijdschriften.nl/tijdschrift/ELR/2022/1/ELR-D-22-00028.pdf >.

Brook J, 'To dispense or not to dispense; A comparison of Dispensing Powers and their Judicial Application', University of Portsmouth 2018, 1—<https://pure.port.ac.uk/ws/portalfiles/portal/12149460/Dispensing_Powers_Clean.pdf>.

Crawford B, 'Will Formalities in the Twenty- First Century' 2019 Wisconsin Law Review , 2018, 269 —<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264683>.

Faber JT, 'Uncertainty About the Condonation of Formally Non-Compliant Wills, and the Rectification of Cross-Signed Mirror Wills: Is an Act-Based Model the Solution?' Potchestfroom Electronic Law Journal,2022,- <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812022000100006>.

Horton D, Kress R, 'Covid-19 and Formal Wills' Stanford Law Review Online,2020,19-<https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/05/73-Stan.-L.-Rev.-Online-Horton-Weisbord.pdf >.

Human Rights Careers —<https://www.humanrightscareers.com/issues/what-is-justice/ > on 6th March 2023.

Johnson R. J, 'Dispensing with Wills Act Formalities for substantively valid wills' Richmond School of Law, 1992, 10 —<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2007&context=law-faculty-publications >.

Oosterhoff A, 'The usefulness of a validating power' WEL Blog, 2020, 1, —<https://pure.port.ac.uk/ws/portalfiles/portal/12149460/Dispensing_Powers_Clean.pdf >.

'The Frightening Statistics for the Validity of Wills', ILSPA's Legal Secretary Journal, 2011, 1—<https://www.legalsecretaryjournal.com/validity_of_wills>.

What constitutes a will?—<https://www.newnhams.com.au/re-nichol-what-constitutes-a-will/> .

Reports

Report of the Commission on the Law of Succession of 1966.