

**EPISTOLARY JURISDICTION AS A MEANS OF ENHANCING ACCESS TO
JUSTICE IN KENYA**

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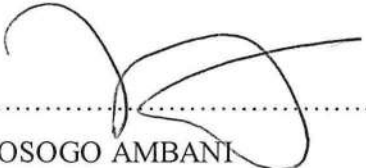
DECLARATION

I, **REXIE KAMAU NDORIA**, 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: 

8th March, 2018.

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

Signed: 

DR JOHN OSOGO AMBANI

ABSTRACT

The right of access to justice is a fundamental right provided for under any Bill of Rights. It establishes the right of any individual to move to a court or any judicial tribunal in order to enforce or protect rights and freedoms from violation or threat of violation. The lack of enforcement of this right can lead to a myriad of violations of other civil, political, social and economic rights since it is the basic right through which other rights are enforced.

Kenya has endeavored to guarantee the right of access to justice by ratifying various treaties which emphasize on the guarantee of access to justice and equal protection of the law. Moreover, it has included in its Constitution guarantees of the right under the Bill of Rights. However, Kenya still faces the heavy burden of enforcing this right to everyone regardless of their status. Poverty and other social inequalities complemented by legal, institutional and structural deficiencies of the judicial process has led to the minimal impact of Kenya's efforts to guarantee access to justice to everyone.

In light of this, this dissertation seeks to discuss poverty as the primary limiter of access to justice. In further discussion of the influence of poverty on access to justice, this dissertation shall elaborate on various legal, institutional and structural problems, including: the lack of legal identity, rigid legal formalism and corruption; facing the Judiciary and the judicial process in its entirety, which further deter poor people from seeking legal redress for their . Thereafter, this dissertation shall discuss Epistolary jurisdiction as a viable procedural mechanism of circumventing the aforementioned challenges. Furthermore, through a comparative study of application of Epistolary jurisdiction in India, this dissertation shall provide viable recommendations on a legislative framework to be applied in the application and implementation of Epistolary jurisdiction in Kenya.

LIST OF CASES

1. Andrew Khisa Wasike v Office of the Public Prosecution & another [2016] eKLR.
2. Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015J eKLR
3. Paul Pkiach Anupa & Another V Attorney General & Another [2012] eKLR
4. Joseph Nyamamba & 4 others v. Kenya Railways Corporation [Civil Appeal No. 239 of 2009] eKLR.
5. Kenya Bus Services Limited and Anor v. Minister of Transport & 2 Others [2012] eKLR.
6. Centre For Human Rights and Democracy and Others v The Judges and Magistrates Vetting Board and Others Nairobi Constitutional Petition II of 20 12 (Unreported).
7. James Mangeli Musoo v Ezeetec limited [2014] eKLR.
8. Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR.
9. Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2012] eKLR.
10. Raila Odinga v I.E.B.C & others [2013] eKLR.
11. Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR.
12. Kamau Kuria v Attorney General. Misc. Civil Application [1988] eKLR.
13. Sunil Batra v Delhi Administration (1978) 4, 494.
14. Parmanand Katara v Union of India (1989) 4 286.
15. Nilibati Behra v State of Orissa and Drs (1993) 25 746.
16. Upendra Baxii (Dr) v State of UP (1983) 2 308.
17. Hussainara Khatoon v State of Bihar, (1980) 1 SCC 93: AIR 1979 SC 1360.
18. People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235: AIR 1982 SC 1473.
19. Kushum Lata v Union of India (2006) 6 SCC 180.
20. Wangari Maathai v Kenya Times Media Trust Ltd [1989] eKLR.
21. Gideon v Wainwright 372 US 335 (1963).
22. Kesavananda Bharati v State of Kerala, (1973) 4 SCC 225, 947: AIR 1973 SC 1461, 2009.
23. People's Union for Democratic Rights v Union of India (1982) AIR 1473, 1983 SCR (1) 456.
24. Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161: AIR 1984 SC 802

CHAPTER 1: INTRODUCTION

1.0. Background

Access to justice is the basic principle of the rule of law¹ necessary for the enforcement of basic and fundamental rights. Access to justice has been described as, “the provision of dispute resolution mechanisms which are affordable, proximate and ensure speedy justice and whose processes and procedures are understood by users”.² In a more apt definition of access to justice, it is described as “the ability to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.”³ Access to justice entails access to the courts and other judicial and quasi-judicial tribunals, language of the court proceedings, court fees, public participation, and accessibility for persons with disabilities and availability of information.⁴ Many international, regional and domestic instruments have gone lengths to establish the importance of access to justice. The Universal Declaration of Human Rights,⁵ the International Convention on Civil and Political Rights⁶ and the African Charter on Human and People’s Rights⁷, to which Kenya is a party, have concisely included access to justice as a fundamental right. The Constitution of Kenya 2010 succinctly includes access to justice as a fundamental right and provides for mechanisms leading to its realization. It provides that the state shall ensure access to justice for all persons⁸ and that every person has a right to institute court proceedings in order to enforce a right or fundamental freedom that has been violated or is under threat of violation. Moreover, it provides for equality before the law and equal protection and benefit before the law⁹. Furthermore, the Constitution provides that the judiciary shall rely on principles that accord: justice to be done to all regardless of status;¹⁰ justice shall not be delayed;¹¹ and justice shall be served without undue regard to procedural technicalities.¹²

¹ United Nations and the Rule of Law <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>, September 10, 2015.

² Kariuki Muigua “Improving Access to Justice: Legislative and Administrative Reforms under the Constitution”, workshop on Access to Justice, Nairobi (Sankara Hotel, Westlands), Tuesday, 23rd October 2012.

³ FIDA Kenya, *the Peoples Version Informal Justice System*, 2011.

⁴ KLRC, *Draft Report on Audit of Laws on Access to Justice*, March 2012.

⁵ Article 8, Universal Declaration of Human Rights, 20 December 1928.

⁶ Article 14, International Convention on Civil and Political Rights, 19 December 1966.

⁷ Article 7(1), African Convention on Human and People’s Rights (Banjul Charter), 28 June 1981.

⁸ Article 48, Constitution of Kenya (2010).

⁹ Article 27, Constitution of Kenya (2010).

¹⁰ Article 159 (2) (a), Constitution of Kenya (2010).

¹¹ Article 159 (2) (b), Constitution of Kenya, (2010).

¹² Article 159 (2) (d), Constitution of Kenya, (2010).

However, despite the legal framework, access to justice in Kenya is far from realization. It has constantly been hampered by high court and legal fees, scarce geographical locations of courts, the complexity of rules and procedure and the use of legalese. The judicial process is also heavily dependent on the limiting rules of civil procedure, and litigious courses taken by the parties themselves.¹³ Against a backdrop of a poor and largely illiterate citizenry, there is a pressing need to invent new mechanisms that ensure the realization of access to justice by all Kenyans which in turn will ensure protection and enforcement of rights and fundamental freedoms.

Epistolary jurisdiction is a new legal mechanism that ensures the access to justice to all regardless of status. This is the jurisdiction of the courts to accept informal documentation that discloses the details of the violation of a right or freedom as an appropriate method of commencing court proceedings, therefore bypassing all procedural difficulties that might hamper access to justice. Although it has been established under Article 22 of the Constitution,¹⁴ it has not been effectively developed and implemented in Kenya.

1.1. Statement of the Problem

Access to justice, as a fundamental right guaranteed by the Constitution has been inefficiently enforced in the Kenyan jurisdiction. This reality is as a result of the many social, legal, structural and institutional barriers that limit access to the judicial process. Many of those who bear the brunt of this burden are those engulfed in poverty; groups of people who are socially and economically disenfranchised and lack the economic or social capital necessary to circumvent such obstacles. These barriers include, the fear of reprisal and mistrust of the justice system, socioeconomic subordination of people living in poverty, lack of empowerment and access to information, lack of legal identity, inadequate legal frameworks and judicial review for social policies, inadequate court capacity and resources, physical inaccessibility to court, high court and legal fees, complex and technical legal procedure, excessive use of detention and incarceration, non-existent or inadequate legal assistance.¹⁵ Deprived of the social or economic resources to counter these barriers, poor

¹³ Kariuki Muigua, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies.'

¹⁴ Article 22 (3) (b) of the Constitution of Kenya states that the Chief Justice shall formulate rules which shall satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; the entertainment of informal documentation to commence court proceedings is what is referred to as Epistolary jurisdiction.

¹⁵ UN General Assembly, 'Report of the Special Rapporteur on extreme poverty and human rights', August 2012, Para III.

people are unable to access courts and obtain legal redress. They are subsequently left in a de facto state of lawlessness, sometimes resulting to extra judicial mechanisms of redress which lead them further into their deprived state. This is despite firm legal guarantees under the Constitution of the right to equal access to justice and protection by the law.

This paper, therefore, primarily seeks to elucidate on the challenges faced by poor people when enforcing their right to access justice and consequently discuss epistolary jurisdiction as a viable mechanism for resolving some of these challenges.

1.2. Hypothesis of the Study

1. Poor people in Kenya, by virtue of: high court and legal fees, complex and technical legal procedure, lack of financial independence, lack of effective legal remedies, backlog of cases in courts that delays justice, lack of awareness of judicial options and lack of legal identity; are unable to access justice in Kenya.
2. Effective implementation of epistolary jurisdiction, as seen under the Indian jurisdiction, will enhance access to justice for poor people in Kenya by circumventing the lack of legal identity, high court and legal fees, complex and technical legal procedure and the lack of effective remedies.
3. The lack of a concise legal framework supporting epistolary jurisdiction, established under the current Constitutional dispensation, limits the development and application of the concept in the Kenyan jurisdiction.

1.3. Objectives of the Research

This research paper seeks to achieve the following objectives:

- i. Investigate the influence of poverty and subsequent social inequality with respect to poor people's inability to access courts and acquire effective legal redress.
- ii. From the foregoing, discuss epistolary jurisdiction, with reference to the Indian jurisdiction, as a valid legal mechanism for enhancing access to justice for poor people in Kenya.
- iii. Provide viable recommendations through which epistolary jurisdiction can be actualized as a means of enforcing the right of access to justice in the Kenyan judicial system.

1.4. Research Questions

- i. To what extent has poverty affected the effective enforcement of the right to access justice in Kenya?
- ii. How viable is epistolary jurisdiction as a mechanism to counter the effects of poverty in society and further guarantee equal access to justice in Kenya?
- iii. What legal frameworks can be designed to ensure efficient implementation of epistolary jurisdiction in Kenya?

1.5. Scope and Limitation of the Study

The research will seek to investigate how poverty and social inequalities frustrate the effective enforcement of access to justice. Moreover, it will seek to analyze epistolary jurisdiction as a means of empowering the poor to get an equal footing in accessing justice and enforcing their rights. Furthermore, the research will carry out a comparative study of the implementation of epistolary jurisdiction in different States and give recommendations on its effective implementation in Kenya.

A major limitation to this research has been the scarcity of material information on the application of epistolary jurisdiction owing to the fact that it has had a limited application and many jurisdictions have not established an effective legal framework around it.

1.6. Literature Review

The United Nations has acknowledged the right of access to justice as a fundamental component in the rule of law. The Human Rights Commission in its General Comment has also acknowledged the right as a procedural means to safeguard the rule of law.¹⁶ This has been so acknowledged since, in the absence of access to justice, people cannot enforce and exercise their rights, participate in effective governance by holding decision makers accountable, fight discrimination and basically have their voices heard.¹⁷ In a resolution adopted by the United Nations, States made a declaration emphasising on the right of access to justice for all especially the vulnerable groups. More so, States emphasised on the importance of raising awareness on legal rights in order to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice

¹⁶ Human Rights Committee, CCPR General Comment No. 32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, (2007).

¹⁷ United Nations and the Rule of Law <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>, September 10, 2015.

for all.¹⁸ In relation to the global importance laid on access to justice, in her report, the Special Rapporteur on Extreme Poverty and Human Rights stated that inequality limits and defeats the enjoyment of human rights and social justice in every sphere of public life. The poorest people and the most marginalized are restricted from accessing justice on an equal footing as the privileged in society. As a result, such disenfranchisement creates a vacuum where the poor are continuously exploited. Their inability to enforce their rights forces them to be entangled in a continuous cycle of poverty, exploitation and aggravated criminal activity. Due to this, she recommended access to justice should be included as a global stand-alone goal for the achievement of the 'human-centered social and economic development'. The realization of the right to access justice for all would elevate the poor to a position of equal footing as the privileged and allow their disentanglement from the vicious cycle of poverty since access to justice is vital in the enforcement of other civil, political, social and economic rights. Further, equal access to justice would help in the enforcement of human rights by reducing the deprivation of the much needed resources by the progressive development of social and economic rights, enforcement of property rights and labor rights curtailing the exploitation of the poor.¹⁹

The paper, *Judiciary in India: Hunger and Thirst for Justice*,²⁰ sheds light into the gradual efforts of the Indian judiciary to bring about increased access to justice for the people of India, in particular the poor and disenfranchised people. Justice Bhagwati acknowledges that a problem faced by India and many other third world countries is the increasing number of groups of people who may be subject to exploitation, injustice and even violence on a sustained and systemic basis, due to the rigid rules of locus standi and judicial complacency, frustrating their right of access to justice. Further acknowledged by the report *On Access to Justice for Persons Living in Poverty: A Human Rights Approach*²¹ which states that poverty is not only a cause of exploitation of human rights, but is also a cause for the lack of enforcement of human rights. The paper states that access to justice is a crucial element in enabling the poor to not only protect themselves against arbitrary limitation of their rights, but also a way of enabling the realization of their socio-economic rights,

¹⁸The General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, 30th November 2012.

¹⁹ OHCHR, Special Rapporteur on Extreme Poverty and Human Rights, 'Equality and Access to Justice in the Post-2015 Development Agenda'.

²⁰ P.N. Bhagwati, C.J. Dias, 'the Judiciary in India: A Hunger and Thirst for Justice', 5 N.U.J.S Law Review, (2012).

²¹ Magdalena Sepúlveda Carmona, Kate Donald, 'Access to Justice for Persons Living in Poverty: A Human Rights Approach', Elements for Discussion Series, Ministry for Foreign Affairs of Finland (Erweko Oy).

which will in turn free them from the yoke of poverty. In light of this, Justice Bhagwati's paper explicates procedural innovations by the Supreme Court of India such as broadening the rules of locus standi via social action litigation and epistolary jurisdiction and, non-adversarial, investigative proceedings of the court as an endeavor to remedy the predicament stated above. Moreover, the paper defends amidst a flurry of criticisms, the need for judicial activism as a way for the judiciary to progressively realize social-economic rights of the people and continuously guarantee justice to the ordinary and disempowered members of the society.

However, in the endeavor to enforce the right of access to justice, it is important to analyze the right in its entirety. In her article,²² Elizabeth L. MacDowell criticizes legal scholars and activists of a narrow interpretation of access to justice which only focuses on the procedures of accessing the dispute resolving institutions, but fails to highlight their capability to dispense justice once those institutions are accessed. She states that 'poor people's courts' have taken part in enforcing subordination of poor people to other privileged groups of people and expanding state power when it comes to the effective provision of access to justice. She further states that the definition of access to justice seems to suggest that once proper systemic infrastructures are put in place enabling equal access to justice for all,²³ then, inevitably, justice shall be served. However, she exposes a concern of the shortcomings of this definition since it fails to recognize that justice does not function in a vacuum and that there are other social factors that may curtail dispensing justice such as judicial bias, court culture and unwanted state interference. Therefore, she recommends the use of a social justice approach in analyzing how the law works for the poor people through legal institutions.

Therefore, in designing a proper legal framework for the implementation of epistolary jurisdiction, an analysis of the various social factors that influence judicial institutions is key in order to ascertain the efficient implementation of epistolary jurisdiction in the enforcement of access to justice and other rights.

²² Elizabeth L. MacDowell, 'Reimagining Access to Justice in the Poor People's Courts.' 2015.

²³ Here she refers to enabling access to dispute resolution institutions and processes.

1.7. Chapter Break Down

Chapter 1: An Introduction

This chapter includes the background of the problem, the statement of the problem and the research hypothesis. It further gives an elaborate review of the literature used in research of this topic and the theoretical framework to be applied.

Chapter 2: Access to Justice in Kenya

This chapter will try to prove the hypothesis that poor people by virtue of their poverty are unable to access the judicial process and consequently are unable to receive redress or enforce their fundamental freedoms and rights. It will further establish that despite Constitutional guarantees, the right of access to justice still remains unrealized for the poor majority of the Kenyan population.

Chapter 3: Comparative Study

This chapter will look into how Epistolary jurisdiction has been implemented in India. It will highlight legal structures and procedural innovations that have enabled India's judiciary to successfully implement Epistolary jurisdiction. More so, it will look into the shortfalls of Epistolary jurisdiction and provide viable ways to correct them.

Chapter 4: Application of Epistolary Jurisdiction in Kenya

This chapter will analyse various judicial pronouncements on epistolary jurisdiction. Furthermore, it shall highlight decisions made on legal standing and the expansion of the right of access to justice in Kenya. It shall seek to prove that Kenya has no precise legal framework guiding the application of Epistolary jurisdiction.

Chapter 5: Conclusion and Recommendations

This Chapter shall conclude the findings of the dissertation, chapter by chapter and provide recommendations as to the legal framework on the application of Epistolary jurisdiction in Kenya.

1.8. Theoretical Framework

i. Universality of Human Rights

This school of thought is of the view that certain human rights and freedoms are universal and inalienable to the human race. It is from this principle of universality that the Universal Declaration of Human Rights (1948) was passed in an effort to codify and institutionalize the said fundamental rights and freedoms. One of the many fundamental rights and freedoms recognized by the Universal Declaration for Human Rights is the right to access justice. It posits verbatim that,

'everyone has the right to an effective remedy by the competent national tribunals for the acts violating the fundamental rights granted to him by the constitution or by law.' Further, epistolary jurisdiction is already in application in India, as a mechanism of accessing justice. India and Kenya have very many features in common. First and foremost they both apply the common law system. Secondly, Kenya is faced with similar challenges as those facing India. According to the World Bank poverty index Kenya is ranked as a low income level with 34-42 % of its population living below poverty line, India on the other hand of the 872.3 million people living below the poverty line worldwide 179.6 million(17.5%) live in India. Poverty is the biggest impediment to accessing justice. Considering the above two similarities and the efficacy of epistolary jurisdiction in India the need for Kenya to adopt it in solving its access to justice puzzle is clear.

ii. *Social Contract Theory*

To best understand epistolary jurisdiction, one must first understand the concept of access to justice. John Rawls envisages a world where actors - behind 'a veil of ignorance' rendering all parties equal - determine the principles of the institutions governing their social institutions. In his institution based theory of justice he asserts two central principles. First, each person has the right to the same liberties as those received by others. Second, if there are to be social and economic inequalities, they must be attached to offices predicated on fair and equal hiring and must be advantageous to the worse off. Amartya Sen in *The Idea of Justice* presents an alternative interpretation of access to justice. Instead of focusing on Institutions, Sen focuses on the behaviour of people in a society. He suggests comparing different communities facing similar challenges and understanding the mechanisms that provide them with more just concerns. This approach moves the focus away from institutions and is concerned with individuals' or communities' actual realizations and commitments. The comparative approach also recognizes that different reasonable principles of justice exist and is thus a more flexible construct when trying to understand justice as perceived by a different culture or community. Thomas Hobbes a proponent of the social contract theory posits that in the original state of nature, man lived a short, nasty and brutish life, governed by the rule of the jungle 'survival for the fittest'. To escape this state of nature, a government is established by a social contract. Whereby individual persons come together, surrender some of their rights and freedoms to a more powerful organ - the government. Through this social contract, the 'Leviathan' (government) is tasked with securing those rights and freedoms. Among the rights entrusted to a government is ensuring accessibility to justice. Whereas the

government has made several advancements towards improving access to justice, a lot more needs to be done as many Kenyans still find it difficult to access justice through the available mechanisms. This depravity has resulted to the continued application of other mechanisms some of which are repugnant to justice and morality and lead to further exploitation.

iii. Utilitarian Theory

The proponents of this school of thought mainly Jeremy Bentham and John Stuart Mill state that laws are socially justified if they brought the greatest happiness or benefit to the greatest number of people. The utility of epistolary jurisdiction as a mechanism to access justice by and large solves problems such as backlog of cases, delay in the delivery of justice and the cost of accessing justice. As expounded on earlier, a considerable number of Kenyans face difficulties accessing justice. Further, it is in the best interest of Kenya and society as a whole that justice delivery be fastened and the cost incurred minimized hence benefiting the greatest number of people.

CHAPTER 2: ACCESS TO JUSTICE IN KENYA

2.0.Introduction

Democracies with a deep respect for the realization and enforcement of basic human rights acknowledge that constitutionalism and the rule of law are key tenets in preserving an orderly and harmonious political, social and economic environment. In such democracies, the constitution is held to be the supreme law directing, defining and permitting all actions of the state. This adherence to the rule of law and constitutional supremacy provides a firm guarantee that powers and liberties provided to authorities under the law shall not be put into whimsical use, betraying the freedoms and human rights guaranteed to the people. As a result, every person is guaranteed equal treatment before the law, institutions of legal redress become readily accessible, firmly guaranteeing the right to access justice to all regardless of social or economic status.

The above description, however, is a Shangri-La for most people in Kenya. Constitutionalism and the rule of law are habitually flaunted as discretionary while many Kenyans are left at the mercy of a tyrannical leadership that is oblivious to their plight. Consequently, basic human rights and freedoms, particularly the right to access justice and equal protection by the law are abhorrently violated.²⁴ For poor people, accessing and obtaining legal redress is close to impossible occasioned by the prevailing lawless and despotic circumstances.

This chapter seeks to investigate and confirm the hypothesis that poor people are unable to access institutions of legal redress such as courts and consequently obtain justice due to the legal, institutional and structural barriers that are created as a result of the aforementioned circumstances. The first part of the Chapter seeks to elaborate on how poverty can result in lack of access to justice with reference to the Kenyan situation. The second part of the Chapter shall then focus on legal, institutional and structural barriers of access to justice. This section is inclined to prove that the legal setting in Kenya is one that has systematically discriminated against the poor from accessing the courts and receiving legal redress. The prominent legal barrier to be discussed in this Chapter shall be the lack of legal identity for many poor people that has resulted to the lack of recognition of these people by the State thus denying them the tools required to seek recourse in courts or

²⁴ Recent actions by the Government of Kenya suggests that this is still a reality even after the promulgation of the Constitution. The unconstitutional creation of various cabinet posts- that is Cabinet Administrative Secretaries- and continuous belittling of the Judiciary, dismissing court rulings and orders, and threatening members of the Judiciary has become Kenya's new reality. Recently, the Government shutdown 3 media houses arbitrarily and refused to heed to court orders that reversed that action.

judicial tribunals. Institutional barriers discussed herein include the judiciary's insufficient capacity and resources, high court and legal fees and corruption. Finally, the structural barriers of access to justice to be discussed include the formality of legal procedure and the concept of legal standing. Lastly, this Chapter shall analyse the Constitution of Kenya, 2010 and how it has sought to resolve these barriers and embrace the poor people into the judicial process.

2.1. Poverty and Access to Justice

Poverty is defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.²⁵ Poverty can be perceived as a double edged sword in that it can be the cause of the deprivation of the right to access justice and a consequence of such deprivation.²⁶

On one hand, the reduced allocation of financial and human resources to judicial institutions can lead to systemic failures. Such systemic failures, understaffing and overstretching of judicial institutions; corrupt practices and bribery, have disproportionate effects on the poor barring them from accessing justice since, as a result of their poverty, they already lack the resources to counter such failures. On the other hand, poor people's inability to access the judicial processes and enforce their political and socio-economic rights, leads them to further exploitation, entrenching them deeper into the cycle of poverty.²⁷

In an economic update report by World Bank²⁸, Kenya's poverty rate is estimated to be at 32%-40% of the population. With an approximate population of 46 million Kenyans, 16 million of them are living below 1.25 dollars a day. In Kenya, the minimum amount of court fees payable to file a plaint is KSh.1500.²⁹ Moreover, the need for legal counsel in order to wade through the murky waters of judicial procedure is an added expense. Clearly, for a person living below a dollar a day, which is approximately KSh.105, it would take an arm and a leg to raise this amount in order to

²⁵ Committee On Economic, Social And Cultural Rights, *Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights: Poverty And The International Covenant On Economic, Social And Cultural Rights*, (E/C.12/2001/1010 May 2001).

²⁶ Edward Ritei Paranta, 'Access To Justice: Epistolary Jurisdiction as a Means of Improving Access to Justice in Kenya.' Published Dissertation Paper, Strathmore University School of Law, 2016.

²⁷ J Beqiraj and L McNamara, '*International Access to Justice: Barriers and Solutions*', Bingham Centre for the Rule of Law Report, International Bar Association, 2014, 14.

²⁸ Randa, John, Gubbins, Paul, 'Kenya Economic Update: Time to Shift Gears; Accelerating Growth and Poverty Reduction in the New Kenya', Edition No.8. Washington DC: World Bank Group.

²⁹ Section 3(b), Schedule to part IX, Judiciary of Kenya; Guide to Assessment of Court fees.

access the judicial institutions and receive redress which they keenly need in order to protect their fundamental rights and economic interests. Therefore, this portion of the population may never obtain redress for violations of their rights and fundamental freedoms.

2.2.Barriers of Access to Justice

Access to justice is a crucial component within any Bill of Rights. It not only enables people to enforce their rights and freedoms, it also allows citizens to hold leaders accountable for their actions. More so, access to justice is a tool for development and economic progress, enabling the poor to use the law, legal systems and legal services to protect their rights and advance their interests as economic actors.³⁰

Since she gained independence, preceded and influenced by a tyrannical colonial legal dispensation, Kenya has suffered its fair share of human rights abuses and violations. The rule of law and constitutionalism and consequently, access to justice, has constantly been disregarded in favor of an autocratic regime serving the interests of a few who have the economic, political or social capital to influence decisions. Institutions, meant to be custodians of the rule of law, have been forced to operate under the bulbous thumb of an almighty executive, denying ordinary Kenyans equal protection by the law. The judiciary has been stripped bare of its sacrosanct independence through the removal of tenure of judges³¹ spawning a rather weak and timid judiciary that operates on the whims of its master. The private bar has also been undermined and silenced through continuous and frivolous arrests of private attorneys and activists³² who dare, and bravely so, to contradict the government position.³³

These intrusions, by an all too powerful executive, have led to the systemic failure of the judicial process. Consequently, many legal, institutional and structural obstacles have thus developed as a result of a weak judiciary, subsequently denying many poor Kenyans an opportunity to enforce their rights.

³⁰ Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Volume 1.

³¹ Constitution of Kenya Amendment Act No. 4 (1988).

³² Justice Willy Mutunga (retired), Mr. John Khaminwa and Mr. Gibson Kamau Kuria were detained for allegedly teaching 'subversion', for defending a political detainee and, filing a habeas corpus application on behalf of Mirugi Kariuki, respectively.

³³ Drew Days III Et Al, Justice Enjoined, 'The State of the Judiciary in Kenya', Publication of the Robert F. Kennedy Memorial Center for Human Rights, 1992, 4.

2.2.1. Legal Barriers

i. Legal Identity

The right to be recognized as a person before the law is a fundamental human right guaranteed under Article 16 of the ICCPR³⁴ and Article 7 of the Convention on the rights of the Child³⁵. More so, the Kenyan Constitution recognizes this right under Article 53 where it guarantees every child the right to a name and nationality from birth.³⁶ Furthermore, the holding of legal documentation in Kenya has proved to be a catalyst in the achievement of various development goals. These include access to employment and economic wellbeing, access to justice, political engagement, and access to services such as health care and education.³⁷ Nevertheless, the achievement of this right under the Kenyan jurisdiction has been designed with stringent bureaucratic procedures that are inefficient in continuously and universally providing documentation of births and national identification cards to all those who require them.³⁸ More so, a report by the Office of the Ombudsman shows the use of such processes to discriminate against those who would want to acquire legal identity in Kenya.³⁹ It is obvious that most people who are unable to acquire such legal identity are the poor and marginalized. This reality is troubling since legal identity is linked with the ability to access entitlements such as social services, political rights and participation in the formal economic sector. This denial of legal identity prevents the victim from operating legal business ventures, denying him or her the ability to further his or her economic interests. This prevents such a person from improving their economic status, further entangling them to the yoke of poverty.

2.2.2. Institutional Barriers

i. Inadequate Resources and Capacity

The judiciary's budget in Kenya falls below one percent of the national budget, with other institutions such as the Directorate of Public Prosecutions being worse off. Considering the

³⁴ Article 16, International Convention on Civil and Political Rights.

³⁵ Article 7, Convention of the Rights of the Child, 20 November 1989.

³⁶ Article 53, the Constitution of Kenya (2010).

³⁷ Open Society of Justice Foundation, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya*, October 2015.

³⁸ Open Society of Justice Foundation, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya*, October 2015.

³⁹ Commission on Administrative Justice Office of the Ombudsman, *'Stateless in Kenya: An Investigative Report on the Crisis of Acquiring Identification Documents in Kenya'*, August 2015.

national footprint of the judiciary's work together with their over 5000 staff membership, the judiciary's budget falls way below the 2.5% budgetary allocation under international best practices.⁴⁰ Deprivation of financial and human resources to the judiciary, the police and prosecution bodies, and insufficient training and capacity-building for judicial and law enforcement officers leads to systemic failures. The result is serious neglect and even mistreatment of those seeking justice, which is more pronounced for the poor, whose cases are usually under-prioritized.⁴¹ Moreover, insufficient resources may result in case backlog delaying the delivery of justice for all.

ii. Fees and Costs

In addition to costs incurred to institute court cases, there are many incidental costs incurred in the pursuit of justice through the judicial process. Legal costs are incurred in every stage of the judicial process. Costs incurred in criminal proceedings are burdensome because one is obligated to put up large sums of money in order to be granted bail, or risk long periods of pre-trial detention. This in turn provides an advantage for economically advantaged people who are able to pay such costs. In civil proceedings, fees are payable when instituting legal proceedings or when timelines are exceeded. More so, in conclusion of a civil suit, the unsuccessful party is required to pay the legal costs. In addition to such payments, obtaining legal counsel will require the exhaustion of more financial capital in order to proceed with a suit. In addition to these administrative fees, persons living with poverty are met with further expenses especially if they come from rural areas and need to travel long distances to access courts, transportation costs may be an added burden. The cumulative impact of such costs is a factor discouraging poor people from seeking redress through court processes frustrating their right to access and receive justice.⁴²

iii. Corruption

Due to insufficient financial and human resources in the judiciary, an influx of corrupt practices bloom due to its overstretched and understaffed circumstances. Illicit payments and favors enable those with financial capital to wade through with greater efficiency and effectiveness at times being able to secure an outcome. In contrast, many poor and disadvantaged people, since they are unable to pay the bribes are left out of the judicial process, their cases either delayed, denied or

⁴⁰ The Judiciary, *State of the Judiciary and the Administration of Justice*, Annual Report [2016 -2017].

⁴¹ UN General Assembly, 'Report of the Special Rapporteur on extreme poverty and human rights', August 2012.

⁴² UN General Assembly, 'Report of the Special Rapporteur on extreme poverty and human rights', August 2012.

discontinued. This predatory culture consequently deters people living in poverty from resulting to the courts for redress. More so, there is an erosion of trust in the judiciary and other legal institutions.⁴³

2.2.3. Structural Barriers

i. Formalism

Due to institutional obstacles such as high court and legal fees, many poor people are unable to secure private legal counsel. By virtue of their illiteracy or ignorance of the law and court procedures, these people are confronted by complex and technical processes of the court, traditions and interactions, the use of legal jargon and mainstream languages and restrictive time limits, unaided. Poor people are intimidated by unfamiliar rules regarding dress codes, the hierarchy of the court system, confrontational courtroom design, and traditions about when to sit, stand and address the judge. As a result, they are in an unequal and disadvantaged position before they even walk into the courtroom. Such formality discourages poor people from seeking redress through courts, hindering fair outcomes.⁴⁴

ii. Lack of Legal Standing.

A major impediment to accessing justice is the lack of legal standing. Rigid rules of standing do not take into consideration the unique circumstances of each violation and the ability of the victims to proceed and litigate their issue in court. Previously in Kenya, the rules of standing allowed only those with an interest in any proceeding to be a party in such a proceeding. Clearly, this discriminated against poor people who were unable to litigate their cases due to the preceding legal, institutional and structural barriers. In addition, this was a tactic used by the government to overcome activist litigation as seen in the case of *Wangari Maathai v Kenya Times Media Trust Ltd*⁴⁵. In this case, Kenya Times Media, which was a parastatal wanted to erect the tallest building in Africa in the Uhuru Gardens, a public recreational park. The petitioner, Wangari Maathai moved to court to stop the construction of the building and destruction of the park. The court, however, denied her audience claiming that she did not have the legal standing to approach the court. The court stated that the matter was a public interest matter in which Wangari Maathai did not show a private interest in litigating it. At the time, only the Attorney General had the standing to litigate

⁴³ Institute of Economic Affairs, *Kenya at the Crossroads: Scenarios for our Future*, 2000, 10.

⁴⁴ UN General Assembly, 'Report of the Special Rapporteur on extreme poverty and human rights', August 2012.

⁴⁵ *Wangari Maathai v Kenya Times Media Trust Ltd* [1989] eKLR.

public interest matters, however, the AG, a political appointee, could not go against the hand that fed it. However, under the new constitutional dispensation, legal standing has been expended to include third party litigation as well as public interest litigation, further discussed below.

As a result of these barriers to access to justice, whether living below or slightly above the poverty line, these men, women, and children lack the protections and rights afforded by the law. They may be citizens of the country in which they live, but their resources can neither be effectively protected nor leveraged. Thus, it is not the absence of assets or lack of work that holds them back, but the fact that the assets and work are insecure, unprotected, and far less productive than they might be. Their property rights and economic rights mean nothing in the face of blatant inequality among classes. Clearly, vast poverty must be understood as created by society itself. The laws, institutions, and policies governing economic, social, and political affairs deny a large part of society the chance to participate on equal terms. This stunts economic development and can readily undermine stability and security.

The outcomes of governance - that is, the cumulative effect of policies and institutions on peoples' lives - will only change if the processes of governance are fundamentally changed.⁴⁶

2.3.The Constitution of Kenya, 2010

Despite the gloomy past, Kenya's new constitutional dispensation promulgated in 2010 has sought to restore balance within the three arms of governments and protect the rights and freedoms of individuals, especially marginalised and vulnerable groups of people, including the poor. To this effect, it provides that the State and consequently every state organ has a duty to observe, promote and respect the rights and fundamental freedoms provided under the Bill of rights. It further states that all state organs and public officers have a duty to address the needs of vulnerable groups.⁴⁷

Article 48 grants that every person has a right to access justice and bestows the State with the responsibility to ensure it is achieved.⁴⁸ It also provides, under the same article, that any fee required to meet this obligation shall be reasonable and not impede access to justice. This provision is supported further under Article 22 (3) which states that the Chief Justice shall make rules⁴⁹ providing for court proceedings in which the criteria that formalities relating to proceedings,

⁴⁶ Commission on Legal Empowerment of the Poor, *'Making the Law Work For Everyone'*, Volume 1.

⁴⁷ Article 21, the Constitution of Kenya (2010).

⁴⁸ Article 48, the Constitution of Kenya (2010).

⁴⁹ The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

including the commencement of proceedings, and in particular, the court entertaining proceedings on the basis of informal documentation, when necessary, shall be met. Moreover, the rules shall ensure that no fee may be charged for commencing such proceedings.

Under the rules, the judiciary's commitment to enhance access to justice for all persons is reiterated as the overriding objective.⁵⁰ Furthermore, the rules emphasize that the court shall pursue access to justice for all persons including the poor, illiterate, uninformed, unrepresented and persons with disabilities.⁵¹ The rules further guarantee access to justice for all by rescinding as mandatory the requirement that commencement of proceedings should be done through a formal application. It states, however, that the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.⁵² Clearly, the Constitution intended that court proceedings, especially those highlighting violation of rights, should not be curtailed. It is in further pursuit of this, and acknowledging that the greatest impediment to accessing justice is the requirements of *locus standi*, that Article 22 sought to extend such requirements. Under section 2, persons are not only allowed to institute suits in their own interests, but also a person can institute a case on behalf of: another person who cannot act in their own name,⁵³ a person acting as a member of, or in the interest of, a group or class of persons,⁵⁴ a person acting in the public interest,⁵⁵ or, an association acting in the interest of one or more of its members.⁵⁶ It is from the extension of these rules that a new form of litigation has thrived, Public Interest Litigation. This form of litigation allows social action groups, activists or any public spirited person to bring an action relating to matters that are held to be of public importance for deliberation in court. Previously, the requirements of *locus standi* prevented individuals who had no personal interest or personal injury in a matter from commencing a suit in court.⁵⁷

⁵⁰ Rule 3 (1), the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

⁵¹ Rule 3 (7), the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

⁵² Rule 10 (3), the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

⁵³ Article 22 (2) (a), the Constitution of Kenya (2010).

⁵⁴ Article 22 (2) (b), the Constitution of Kenya (2010).

⁵⁵ Article 22 (2) (c), the Constitution of Kenya (2010).

⁵⁶ Article 22 (2) (d), the Constitution of Kenya (2010).

⁵⁷ Wangari Maathai v Kenya Times Media Trust Ltd [1989] eKLR.

Thus, in light of the above provisions, Article 159 directs the judiciary to be guided by these principles while carrying out its duties:

- i. that justice shall be done to all, irrespective of status;
- ii. that justice shall not be delayed;
- iii. that justice shall be administered without undue regard to procedural technicalities;
- iv. that the purposes and principles of the Constitution shall be protected and promoted.

These provisions, if implemented religiously, are a foundation upon which epistolary jurisdiction may be enforced within the judicial process. The Constitution has strived to ensure that every Kenyan, especially those vulnerable to abuses and violations of human rights and freedoms have unconstrained access to courts and are able to receive audience and redress.

2.4. Conclusion

Despite the above efforts, we are still a long way from achieving access to justice for all without undue regard to status. Case in point, the Civil Procedure Rules of 2010 provide that a pauper may institute any suit subject to the rules provided therein.⁵⁸ A pauper is defined as a person who is not possessed of sufficient means to enable him to pay for the fee prescribed by law for the institutions of such suit.⁵⁹ However, such rules, as appealing as they may seem, are contradicted by succeeding provisions which provide grounds for rejection of an application to sue as a pauper. One of the grounds for rejection of such applications by the courts is where pleadings are not framed and presented in the prescribed manner.⁶⁰ This provision is oblivious of the fact that a poor, illiterate, uninformed or an unrepresented person does not know how to draft pleadings in accordance with the required prescriptions under the law nor is he able to secure private counsel to ensure the same. It is, therefore, prejudiced to equate the threshold of compliance of such a person to that of an advocate. After all, provisions of Article 159(2) (c) of the Constitution should come into effect in this case. Moreover, where the application to sue as a pauper is approved but the suit fails, the rules require the pauper (or the plaintiff) to cater for the fees as may be directed by the court.⁶¹ This brings into question the entire purpose of the provisions to sue as a pauper if such application shall only be credible if your suit succeeds.

⁵⁸ Order 33 Rule 1-1, Civil Procedure Rules, 2010.

⁵⁹ Order 33 Rule 1-2, Civil Procedure Rules, 2010.

⁶⁰ Order 33 Rule 5, Civil Procedure Rules, 2010.

⁶¹ Order 33 Rule 11, Civil Procedure Rules, 2010.

Considering the state of paupers, many of whom are unrepresented, illiterate and uninformed, these provisions discourage many of them from instituting proceedings since they may fail- that is, if they are at all aware of the provision itself. The Order continues to provide that where an application to sue as a pauper fails, the plaintiff (or the pauper) shall be barred from any subsequent applications of the like nature as a pauper.⁶²

Advocates are also required pursuant to the Law Society of Kenya's (LSK) Digest of Professional Conduct and Etiquette to assist poor persons who are unable to pay an advocate's fee in the ordinary way, on a pro bono or pro deo basis. Whereas the rule goes ahead to provide guidelines on the exercise of such a mandate, such assistance is not mandatory.⁶³

It is, therefore, clear that more policy and legislative reviews need to be done to bring uniformity between the Constitution and other statutory provisions. More so, to further enhance and guarantee equal access to justice for all in Kenya, Epistolary jurisdiction, as this dissertation seeks to advance, is a credible and efficient way to provide access to justice for all, regardless of their status. This will not only enhance a culture of human rights protection and advancement but also provide a much needed for economic progress and poverty alleviation.

⁶² Order 33 Rule 14, Civil Procedure Rules, 2010.

⁶³ Rule 34, Law Society of Kenya Digest of Professional Conduct and Etiquette, 2000.

CHAPTER 3: EPISTOLARY JURISDICTION THROUGH THE INDIAN EXPERIENCE

3.0. Introduction

This chapter seeks to confirm the second hypothesis of this paper which propounds that the effective implementation of epistolary jurisdiction, with comparative application of Indian jurisprudence on the concept in Kenya, will enhance access to justice for the poor by by-passing the constraints emanating from the lack of legal identity, high court and legal fees, complex and technical legal procedure and the lack of effective remedies in the Kenyan judicial process. The basis of selecting India as a country of choice for the comparative study lies with its vibrant, human rights centered judiciary that has correctly and instructively advanced the concept of epistolary jurisdiction within its judicial process.

The first part of this Chapter discusses the legal basis upon which epistolary jurisdiction was developed in India. It discusses the concept of Social Action Litigation as the jurisprudential basis of epistolary jurisdiction. The second section of this Chapter provides a historical insight into India's judicial process, prior to the enactment of Epistolary jurisdiction, which was marred with ineffective and uncondusive legal procedures to the majority of the Indian citizenry. This necessitated the invention of an alternative to the traditional and rigid rules of locus standi that were inconsistent with the needs of the poor majority in the country.

The third section of this Chapter seeks to analyse the development and application of Epistolary jurisdiction in India; the consequent rules of procedure that were created to facilitate the efficient use of this new concept are also highlighted therein. Finally, the Chapter concludes with brief criticisms of Epistolary jurisdiction in India and subsequent suppositions of how such shortfalls may be amended in the application of Epistolary jurisdiction in Kenya.

3.1. Social Action Litigation and Epistolary Jurisdiction

Epistolary jurisdiction was first developed in the United States in the case of *Gideon v Wainwright*⁶⁴ when a prisoner's postcard was accepted by the court as a petition, however, the principle of epistolary jurisdiction has by large been developed in India where its resultant form has been adapted and adopted in other South Asian countries including Pakistan and Bangladesh. The Supreme Court of India in its efforts to promote justice for all, that is the rich and poor, over-privileged and under-privileged, disadvantaged and vulnerable, exploited and excluded alike, has

⁶⁴ *Gideon v Wainwright* 372 US 335 (1963).

developed a special breed of public interest litigation which is known as Social Action Litigation.⁶⁵ SAL was developed as a response to the problem most people in India and many other third world countries face, poverty and inequality among classes. The Supreme Court in India realized that access to court and redress of injustices had become a prerogative of the rich and wealthy, an arena of legal quibbling for men with long purses.⁶⁶ Meanwhile, there was a large number of Indians, most of them poor, illiterate or unaware of their constitutional rights who were unable to access the courts and find legal redress for their abuses. The adversarial system of litigation was a huddle in affording poor people legal redress and it was essential to rethink the entire litigation system and move away from Western influenced models of thinking in order to accommodate the circumstances of poor people. Since the adversarial system was based on the rule of fairness among parties, the poor and disadvantaged could not possibly be held to be on equal footing as those with enough resources to see their case through the process.⁶⁷ As a result, Social Action Litigation was developed to provide an alternative approach towards the traditional court process by departing away from the adversarial system but still preserving the principles of fair play.⁶⁸ Consequently, it has become an avenue for the government to take a bolder step towards making human rights more meaningful for the poor and disadvantaged in India.

3.2. History of Epistolary Jurisdiction

The Constitution of India guarantees a right to move the Supreme Court, through appropriate proceedings, for the enforcement of rights under it.⁶⁹ Moreover, the Constitution grants the Supreme Court authority to issue any order or writ, whichever may be appropriate, for the enforcement of rights and freedoms guaranteed under it.⁷⁰ More so, the High Courts are granted the same prerogative within their territories for the enforcement of rights.⁷¹ Thus, the Constitution of India grants a wide berth of appropriate avenues for Courts to uphold and enforce rights under the Constitution. However, for a long time these provisions of the Constitution remained

⁶⁵ Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India,' *Third World Legal Studies*: Vol. 4, Article 6, 1985.

⁶⁶ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 947: AIR 1973 SC 1461, 2009.

⁶⁷ *S.P. Gupta v. Union of India*, 1981 Supp. SC 87, 210 (Explicitly stating that there is a need for opening standing to the disadvantaged where there is legal injury. The direct inference is an acknowledgement that it is unfavourable to continue to limit access to legal remedies).

⁶⁸ P.N Bhangwatti and C.J Dias, 'the Judiciary in India: A Hunger and Thirst for Justice', April-June 2012.

⁶⁹ Article 32 (1), the Indian Constitution.

⁷⁰ Article 32 (2), the Indian Constitution.

⁷¹ Article 226, the Indian Constitution.

ineffective as it was uncovered that Indian courts had outpriced the poor and disadvantaged, allowing only the wealthy to afford redress from them. Effectively, this left the poor and disadvantaged in a de facto state of lawlessness. It was impossible for the poor to approach the Court for justice because they lacked the awareness, assertiveness, and access to the machinery required to enforce their constitutional and legal rights.⁷² More so, the rules of *locus standi* were an impediment to the redress of violations occasioned on the poor and disadvantaged. The rules required that only persons who had suffered a specific legal injury, by reason of actual or threatened violation of a legal right or a legally-protected interest can bring an action for judicial redress. Additionally, it was only the holder of the right who could bring an action to court for redress. Obviously, this requirement of standing prevented many poor people who were unaware or ignorant of their rights and duties from moving the court to enforce their rights. This requirements also prevented access to courts for these groups of people due to the exorbitant court fees and legal costs. Moreover, the requirements of evidence for proving violations against them were impossible to satisfy since these groups of people rarely had the means or influence to collect material documentation to prove their cases.

As a result, the Supreme Court decided to move away from the traditional rules of standing and broaden them to enable suits from the poor and disadvantaged to be instituted. In a landmark decision in the case of *Bandhua Mukti Morcha v Union of India*⁷³, the court held that the ‘appropriate relief’ in Article 32 did not refer to appropriateness in reference to any rule whatsoever, but appropriateness in the purpose of the proceedings. Consequently, the court held that Article 32 not only allowed the Supreme Court to make high prerogative writs such as habeas corpus, mandamus, prohibition, certiorari and quo warranto, but also make directives, orders and writs in the nature of these high prerogative writs. Therefore, if in making a directive, order or writ, the conditions of these high prerogative writs were not fulfilled, the Court could, nevertheless, issue directives, orders or writs appropriate for the enforcement of rights and fundamental freedoms in the Constitution. Following this decision, in the case of *People’s Union for Democratic Rights v Union of India*,⁷⁴ the court expanded the rules of locus standi to include, where a legal wrong or a legal injury was caused to a person or to a class of persons by reason of

⁷² P.N Bhangwatti and C.J Dias, ‘the Judiciary in India: A Hunger and Thirst for Justice’, April-June 2012.

⁷³ *Bandhua Mukti Morcha v Union of India and others* 1984 AIR 802, 1984 SCR (2) 67.

⁷⁴ *People’s Union for Democratic Rights v Union of India* 1982 AIR 1473, 1983 SCR (1) 456.

violation of their constitutional or legal right, and such person or class of person was by reason of poverty or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of the public or social action group acting bona fide could institute an action on their behalf. More so, in preserving fairness, the court acknowledging that it would not be right to expect these public spirited individuals or social action groups to cater from their own coffers the legal costs and court fees when instituting cases for the poor and downtrodden, it allowed for such cases to be instituted through letters sent to the Supreme Court. Thus, the court developed a new procedure to be known as 'Epistolary Jurisdiction'.⁷⁵

The courts in India have successfully adopted this interpretation of Article 32 and consequently epistolary jurisdiction. In the landmark case of *Sunil Batra v. Delhi Administration*, the case was initiated by a letter that was written by a prisoner lodged in jail to a Judge of the Supreme Court. The prisoner complained of a brutal assault committed by a head warder on another prisoner. The Court treated that letter as a writ petition, and stated that:

"...technicalities and legal niceties are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found."⁷⁶ In *Parmanand Katara v. Union of India*, the Supreme Court accepted an application that highlighted a newspaper article titled, '*Law Helps the Injured to die*,' published by *The Hindustan Times*. The petitioner brought to light the difficulties faced by persons injured in road and other accidents in availing urgent and life-saving medical treatment, since many hospitals and doctors refused to treat them unless certain legal procedural formalities were completed. The Supreme Court directed medical establishments to provide instant medical aid to such injured people, notwithstanding the formalities to be followed.⁷⁷ Similarly, in *Nilibati Behra v State of Orissa and Drs*, a mother wrote a letter to the Supreme Court seeking an order of Habeas Corpus with regard to her dead son. The letter was treated as a writ petition.⁷⁸ In *Upendra Baxii (Dr) vs. State of UP*, the Supreme Court accepted a letter written by two law professionals as a matter of public interest litigation and treated

⁷⁵ *S.P Gupta v Union of India* (where Justice P.N Bhagwati led the court in stating that epistolary jurisdiction would allow the court to readily respond even to a letter addressed by an individual acting pro bono public and treat it as a formal writ petition for Public Interest Litigation purposes.)

⁷⁶ *Sunil Batra v Delhi Administration* (1978) 4, 494.

⁷⁷ *Parmanand Katara v Union of India* (1989) 4, 286.

⁷⁸ *Nilibati Behra v State of Orissa and Drs* (1993) 25,746.

it as a writ petition before proceeding to issue guidelines with a view of improving the pathetic conditions prevailing in the government protective homes at Agra.⁷⁹

3.3. Application of Epistolary Jurisdiction in India

Social Action Litigation was borne from a critical point in India's experience. Often, it is used interchangeably with the term Public Interest Litigation which is synonymous in practice to the United States of America. However, as particularly intimated by Professor Upendra Baxii, Social Action Litigation should be used in reference to its practice in India, distinguishable substantively and procedurally with Public Interest Litigation. Social Action Litigation stands out as a mechanism to expose and cure the exploitation of and deprivation of fundamental rights and freedoms from disadvantaged groups of people occasioned as a result of governmental lawlessness and administrative deviance.⁸⁰ As a result, Social Action Litigation has brought about unprecedented and complex cases that have required extraordinary remedies, challenging perceived notions of the separation of powers and the inherited distinctions between adjudication and legislation as well as adjudication and administration. More so, it has required a new form of lawyering and judging, provoking dialogue on the role of the judiciary in a society such as India's.⁸¹

Resultantly, the application of Epistolary jurisdiction, as a derivative procedural innovation of Social Action Litigation has influenced the adoption of new rules of procedure that enhance its application and preserve judicial efficiency. In a judicial notice issued by the Supreme Court of India dated 1st December 1988, the Chief Justice of India, at the time, provided guidelines to be followed for the entertainment of letter petitions under Social Action Litigation.⁸² The guidelines proscribe the type of cases to be instituted through epistolary jurisdiction. Such cases include; bonded labour, neglected children, petitions from prisoners, petitions against the police, petitions against atrocities on women, children and scheduled castes and scheduled tribes, petitions on environmental matters, adulteration of drugs and food, maintenance of heritage and culture and other matters of public importance. The notice also set out matters which ordinarily were not to be

⁷⁹ Upendra Baxii (Dr) v State of UP (1983), 2, 308.

⁸⁰ P.N Bhagwatti and C.J Dias, 'the Judiciary in India: A Hunger and Thirst for Justice', April-June 2012.

⁸¹ Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India,' Third World Legal Studies: Vol. 4, Article 6.

⁸² The list of guidelines has continuously been updated through the years by the sitting Chief Justice with the latest modification being on 29th August, 2003.

entertained such as landlord-tenant disputes, service matters and admission to medical and other educational institutions.

Furthermore, it was essential to ensure that this jurisdiction of the courts was not used for frivolous reasons petitions more so to avoid multiplicity of petitions, the court formed Public Interest Litigation and Information cells with full-fledged staff to deal with letters under public interest litigation. In these cells, letters are to be scrutinized by the staff who are employed exclusively for this purpose. If the letter describes infringement of fundamental right, it is forwarded to the Supreme Court Legal Aid Committee and if it describes violation of a legal right, it is forwarded to the Legal Aid Board. These cells provide updates on the status of pending cases to the relevant petitioners.⁸³

Another innovation by the Supreme Court of India was with respect to collection and production of evidence to prove matters brought to the court through epistolary jurisdiction. Essentially, the poor and disadvantaged groups of people did not have the power to collect the necessary evidence to prove their cases. Not only was it crucial to develop a whole system of litigation that could accommodate their needs, but also it was essential to provide a means for the court to acquire the necessary evidence to determine their cases. Obviously, the respondents to these cases who were mostly in positions of authority were bound to deny through affidavits the allegations of violations of fundamental rights and freedoms. Moreover, they denied the credibility of social action groups who instituted cases on behalf of the victims of such violations. Therefore, the court developed a new strategy in which they could be able to investigate the violations and collect the relevant evidence needed to determine the cases. Following its authority under Article 32 of the Indian Constitution, the court started appointing socio-legal commissions of inquiry⁸⁴ constituting judicial officers, researchers, teachers, government officers, and journalist. Such commissions were mandated to make inquiries into the violations in a particular case and gather relevant information and evidence, after which they would compile a report setting out findings and recommendations. In the case of *Bandhua Mukti Morcha v. Union of India*⁸⁵ concerning the use of bonded labour in the Faridabad stone quarries, the Supreme Court appointed Dr S Patwardhan, a Professor of Sociology working at the Indian Institute of Technology, to carry out a socio-legal

⁸³ An MHRD Project, *Access to Justice under Public Interest Litigation*.

⁸⁴ P.N Bhagwati and C.J Dias, 'the Judiciary in India: A Hunger and Thirst for Justice', April-June 2012.

⁸⁵ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802.

investigation into the conditions of the stone quarry workers. On the basis of his report, the Supreme Court gave various directions detailed in the case. The adoption of his system is a step away from the adversarial system of litigation and the conception of a more collaborative system of litigation.

Social Action Litigation is concerned with the enforcement of collective rights held by groups of people. Reliefs under the adversarial system of litigation are concerned with private held rights and, therefore, cannot be sufficient for cases under the social action litigation system. In light of this, the Supreme Court needed to come up with new reliefs for cases instituted under SAL. In the *Bandhua Mukti Mocha* case, the court gave various directions for identifying, releasing, and rehabilitating bonded labourers, ensuring payment of the minimum wage, the observance of labour laws, provision of wholesome drinking water and the setting up of dust sucking machines in the stone quarries. The Supreme Court also set up a monitoring agency to continuously monitor implementation of those directions. Moreover in the case of *Hussainara Khatoon v. State of Bihar* the Supreme Court directed that the State Government should prepare an annual census of under-trial prisoners on October 31 each year and submit it to the High Court. Thereupon, the High Court would give directions for early disposal of cases where the under-trial prisoners had been under detention for unreasonably long periods of time.⁸⁶ These reliefs provided by the court were structured to suit the needs of the cases in which they were given. Through its power under Article 32 of the Indian Constitution, the court can provide any relief it deems appropriate to uphold the fundamental rights and freedoms of the people. This allows the court to give reliefs structured to cater for the different needs of each case.

Finally, the issue of enforcement of the court's orders comes into question. Social Action Litigation is dependent on the enforcement of orders, directives or writs issued by the courts. Without this enforcement, the entire social action litigation structure would become devoid of meaning and prove itself redundant. Social Action Litigation groups and public spirited individuals who institute SAL cases and are able to secure orders of the court should ensure full implementation of such orders. They should bring to the notice of the court if such orders or writs are not implemented satisfactorily. Since orders under this jurisdiction of the court are made against state authorities, the court can find the State officers obligated with the implementation of

⁸⁶ *Hussainara Khatoon v State of Bihar*, (1980) 1 SCC 93: AIR 1979 SC 1360.

such orders in contempt of court if it is discovered that there is wilful disregard to the orders.⁸⁷ More so, the court in its authority, can issue directions as to enforcement of the orders provided in a case. In the case of *Bandhua Mukti Mocha*, the court appointed Laxmi Dhar Misra, a Joint Secretary, in the Ministry of Labour, to visit the Faridabad stone quarries after a period of about two or three months. This was done to ascertain whether the directions given by the Court had been implemented and to make a report for the Supreme Court with regard to the implementation of those directions. In the case of *People's Union for Democratic Rights v. Union of India*⁸⁸, the court appointed three social activists as ombudsmen for the purpose of ensuring that labour laws were being observed by the state administration.

The Supreme Court of India has surely proved its commitment towards the protection of fundamental rights and freedoms of poor and marginalised groups of people. As time progresses, it is expected that the concept of Social Action Litigation and consequently epistolary jurisdiction of the court will be developed further. New methods and strategies shall continue to be employed for the perfection of this powerful legal tool.⁸⁹

3.4. Criticisms of Epistolary Jurisdiction

Similarly to any other innovation that challenges the status quo, epistolary jurisdiction has come under criticism from various parties. Such criticisms have, more often than not, been related to Social Action Litigation and its purpose in the judicial system.

The most prominent criticism has been argued that the adoption of social action litigation by the Supreme Court of India has gone ahead to cause imbalance between the three arms of government. SAL has enabled the court to place upon itself duties and powers exercised by other arms of government thereby upsetting the principle of separation of powers. In the case of *Kushum Lata v. Union of India*,⁹⁰ a two judge bench criticised the trend towards judicial activism with regards to administrative actions stating that the executive were well versed in their field of duty and it was not the duty of the court to provide directions to the executive. More so, the court criticised a previous judgement of a three judge bench calling such a judgement a glaring example of deviations from the clearly provided constitutional scheme of separation of powers.⁹¹ Definitely,

⁸⁷ Article 129, Constitution of India; Section 4 and Section 15 of the Contempt of Court Act, 1971.

⁸⁸ *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235: AIR 1982 SC 1473.

⁸⁹ P.N Bhagwatti and C.J Dias, 'the Judiciary in India: A Hunger and Thirst for Justice', April-June 2012.

⁹⁰ *Kushum Lata v. Union of India* (2006) 6 SCC, 180.

⁹¹ *Kushum Lata v. Union of India*, (2006) 6 SCC, 180, Par 17-41.

the court should be wary of usurping the powers of the executive and the legislature. However, in rebutting this strain of criticism, it has been argued that the courts have shown consistency in upholding claims brought through SAL occasioned by the excesses of the executive. Previously, the court has focused its reprimand on junior officers and certainly not powerful politicians. It would then not be a surprise that when the court directs itself towards senior officials and powerful interested parties in the executive, that accusations of usurpation of powers would arise. Such allegations are consequently borne out of frustrations from their own partisan actions.⁹²

3.5. Conclusion

Nevertheless, the adoption of epistolary jurisdiction has been essential for the development and enforcement of fundamental rights and freedoms in India. Not only has it led to decisions that have changed the course of constitutional interpretation and application in India, but it has also allowed for the court process in India to be accessible by all, enhancing the right of access to justice. The Supreme Court has ceased to only exist as the Supreme Court of India and become the Supreme Court of all Indians.

In the same vein, application of Epistolary jurisdiction in Kenya will not only require substantive and procedural shifts in its legal framework but it will also require the change of mind sets among judges and legal practitioners. Development of a culture that recognizes and supports human rights and respects their enforcement requires strong leadership from the Judiciary of Kenya.

⁹² Prashant Bhushan, '*Supreme Court and PIL: Changing Perspectives under Liberalisation*,' 39 EPW 194 (2004); P.N Bhagwati and C.J Dias, 'the Judiciary in India: A Hunger and Thirst for Justice.' April- June 2012, 186-187.

CHAPTER 4: APPLICATION OF EPISTOLARY JURISDICTON IN KENYA

4.0. Introduction

As discussed in the previous chapter, Epistolary jurisdiction is an invention of the judiciary. It is a result of the augmentation of the traditional judicial process to suit the unique characteristics of the society in which it is applied, in order to deliver justice to all those who have been wronged. In the eyes of Amartya Sen, the concept of epistolary jurisdiction would be a natural manifestation of his theoretical analysis of a just society. In his theory he states that the pursuit of justice in a society is actually predicated on making policy comparisons rather than implementing singular policies drawn from a universal ideal theory of justice.⁹³⁹⁴ Such policy comparisons, he states, will lead to the implementation of policies that are most ideal in providing justice in the society, acknowledging such a society's unique characteristics and needs.⁹⁵

Successful implementation of epistolary jurisdiction has to be accompanied by several procedural alterations in the judicial process. Indeed, epistolary jurisdiction was originally created to bypass procedural technicalities that prevented poor people from accessing the court process. Such technicalities stifle the enforcement of access to justice as a fundamental right and consequently prevents the development of substantive legal precedent necessary for the realization of fundamental rights and freedoms in a democratic state. As discussed earlier, the major procedural limiter of access to justice for this group of people is the requirements of *locus standi*. The adversarial form of litigation also creates limitations to the full realization of access to justice, especially in the Kenyan context where close to half of its population lives in poverty. This is due to its private right based remedies and its apparent constraints on judicial activism.

This chapter therefore seeks to analyze the extent to which such procedural requirements have been or should be altered to allow full implementation of epistolary jurisdiction in Kenya and resultantly full realization of access to justice to poor people. Moreover, the chapter will seek to examine how Kenyan courts have interpreted Article 22 and the *Mutunga* rules, which are the foundation for the application of epistolary jurisdiction in Kenya.

⁹³ Amartya Sen, 'The Idea of Justice', the Belknap Press of Harvard University Press Cambridge, Massachusetts 2009.

⁹⁴ John Rawls, 'A Theory of Justice', the Belknap Press of Harvard University Press Cambridge, Massachusetts.

⁹⁵ Amartya Sen, 'The Idea of Justice', the Belknap Press of Harvard University Press Cambridge, Massachusetts, 2009.

4.1. Application of Epistolary Jurisdiction in Kenya

In 2010, we promulgated a new Constitution, and with it a wind of change swept over Kenya. The rules of *locus standi*, which have held back years of progressive jurisprudence, have been expanded to facilitate third party litigation.⁹⁶ Additionally, under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, informal documentation can be used, where necessary, to commence a suit. These rules are further supported through Article 159 that outlines principles that shall govern the judiciary including under Article 159 (d) that the court shall not pay undue regard to procedural technicalities. Indeed, the Constitution has acknowledged the vitality of access to justice in advancing the rule of law and democracy.⁹⁷

However, the Judiciary concedes that in order for it to effectively perform its role and advance the values and principles of the Constitution, it must lift itself out of years of political servitude, financial insecurity, widespread corruption and delinquent jurisprudence.⁹⁸ It additionally accepts that it must not only re-organize and restructure its institutional operations, but also wholly embrace the unique responsibilities bestowed upon it by the Constitution.

The Judiciary holds itself up to achieve several goals including reordering its administrative and judicial processes so that the former supports the latter to enhance delivery of services; improve the speed of justice; and improve access to justice especially for the marginalized and traditionally under-served communities. Evidently, the court has taken cognisance of the need to adopt new procedural mechanisms in order to improve justice delivery and access to justice. More so, it has realized that such procedural mechanisms will require distinctive administrative support to bring to fruition. Consequently, it has conceived a four pillar strategy envisaged to propel the judiciary towards its overriding objective: to achieve access to, and expeditious delivery of justice to all.⁹⁹ Article 159 of the Constitution provides that judicial authority is derived from the people of Kenya and is vested in and exercised by the courts and tribunals created under the Constitution.¹⁰⁰ Based on this, the judiciary aims to achieve a people-focused system of delivery of justice. In order to achieve this, the Judiciary, as the custodian of justice in Kenya, needs to take effective steps to

⁹⁶ Article 22, the Constitution of Kenya (2010).

⁹⁷ Under Article 10-2 (a), the rule of law and democracy are listed as some of the national principles to be advanced by all state organs, state officers and public officers while carrying out their duties.

⁹⁸ The Judiciary, *Judicial Transformation Framework*, 2012-2016.

⁹⁹ The Judiciary, *Judicial Transformation Framework*, 2012-2016, 13.

¹⁰⁰ Article 159, the Constitution of Kenya (2010).

reduce the obstacles that hinder public access to information; ensure proximity and physical access to courts; simplify court procedures so that all litigants can understand and effectively participate in court processes. In guaranteeing equal protection of the law, the Constitution demands that the Judiciary must not only remove barriers to access to justice, but it must also ensure that the Judiciary remains open and available to all those who seek its assistance. Taking these measures will not only serve the objective of enhancing the expeditious delivery of justice but also reduce the people's alienation from the justice system.¹⁰¹

To this effect, quite a few court cases have recognized the need to expand the scope of access to justice and move past rigid procedural mechanisms that limit it.

In the case of *Joseph Nyamamba & 4 others v. Kenya Railways Corporation*, the court expounded on the extent to which Article 48 was applicable. It admitted that the right of access to justice was wide and included the ability of a party to institute a suit in court, the ability to access the police with legitimate expectation of fair, expeditious and prompt enforcement of one's complaint, prosecution of suspects, enforcement of decrees and orders issued by a court and prompt and fair compensation by government upon compulsory acquisition of one's property for public use.¹⁰² Moreover, in the case of *Kenya Bus Services Limited and Anor v. Minister of Transport & 2 Others*¹⁰³, the court reckoned that access to justice is incorporated in the constitution to allow us to look beyond the dry letter of the law, to fight against legal formalism and dogmatism and to uphold national values and principles of governance, which include the rule of law, social justice, human dignity and democracy that can only be realized through the legal processes. Moreover, the court stated that Article 48 invited the court to consider, '... *the conditions which clog and fetter the right of persons to seek the assistance of courts of law.*'"

In light of the above pronouncements, the court has shown great commitment to the realization of the right of access to justice. It has acknowledged the need to go beyond the legal straight jacket and develop new methods of achieving the right to access courts and the judicial process. This has been acknowledged in the *Centre For Human Rights and Democracy and Others v The Judges and Magistrates Vetting Board and Others*¹⁰⁴, where the court stated that it is part of and core of

¹⁰¹ The Judiciary, *Judicial Transformation Framework*, 2012-2016.

¹⁰² *Joseph Nyamamba & 4 others v Kenya Railways Corporation* [2009] eKLR.

¹⁰³ *Kenya Bus Services Limited and Anor v Minister of Transport & 2 Others* [2012] eKLR.

¹⁰⁴ *Centre For Human Rights and Democracy and Others v The Judges and Magistrates Vetting Board and Others* [2012] (Unreported).

the courts' constitutional and statutory obligations to innovate new methods and devise new strategies for purposes of providing access to justice to all persons who are denied their basic fundamental and human rights. This is predicated on its duty as the custodian of the constitution, to ensure the principles and values under it are upheld.

It is in this same vein that the court, guided by the Constitution, has adopted liberal interpretations to the requirements of *locus standi*. Article 159 (d) directs that the court should not place undue regard to procedural technicalities in the delivery of justice.¹⁰⁵ In the case of *James Mangeli Musoo v Ezeetec Limited*¹⁰⁶ the court defined procedural technicalities as provisions of law or procedure that **inhibit** or **limit** the direction of pleadings, proceedings and even decisions of court matters. In *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another*¹⁰⁷ the court recognized that the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. More so, the court continued to state that in the interest of advancing meaningful human rights and for the purpose of those who may be indigent and unsophisticated, the rules of locus standi have been extended to allow such people to access the judicial process and enforce their rights. Additionally, in the case of *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others*¹⁰⁸ the court reiterating its commitment to the values of substantive justice, the rule of law, public participation, inclusiveness, transparency and accountability envisaged under Article 10, stated that it cannot sanction a judicial standard for locus standi that places limitations on the access to courts.

Resultantly, the legal conditions and judicial attitudes towards access to justice for all regardless of status, are not only feasible for the effective implementation epistolary jurisdiction in Kenya, but have also encapsulated it in our procedural rules through the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Rules of 2010, providing a legal basis for its use.

Nonetheless, some court decisions have created uncertainty towards the interpretation of Article 159 (2) (d), and its application in the judicial process.

¹⁰⁵ Article 159 (d), the Constitution of Kenya (2010).

¹⁰⁶ *James Mangeli Musoo v Ezeetec limited* [2014] eKLR.

¹⁰⁷ *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another* [2016] eKLR.

¹⁰⁸ *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [Civil Appeal No. 290 of 2012] eKLR.

In the case of *Raila Odinga v I.E.B.C & others*¹⁰⁹, the court cautioned itself against the blanket application of Article 159. It admitted that the essence of article 159 (2) (d) was to prevent a court from allowing prescriptions of procedure and form, from preventing the primary objective of dispensing substantive justice to the parties. However, it further stated that this principle of merit was not set in stone and a court, as an agency of the judicial process, was called upon to appreciate all circumstances and requirements of a particular case. In the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others*¹¹⁰, Justice Kiage in a dissenting opinion holds that courts cannot aid in the bending and circumventing of even handed processes and that the rules of procedures serve to make the process of judicial adjudication and determination fair, just, certain and even handed.

In the previous constitutional dispensation, procedural requirements or the absence of such requirements set by law were used as an affront to deny justice to people. For example, in the case of *Kamau Kuria v Attorney General*¹¹¹, the court denied redress to the applicant due to the fact that rules under Section 84 of the repealed Constitution had not been made by the Chief Justice.¹¹² It was in light of such pronouncements by the Court that Article 159 was included; to prevent over reliance on procedural technicalities in order to defeat justice. Clearly, courts are also weary of exploitation of article 159 to defeat procedural rules laid down to bring order to the judicial process. However, Article 258 of the Constitution provides that the Constitution shall be interpreted in a manner that advances its purposes, values, principles, the rule of law and rights and freedoms under the Bill of Rights.¹¹³ Clearly, the purpose of Article 159 was to enhance access to justice to all regardless of status and it would be redundant if it is used to defeat the same defect it sought to cure.¹¹⁴

Moreover, although limited in number, some court decisions have questioned the use of epistolary jurisdiction and therefore led to uncertainty in its application. In the case of *Republic v Francis Kariko Kimani*, an accused through his counsel instituted a case through epistolary jurisdiction for his release on cash bail. In determining the case, Emukule J. stated that although epistolary

¹⁰⁹ *Raila Odinga v I.E.B.C & others* [2013] eKLR.

¹¹⁰ *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR.

¹¹¹ *Kamau Kuria v Attorney General*, Misc. Civil Application [550 of 1988] eKLR.

¹¹² Under the 2010 Constitution, Article 22(4) states that the absence of such rules shall not limit the right to any person to commence court proceedings under Article 22, and to have a matter determined by court.

¹¹³ Article 259, the Constitution of Kenya, 2010.

¹¹⁴ Edward Ritei Paranta, 'Epistolary Jurisdiction as a Means of Enhancing Access to Justice in Kenya', Published Dissertation, Strathmore University, 2016.

jurisdiction was applied in countries such as India, it involved major issues such as the effects of industrialization and climate change which were determined by the Supreme Court after investigation of the issues raised in complaint. The judge therefore denied the applicant bail based on his epistolary application. It is clear, from the analysis of epistolary jurisdiction done under Chapter 3 of this dissertation that the honourable judge, in the case, lacked the precise understanding of the purpose of epistolary jurisdiction as a principle of law and the defects it was meant to cure in the Kenyan context. What he pronounces to be reasons against its application in Kenya, are the administrative and procedural manifestations of epistolary jurisdiction in India. This decision does not, therefore, take into consideration Article 22 (3), 159 (2) and 259 (1) of the Constitution and creates damaging precedent on the future of Epistolary jurisdiction. More so, in the case of *Andrew Khisa Wasike v Office of the Public Prosecution & another*¹¹⁵ the court outlines that in its view, epistolary jurisdiction should only be invoked in circumstances concerning public interest litigation and where a party is not represented, thereafter the court cited the case of *People's Union of Democratic Rights and Others v Union of India and Others* to support its decision. Indeed, this case portrays a clearer understanding of the application of epistolary jurisdiction. However, it goes to show that epistolary jurisdiction lacks clarity of definition and institutional recognition by the Judiciary and therefore, there is fluctuation and uncertainty as to when, where and how this jurisdiction may be invoked in Court. In the case of *Geoffrey Muthinja & another v Samuel Muguna Henry*¹¹⁶, the court of appeal attempted to bring some certainty in the criteria of determining formal competency of an application invoking epistolary jurisdiction. It stated that so long as there was sufficiency of information as to the constitutional right violated with particulars supplied, then a court of competent jurisdiction, in the spirit of the Constitution, ought to take the matter up, investigate and provide redress or relief if merited, careful not to defeat substance at the altar of procedure. In fact the court held that petition in question satisfied the requisite formal competency.

This Court of Appeal case can be cited as the first case to elucidate on the application of epistolary jurisdiction. For now, an application of epistolary jurisdiction is formally competent if it outlines the details of the applicant and the constitutional right violated. Furthermore, a court has the

¹¹⁵ Andrew Khisa Wasike v Office of the Public Prosecution & another [2016] eKLR.

¹¹⁶ Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR.

obligation to consequently take up the matter, investigate and provide a suitable relief for such a party.

4.2. Conclusion

The Judiciary, despite its countless efforts at reform, has been slow to recognize the lacuna in law in the application of epistolary jurisdiction. Since 2010, there has been little to no development in the area. The limited number of cases involving epistolary jurisdiction signifies a lack of knowledge, by the general public, of this provision of law. More so, due to the uncertainty brought about by conflicting interpretations of epistolary jurisdiction by the court, the legal community has been reluctant to institute cases in this form. Evidently, there lacks a concise legal framework detailing the procedure of bringing an epistolary application to court; directing what type of cases can be instituted through epistolary jurisdiction; and the obligations of the court in investigating- that is the collection of evidence- and providing a suitable relief to the aggrieved party. This jurisprudential void may result in a floodgate of cases if the provision of law becomes popular, owing to the fact that it would attract many of Kenya's citizens who are poor. Moreover, the lack of a legal framework will result in the misuse of Epistolary jurisdiction leading to many frivolous suits being instituted, resulting in inefficiencies in the judicial process.

A lot needs to be achieved in order to attain universal access to justice in Kenya. The foundations of any democracy that has the ability to facilitate, enforce and protect the fundamental rights and freedoms of its citizens lie within its respect of the rule of law and constitutionality. It is through this that a culture of respect of human rights will develop amongst individual people. The Executive must not disregard the rule of law and overstep its mandate. The Judiciary in further development of epistolary jurisdiction must seek to cooperate with other public and private institutions in order to bring about a process that is adaptable to the Kenyan situation.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

Following the words of Justice P.N Bhagwatti, whereas the articles of the constitution are couched in the widest of terms possible they mean little to the bulk of the population for as long as the courts fail to embrace the invocation of such jurisdiction. The Constitution of Kenya 2010 has been explicit about the invocation of epistolary jurisdiction as a legitimate method of instituting court proceedings. This couched with the expansion of the rules of *locus standi* has created the viable legal atmosphere for epistolary jurisdiction to thrive. However, due to the lack of a proper legal framework on this provision of law epistolary jurisdiction remains in the dark.

This chapter seeks to provide the research findings from each chapter and consequently provide viable recommendations on the application of epistolary jurisdiction in Kenya

5.2. Access to Justice is hindered by Legal, Institutional and Structural Barriers

Poverty as defined earlier is a condition in which human beings are deprived of the resources, capabilities and powers necessary for the attainment of an adequate standard of life. Such deprivation is occasioned by an ineffective or non-responsive policing and judicial system. Inspired by the social contract theory, these two institutions are the backbone of an effective democracy. The police are obligated to secure and protect the rights and freedoms guaranteed under the Constitution. The Judiciary is obligated to enforce and promote further such rights and freedoms if and when they are violated or simply under threat of violation. The systemic disintegration of the processes that keep such institutions running are a result of negligence and poor leadership. Understaffing and overstretching of the staff members of these institutions, who function under a very limited budget, culminates into the emergence of detrimental and unethical practices such as corruption. Conversely, without the effective channels to protect, enforce and promote fundamental rights and freedoms, nothing is guaranteed and the weak and vulnerable are left to their own devices. Resultantly, poor people's rights and freedoms are violated further, pushing them into greater poverty. They are denied of the opportunity to strengthen their economic status.

Evidently, enforcement of the right of access to justice is not predicated on the Judiciary alone, it is dependent on the wholesome cooperation of the three arms of government.

- i. The Executive should ensure proper and sufficient budgetary allocations to all arms of government. Moreover, through separation of powers, the Executive should not

succumb to political pressure and infringe on the independence of the Judiciary. Through separation of powers, each arm of government is kept on its toes, accountable for every action it takes. It is therefore critical to maintain the balance.

- ii. The Legislature and the legal fraternity should continuously seek to harmonize statutory provisions to the Constitution of Kenya 2010 in order to ensure uniformity in interpreting and applying the laws.
- iii. Moreover, due to the expanded rules of locus standi, independent citizens can effectively institute proceedings challenging unconstitutional laws that prohibit access to justice. Policies and institutional regulations that prohibit ordinary citizens from obtaining legal identity and claiming their legal entitlements should be challenged.
- iv. The Judiciary should continuously ward off any attempts at its independence, for a Judiciary cannot rise above the status of its authority. More so, it should ensure effective reform and attainment of the four pillar strategy towards the overriding objective of the Judiciary: guaranteeing access to justice for all and ensuring equal protection of the law.
- v. In *Paul Pkiach Anupa & Another v Attorney General & Another*¹¹⁷ the court reiterated that an environment, in which access to justice for all is promoted and enforced, regardless of social or economic status, was that in which the rule of law flourished. Clearly, above all else, the rule of law and constitutionalism ought to be the guiding principles for Kenya's young democracy. Attainment of above mentioned recommendations is predicated on adherence to these guiding principles.

5.3. Effective Implementation of Epistolary Jurisdiction will enhance Access to Justice for the Poor people in Kenya.

As seen under Indian jurisprudence, epistolary jurisdiction is a mechanism developed with the most disadvantaged member of society in mind. It seeks to bypass all procedural, legal, institutional and structural barriers that may impede access to court. Through Social Action Litigation, the Indian Supreme Court has been able to significantly revolutionise the human rights landscape in India, through judicial activism and progressive interpretation of human rights provisions under their Bill of Rights.

¹¹⁷ Paul Pkiach Anupa & Another v Attorney General & Another [2012] eKLR.

The Kenyan judiciary, closely following in their footsteps, has readily accepted its mandate as a protector of the Constitution and promoter of Constitutional principles. The rules of *locus standi* have been expanded, allowing for a party to institute legal proceedings without having any individual interest in the matter. More so, the Constitution and subsidiary legislation have expressly allowed the institution of proceedings through letters. In the case of *Geoffrey Muthinja & another v Samuel Muguna Henry*, the Court of Appeal provided the basic requirements for the legitimacy of an epistolary application: particulars of the party applying and sufficiency of information as to the constitutional right violated. Indeed, the fundamental legal requirements of the application of epistolary jurisdiction are in place.

The Judiciary should now furnish the necessary administrative procedures and rules so as to effectively and efficiently adjudicate such matters. Primarily, the Judiciary should define the scope of application of epistolary jurisdiction. In the earlier cited case of *Geoffery Muthinja*, the court stated that epistolary applications should be limited to public interest litigation matters and litigants who have no representation. However, Article 22, under which epistolary jurisdiction is inferred, provides for mechanisms in which the Bill of Rights shall be enforced. Clearly, epistolary jurisdiction under the Kenyan legal system is meant to institute any matter that outlines a violation of rights and fundamental freedoms. Under Article 165, the High Court of Kenya has original jurisdiction to listen and determine applications for redress of a denial, violation or infringement of a right or fundamental freedom under the Bill of Rights. It would fall under the mandate of the High Court to receive epistolary applications.

With regards to the investigation and collection of evidence in any epistolary matter, the Kenya National Human Rights and Equality Commission may conduct any investigation, in accordance to their constitutional mandate, and collect evidence related to such a case and present it before the court. Such mutual cooperation will allow efficient use of limited court resources to advance matters brought under Epistolary jurisdiction. The Kenya National Commission on Human Rights Act, under Section 8-i states that the Commission may perform such other functions as the Commission may consider necessary for the promotion and protection of human rights; Article 249 of the Constitution provides the objects of such commissions as to protect sovereignty; secure the observance by all State Organs of the democratic values and principles; and promote constitutionalism. Therefore in fulfillment of their Constitutional mandate and promotion of the values and principles of the Constitution, the Kenya National Commission on Human Rights and

the Commission on Administrative Justice should engage the Judiciary in such cooperative actions in order to better enable the achievement of access to justice for all through epistolary jurisdiction.

5.3. Creation and Implementation of a Legal Framework governing Epistolary Jurisdiction will promote the Access to Justice for All.

As seen in Chapter 4, various court pronouncements differ on the principle application of epistolary jurisdiction. Such uncertainty of legal procedure may lead to the under use of the legal concept of epistolary jurisdiction. The function of the law is to ensure certainty of outcomes of various actions. Lack of such certainty leads to a high amount of risk while litigating on an issue instituted through epistolary jurisdiction. More so, lack of a legal framework may result in the misuse of the concept. This will be as a result of frivolous suits instituted to avoid court fees culminating to inefficient court processes thereby delaying timely resolution of disputes. Harmonization of laws and precedent is therefore a crucial objective for the legislature and judiciary to achieve.

5.4. Conclusion

This dissertation was mainly carried out through desktop research of articles, books and academic papers on the issue of enhancing access to justice through Epistolary jurisdiction. Despite the successes I have gained from this method of research, more could have been achieved if there was sufficient information in Kenya on epistolary jurisdiction and its application. More so, this study could have gained further insight into the conditions of poor people and the problems they face while attempting to access courts and judicial tribunals if field interviews had been carried out. However, it is my sincere belief that through the implementation of the recommendations of this study, epistolary jurisdiction can be developed into a tool through which access to justice shall be achieved for every person, despite their social or economic status.

BIBLIOGRAPHY

Books, Articles, Reports and Journals

United Nations and the Rule of Law <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice> September 10, 2015.

Kariuki Muigua "Improving Access to Justice: Legislative and Administrative Reforms under the Constitution."

FIDA Kenya, the Peoples Version Informal Justice System, (2011).

KLRC, Draft Report on Audit of Laws on Access to Justice, (March 2012).

Kariuki Muigua, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies', *Workshop on Access to Justice, Nairobi (Sankara Hotel, Westlands), 23rd October 2012.*

Committee On Economic, Social And Cultural Rights, 'Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights: Poverty And The International Covenant On Economic, Social And Cultural Rights.' (E/C.12/2001/1010 May 2001).

Edward Ritei Paranta, 'Access To Justice: Epistolary Jurisdiction as a Means of Improving Access to Justice in Kenya.' *Published Dissertation Paper, Strathmore University School of Law, 2016.*

J Beqiraj and L McNamara, 'International Access to Justice: Barriers and Solutions', *Bingham Centre for the Rule of Law Report (2014).*

Randa, John, Gubbins, Paul, 'Kenya Economic Update: Time to Shift Gears; Accelerating Growth and Poverty Reduction in the New Kenya', 2013, Edition No.8. *Washington DC: World Bank Group.*

Human Rights Committee, CCPR General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial (2007).

The General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 30th November 2012.

UN General Assembly, 'Report of the Special Rapporteur on extreme poverty and human rights', August 2012.

Magdalena Sepúlveda Carmona, Kate Donald, 'Access to Justice for Persons Living in Poverty: A Human Rights Approach', *Elements for Discussion Series, Ministry for Foreign Affairs of Finland (Erweko Oy).*

Elizabeth L. MacDowell, 'Reimagining Access to Justice in the Poor People's Courts.' 2015.

P.N. Bhagwati & C.J. Dias, 'the Judiciary in India: A Hunger and Thirst for Justice ', 5 N.U.J.S Law Review, (2012).

Judicial Transformation Framework, 2012-2016.

Access to Justice under Public Interest Litigation: An MHRD Project under its National Mission on Education through ICT.

Drew Days III Et Al, Justice Enjoined, 'The State of The Judiciary In Kenya ', Publication Of The Robert F. Kennedy Memorial Center For Human Rights, (1992)

Commission on Administrative Justice Office of the Ombudsman, 'Stateless in Kenya: An Investigative Report on the Crisis of Acquiring Identification Documents in Kenya ', August 2015.

Prashant Bhushan, 'Supreme Court and PIL: Changing Perspectives under Liberalisation', (2004).

Amartya Sen, 'The Idea of Justice', the Belknap Press of Harvard University Press Cambridge, Massachusetts, 2009.

John Rawls, 'A Theory of Justice', the Belknap Press of Harvard University Press Cambridge, Massachusetts, 1971.

Baxi, Upendra, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India,' Third World Legal Studies: Vol. 4 (1985).

Commission on Legal Empowerment of the Poor, 'Making the Law Work For Everyone', Volume 1.

Open Society of Justice Foundation, Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya, October 2015.

The Judiciary, 'State of the Judiciary and the Administration of Justice.' Annual Report 2016 - 2017.

Institute of Economic Affairs, 'Kenya at the Crossroads: Scenarios for our Future'. 2000.

Cases

Andrew Khisa Wasike v Office of the Public Prosecution & another [2016] eKLR.

Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR.

Paul Pkiach Anupa & Another v Attorney General & Another [2012] eKLR.

Joseph Nyamamba & 4 others v Kenya Railways Corporation [Civil Appeal No. 239 of 2009] eKLR.

Kenya Bus Services Limited and Anor v. Minister of Transport & 2 Others [2012] eKLR.

Centre For Human Rights and Democracy and Others v The Judges and Magistrates Vetting Board and Others Nairobi Constitutional Petition II of 20 12 (Unreported).

James Mangeli Musoo v Ezeetec limited [2014] eKLR.

Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR.

Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [Civil Appeal No. 290 of 2012] eKLR.

Raila Odinga v I.E.B.C & others [2013] eKLR.

Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR.

Kamau Kuria v Attorney General. Misc. Civil Application [550 of 1988] eKLR.

Sunil Batra v Delhi Administration (1978) 4, 494.

Parmanand Katara v Union of India (1989) 4 286.

Nilibati Behra v State of Orissa and Drs (1993) 25 746.

Upendra Baxii (Dr) v State of UP (1983) 2 308.

Hussainara Khatoon v State of Bihar, (1980) 1 SCC 93: AIR 1979 SC 1360.

People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235: AIR 1982 SC 1473.

Kushum Lata v Union of India (2006) 6 SCC 180.

Wangari Maathai v Kenya Times Media Trust Ltd [1989] eKLR

Gideon v Wainwright 372 US 335 (1963).

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, 947: AIR 1973 SC 1461, 2009.

People's Union for Democratic Rights v Union of India 1982 AIR 1473, 1983 SCR (1) 456.

Bandhua Mukti Morcha v Union of India, (1984) 3 SCC 161: AIR 1984 SC 802.

Constitutions, Treaties and Acts of Parliament

Universal Declaration of Human Rights.

International Convention on Civil and Political Rights.

African Convention on Human and People's Rights (Banjul Charter).

Constitution of Kenya 2010.

Constitution of India.

Judiciary of Kenya; Guide to Assessment of Court fees.

The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

Law Society of Kenya Digest of Professional Conduct and Etiquette, 2000.

Constitution of Kenya Amendment Act No. 4 (1988).

Indian Contempt of Court Act, 1971.