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

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE BACHELOR
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DECLARATION

I hereby declare that this thesis is a presentation of my original research work and that wherever contributions, works or expressions of others are involved; every effort has been made to indicate this clearly.

I certify that this dissertation is my original work and to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

Paranta Edward Ritei

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ABSTRACT

Access to justice is cardinal to the success and well-being of any democracy. To this effect various legislative mechanisms and avenues have been instituted in different democracies to ease enjoyment of this cardinal right especially to the poor and the under-privileged. Epistolary jurisdiction is one of such mechanisms whose proper exploitation and institutionalization would go a long way in improving access to justice.

Access to justice in Kenya has faced a myriad of challenges. Resulting thereof, the poor have fallen victim to systemic barriers due to the unavailability of formal mechanisms through which they can pursue their claims.

This dissertation explores the viability of epistolary jurisdiction as a means of improving access to justice in Kenya. Additionally, it seeks to explore the sufficiency of the existing legislative framework with regard to the exercise of epistolary jurisdiction. Moreover, it strives to draw some valuable lessons from other jurisdictions that have already institutionalized the practice of this jurisdiction.

This research has been carried out with reference to the available secondary documents .Most of the requisite information could be accessed either through books, papers, and website or published journals.

LIST OF CASES

1. *Bandhua Makati Morcha case* (1984) 3 SCC 161 at 188
2. *David Kanjai Keter & 9 others v Ethics and Anti-Corruption Commission & another* [2014] eKLR
3. *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR
4. *Raila Odinga v. I.E.B.C & others* (2013) eKLR
5. *James Mangeli Musoo v Ezeetec Limited* [2014] eKLR
6. *Chhetriya Pradushan Mukti Sangharsh Samiti v. State of Uttar Pradesh Darshan Mashi,* PLD (1990) 513
7. *Gideon v Wainwright* 372 U.S. 335 (1963)
8. *Sunil Batra v Delhi Administration* (1978) 4 SCC 494
9. *Upendra Baxi (Dr) v State of UP* (1983) 2 SCC 308
10. *Parmanand Katara v Union of India,* (1989) 4 SCC 286
11. *Nilibati Behra v State of Orissa and Ors,* (1993) 25 CC 746
12. *Sunil Batra v Delhi Administration* (1978) 4 SCC 494
13. *Mumbai Kamgar Sabha v. Abdul Bhai* (1976) 3 SCC 832.
14. *Paul Pkiach Anupa & Another v Attorney General & Another* [2012] eKLR
15. *Kenya Bus Services Limited and Anor v Minister of Transport & 2 other* [2012] eKLR
16. *Dr. Christopher Ndarathi H Murungaru v Kenya Anti-Corruption Commission & another* Civil Application No. Nairobi 43 of 2006 [2006] 1 KLR 77
17. *M C Mehta v. Union of India* (1987) 4 S.C.C. 463
18. *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR
19. *Centre for Human Rights and Democracy and Others v the Judges and Magistrates Vetting Board and Others, Nairobi Constitutional Petition 11 of 2012(Unreported)*
20. *Republic v Francis Kariko Kimani* [2010] eKLR
21. *Sudip Majumdar v. State of Madhya Pradesh* (1983) 2 SCC 25

CHAPTER 1: INTRODUCTION

1.1 Background

Access to justice entails the provision of dispute resolution mechanisms which are affordable, proximate and ensure speedy justice and whose processes and procedures are understood by users.¹ It encompasses various issues dealing with accessibility of courts among them court fees, language of proceedings, public participation in the administration of justice, accessibility to persons with disability and availability of information.² The Constitution guarantees every person a right to an expeditious, efficient, lawful, reasonable and procedurally fair administrative action.³ Further, the State is mandated to ensure access to justice for all persons.⁴ In a bid to stamp this right further, the Constitution posits that every person shall have a right to institute court proceedings should any of his rights be denied, violated, infringed or threatened.⁵ Pursuant to this provision, the Chief Justice is mandated to make rules on formalities relating to the proceedings, including commencement of proceedings which shall be kept at a minimum and, in particular, the court shall, if necessary entertain proceedings on the basis of informal documentation.⁶

However, despite having very good Constitutional guarantees access to justice in Kenya has been bedeviled by various challenges including high court fees, geographical location, complexity of rules and procedure, use of legalese, understaffing, lack of financial independence, lack of effective remedies, and a backlog of cases that delays justice, lack of awareness of alternative dispute resolution (ADR) and traditional dispute resolution mechanisms.⁷

There is, therefore, need to incorporate mechanisms to address the above challenges. Epistolary jurisdiction serves as one of the best mechanisms that can be adopted to ease this vexing state of affairs. Epistolary jurisdiction is defined as a legal innovation devoid of many

¹Kariuki 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 ,Pg. 1

² Draft Report on Audit of Laws on Access to justice, KLRC (March,2012)

³Article 47, Constitution of Kenya (2010)

⁴Article 48, Constitution of Kenya (2010)

⁵Article 22, Constitution of Kenya (2010)

⁶ Article 22, Constitution of Kenya (2010)

⁷ICJ Kenya , 'Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution', Vol.III (2002), 7-8 : Kariuki Muigua, 'Access to Justice; Promoting Court and Alternative Dispute Resolution Strategies', Pg. 1

procedural technicalities through which the wronged or those seeking redress from the courts may channel their concerns to the courts by way of informal documentation such as letters, telegrams, and newspaper articles amongst others.⁸

Whereas this jurisdiction is yet to be operationalized in Kenya, the Constitution under Article 22 provides a lee-way whose proper exploitation may see exercise of this jurisdiction become a reality in Kenya.

1.2 Statement of the Problem

Access to justice in Kenya has been hampered by various challenges, some of which have been stated above in the background.⁹ However, of particular concern to this research are poverty and complexity of rules and procedure.

Poverty is both a cause and a consequence of inadequate levels of access to justice. Reduced financial and human resource allocations to justice institutions produce failures in the justice system. These failures, in turn, have a disproportionate impact on the poor, precisely because of their lack of individual economic resources enabling them to overcome systemic failures.¹⁰ Moreover, without equal access to justice, persons living in poverty are unable to claim their rights, or challenge crimes, abuses or violations committed against them, trapping them in a vicious cycle of impunity, deprivation and exclusion. The inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights, while their increased vulnerability and exclusion further hampers their ability to use justice systems.¹¹

The minimum payable fee to file a plaint in the High Court of Kenya is 1,500 shillings.¹² According to an economic update on Kenya released by the World Bank on June

⁸Sunil Batra v. Delhi Administration (1978) 4 SCC 494 ; K.G. Balakrishnan , 'Judicial Activism under the Indian Constitution', address at Trinity College Dublin, Ireland, October 2009, Pg. 5 & 18.

⁹Kariuki Muigua, 'Improving Access to Justice: Legislative and Administrative Reforms under the Constitution', at 1: ICJ Kenya, 'Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution', Pg. 7-8

¹⁰ J Beqiraj and L McNamara, 'International Access to Justice: Barriers and Solutions', Bingham Centre for the Rule of Law Report (2014) (International Bar Association), Pg. 14.

¹¹Magdalena Sepúlveda Carmona and Kate Donald, "Access to justice for persons living in poverty: a human rights approach," in Elements for Discussion Series, Ministry for Foreign Affairs of Finland(Erweko Oy), Pg.7

¹² Section 3(b), Schedule to part IX, Judiciary of Kenya; Guide to Assessment of Court fees. <http://www.judiciary.go.ke/portal/portal/assets/downloads/Reports%20&%20Downloads/Guide%20to%20Assessment%20of%20Court%20Fees.pdf> on 27/1/2016

2013, Kenya's poverty rate is estimated to be in the range of between 34 and 42 percent.¹³ This, therefore, means at least 13.6 million Kenyans are living on less than 1.25 dollars a day. Raising 1500 shillings alone without other costs involved is quite challenging for a person earning less than 1.25 dollars a day. Consequently, this population as a whole might not easily access justice; there is need for mechanisms through which they can seek redress from the formal justice system. Epistolary jurisdiction is a good example of such mechanisms which if adopted will go a long way in improving access to justice.

1.3 Justification of the Study

Inability to access to justice as noted earlier affects a significant population in Kenya (approximately 34 -42%). This limited ability of people especially the poor to access legal and adjudicatory processes and mechanisms is not only a violation of human rights in itself, but is also a consequence of numerous other rights violations under International treaty law of which Kenya is party to.¹⁴ Studies have shown that where people whose rights have been violated are unable to access justice many times they tend to resort to vigilante justice, which evolves into the law of the strongest or richest, and contributes to a climate of violence.¹⁵ The cost of violence is too high that Kenya cannot afford.

Further, there are strong links between establishing democratic governance, reducing poverty and securing access to justice. Democratic governance is undermined where access to justice for all citizens (irrespective of gender, race, religion, age, class or creed) is absent. Access to justice is also closely linked to poverty reduction since being poor and marginalized means being deprived of choices, opportunities, access to basic resources and a voice in decision-making. Lack of access to justice limits the effectiveness of poverty reduction and democratic governance programmes by limiting participation, transparency and accountability.¹⁶ There is therefore need to enforce additional means to improve access to justice, one such means is epistolary jurisdiction. This study which seeks to assess the

¹³ The World Bank, 'Kenya Economic Update: Time to shift gears; Accelerating growth and poverty reduction in the new Kenya', Edition No. 8, June 2013.

Available at <http://www.worldbank.org/content/dam/Worldbank/document/Africa/Kenya/kenya-economic-update-june-2013.pdf> accessed on 11 Nov. 2015

¹⁴ UN General Assembly, 'Report of the Special Rapporteur on extreme poverty and human rights' Aug. 2012, Pg. 4, Para. 6,

Available at <http://daccess-dds- y.un.org/doc/UNDOC/GEN/N12/458/06/PDF/N1245806.pdf?OpenElement>

¹⁵ Avocats Sans Frontières, 'The Obstacles of People living in extreme Poverty in Accessing Justice', Pg. 7

¹⁶ UNDP, 'Access to Justice: Practice Note', (2004), Pg. 3.

viability of epistolary jurisdiction as a means of improving access to justice in Kenya is therefore justified.

1.4 Statement of Objectives

The objectives of this study are to;

- a) Rationalize the right to access to justice, its challenges and steps being undertaken by the Judiciary to improve accessibility to justice.
- b) Analyze the viability of epistolary jurisdiction as a means of accessing justice in Kenya.
- c) Assess the place of epistolary jurisdiction in Kenya's current legal framework. Whether there's need for extra legislations streamlining the exercise of the above jurisdiction.
- d) Deriving from the foregoing, provide a mechanism with which the problem of inaccessibility of justice in Kenya, can be solved if not wholly considerably.

1.5 Research Questions

The following amongst others constitute the research questions of this study;

What is being done to resolve the problem of inaccessibility of justice in Kenya? To what extent have they resolved the same?

How viable is epistolary jurisdiction as a means of improving access to justice in Kenya?

What is the place of epistolary jurisdiction in Kenya? Whether there is a legal framework giving it effect, to what extent and if there is need for extra legislations with regards to the same.

1.6 Scope and Limitations of the Study

The question of access to justice is rather broad, in which case this single study would not exhaustively address. This study, therefore, narrows its scope down to the viability of epistolary jurisdiction as means of improving access to justice specifically poverty and procedural technicalities as impediments to access to justice.

This research has been carried out with reference to the available secondary documents. Most of the requisite information could be accessed either through website or published journals. However, the limitations faced included the lack of Kenyan research and legal writing on Epistolary jurisdiction. Consequently, most of the experiences, decisions and writings relied

on are from other jurisdictions tied in to the Kenyan context: Further, resulting from such scarcity access to the necessary resources was quite challenging.

1.7 Chapter Breakdown

Chapter 1: Introduction

Under this chapter a background on access to justice, statement of the problem, justification of the study and research questions have been provided. Additionally the study's objectives, scope and limitations have been provided as well.

Chapter 2: Theoretical Framework

Chapter 2 explores in great detail the various theories underpinning this study, as well as, how the various legal theories are connected or relate to the subject matter of this paper.

Chapter 3: The right to access to justice.

An analysis of the above right, challenges facing it and steps in place or being undertaken to address the said challenges, as well as their sufficiency shall be dealt with under this chapter.

Chapter 4: Epistolary Jurisdiction; Its viability as a means of accessing justice.

This Chapter seeks to give a historical account of how epistolary jurisdiction came about, what it entails; how it operates and its suitability in solving the problem of inaccessibility to justice in Kenya.

Chapter 5: The place of Epistolary Jurisdiction in Kenya's current legal framework.

This chapter explores existence of provisions allowing the exercise of epistolary jurisdiction in Kenya. Further, an analysis of their sufficiency and whether there's need for extra legislations streamlining the exercise of the above jurisdiction shall be provided.

Chapter 6: Conclusion and Recommendations.

Lastly, resulting from a critical analysis in the preceding chapters' way forward and possible recommendations that might go a long way in resolving the challenge of non-accessibility to justice in Kenya shall be provided in this chapter.

CHAPTER 2: THEORETICAL FRAMEWORK

The following are some theories relevant to this research topic;

2.1: 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.¹⁷ 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.’¹⁸

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 are both British colonies and as such 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.¹⁹ Poverty is the biggest impediment to accessing to justice. Considering the above two similarities and the

¹⁷ Jack Donnelly, “The Relative Universality of Human Rights” John Hopkins University Press, Human Rights Quarterly, Vol.29(May 2007) PP. 281-306

¹⁸ Article 8, Universal Declaration for Human Rights

¹⁹ The World Bank, ‘Kenya Economic Update: Time to shift gears; Accelerating growth and poverty reduction in the new Kenya’, Edition No. 8, June 2013.

Available at <http://www.worldbank.org/content/dam/Worldbank/document/Africa/Kenya/kenya-economic-update-june-2013.pdf> accessed on 11 Nov. 2015

efficacy of epistolary jurisdiction in India shows the need for Kenya to adopt it in solving its access to justice puzzle.

2.2: 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.²⁰

Amartya Sen in *The Idea of Justice* presents an alternative interpretation of access to justice. Instead of focusing on Institutions, Sen focuses on the behavior 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 individual or communities "actual realizations and commitments."²¹ 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.²²

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.²³

²⁰ Siena Anstis, "Access to justice in Cambodia: The experience of grass root networks in land rights issues" McGill University, Centre for International Sustainable Development Law (2012), Pg. 2.

²¹ Amartya Sen, "The Idea of Justice", Cambridge, Mass.: Belknap Press of Harvard University Press, 2009, at Pg. 7 & 10.

²² Amartya Sen. "The Idea of Justice" Pg. 10

²³ Thomas Hobbes, "The Leviathan", prepared for McMaster University Archive of the History Economic Thought by Rod Hay,(1651) Part XIII

Among the rights entrusted to a government is ensuring accessibility to justice.²⁴ 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.

2.3: Utilitarian Theory

The proponents of this school of thought mainly Jeremy Bentham and John Stuart Mill posit 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.

²⁴ The Constitution of Kenya 2012, Article 48

CHAPTER 3: ACCESS TO JUSTICE

Access to justice is the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.²⁵ Alternatively, it may be defined as the provision of dispute resolution mechanisms which are affordable, proximate and ensure speedy justice and whose processes and procedures are understood by users. Arising from the foregoing definitions, there are two means through which persons may seek to access justice; formal and the informal Systems. The formal justice system involves civil and criminal justice and includes formal state-based justice institutions and procedures, such as police, prosecution, courts (religious and secular) and custodial measures while on the other hand informal justice systems refer to dispute resolution mechanisms that fall outside the scope of the formal justice system. This paper's focus is on the access of justice via the formal justice system.

Access to justice is a fundamental human right for the success of any legal system across the world. It provides a foundational basis for the realization of all other rights, be it civil political rights or social economic rights. For the rule of law to exist effectively, the right to access justice must not only be granted but also operationalized. This right is enshrined in both treaty law and national laws, however, its realization has proved to be challenging.

3.1: Access to justice under Treaty Law

In recognition of the vitality and centrality of this right, various treaties some of which Kenya is party to, enshrine it.

²⁵ FIDA Kenya, "The Peoples Version Informal Justice System" (2011).

The Universal Declaration of Human Rights being the mother of current day bill of rights posits that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.²⁶ Moreover, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.²⁷

The International Covenant on Civil and Political Rights to which Kenya acceded to the on the 1st of May 1972 provides that each party state shall undertake to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. Further, where not already provided for by existing legislative or other measures, each State Party to the Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.²⁸

The UN Convention on the Rights of Persons with Disabilities also provides that States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.²⁹

The African (Banjul) Charter on Human and Peoples' rights to which Kenya is party to stipulates that every individual shall have the right to have his cause heard. This comprising amongst others the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.³⁰

²⁶ Article 8, Universal Declaration of Human Rights.

²⁷ Article 10, Universal Declaration of Human Rights.

²⁸ Article 3, International Covenant on the Civil and Political Rights(1966)

²⁹ Article 13, UN Convention on the Rights of Persons with Disabilities(2006)

³⁰ Article 7(1)(a), African Charter on Human and Peoples' Rights (1981)

Accordingly, the foregoing international treaty law imputes that party states among them Kenya shall undertake necessary steps and mechanisms enabling the full realization of the right to access justice. Moreover, states have not just an obligation but rather a positive obligation to effectualise the same. Further, pursuant to the Constitution of Kenya, the above treaties by virtue of ratification form part of the law of Kenya.³¹ Consequently, imputing compliance.

3.2: Access to Justice under Domestic Laws.

The Constitution guarantees every person a right to an expeditious, efficient, lawful, reasonable and procedurally fair administrative action.³² Further, it mandates the State to ensure access to justice for all persons.³³ Moreover, the Constitution provides that every person shall have a right to institute court proceedings should any of his rights be denied, violated, infringed or threatened.³⁴ Pursuant to this provision thereof the Chief Justice is mandated to make rules on formalities relating to the proceedings, including commencement of proceedings which shall be kept at a minimum and, in particular, the court shall, if necessary, entertain proceedings on the basis of informal documentation.³⁵ This is a crucial provision which if properly exercised epistolary jurisdiction will come into effect in Kenya. In a bid to rest any doubts, the Constitution further provides that in exercising judicial authority, the courts and tribunals shall be guided by various principles which include; that justice shall be done to all irrespective of status, justice shall not be delayed, alternative forms of dispute resolution shall be promoted and that justice shall be administered without undue regard to procedural technicalities.³⁶

Whereas the Constitution provides very useful provisions with regard to exercise of this right, a myriad of challenges inhibiting the same do exist. Further there exist a few legislative avenues through which one especially the poor may seek to achieve this right.

The Civil Procedure Rules of 2010 posit that a pauper may institute any suit subject to the rules provided thereof. Accordingly, a pauper is defined as a person who is not possessed of

³¹ Article 2(6), Constitution of Kenya (2010)

³² Article 47, Constitution of Kenya (2010)

³³ Article 48, Constitution of Kenya (2010)

³⁴ Article 22, Constitution of Kenya (2010)

³⁵ Article 22, Constitution of Kenya (2010)

³⁶ Article 159 (2), Constitution of Kenya(2010)

sufficient means to enable him to pay for the fee prescribed by law for the institutions of such suit.³⁷ Whereas this provision looks very appealing, it proceeds to provide other provisions which nullify the purpose and intent of this provision to begin with, one of the grounds for rejection of such applications by the courts under Sub-rule 5 of the same Order is where pleadings are not framed and presented in the prescribed manner. This provision is oblivious of the fact that a common *mwananchi* does not know how to draft pleadings in accordance with the required prescriptions under the law, it is, therefore, unfair to equate the threshold of compliance of such a person to that of an advocate who has specialized in the law. After all, provisions of Article 159(2) (c) of the Constitution should come into effect in this case.

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/pro deo basis. Whereas the Rule goes ahead to enumerate guidelines on the exercise of such prerogative, offering such assistance is not mandatory.³⁸

Nonetheless, despite having very good legal provisions, access to justice still remains a challenge to many. The following are some of the challenges affecting the exercise of this right; high court fees, geographical location, complexity of rules and procedure, use of legalese, understaffing, lack of financial independence, lack of effective remedies, and a backlog of cases that delays justice, lack of awareness of ADR and traditional dispute resolution mechanisms amongst others.³⁹As discussed earlier, Kenya's poverty rate currently stands between 34 and 42 percent.⁴⁰ This, therefore, means at least 13.6 million Kenyans living on less than 1.25 dollars a day could potentially face difficulties should they want to access justice.

In a bid to address the above challenges the Judiciary has adopted various measures to improve access to justice, these include; increased number of mobile courts (from 5 to 20),

³⁷ Order 33 ,Civil Procedure Rules (2010)

³⁸ Rule 34 of the Law Society of Kenya's Digest of Professional Conduct and Etiquette (Current as at 1st Jan 2001)

³⁹ICJ Kenya, 'Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution', Vol.III (2002), 7-8 : Kariuki Muigua, 'Access to Justice; Promoting Court and Alternative Dispute Resolution Strategies', Pg. 1

⁴⁰ The World Bank, 'Kenya Economic Update: Time to shift gears; Accelerating growth and poverty reduction in the new Kenya', Edition No. 8, June 2013.

Available at <http://www.worldbank.org/content/dam/Worldbank/document/Africa/Kenya/kenya-economic-update-june-2013.pdf> on 11 Nov. 2015

establishment of new courts to address the challenge of physical access to justice, betterment of judicial amenities, publication of new rules by the Chief Justice to reduce procedural barriers to justice and awarding of Council of Legal Education points to motivate advocates to join pro bono schemes.⁴¹

In conclusion, despite the above crucial strides in the realization of the right to access justice, more needs to be done. Epistolary jurisdiction is one of the viable mechanisms through which the judiciary can improve on access to justice especially for the poor and illiterate.

CHAPTER 4: EPISTOLARY JURISDICTION; ITS VIABILITY AS A MEANS OF ACCESSING JUSTICE.

Epistolary jurisdiction is defined as a legal innovation devoid of many procedural technicalities through which the wronged or those seeking redress from the courts may channel their concerns to the courts by way of informal documentation such as letters, telegrams, and newspaper articles amongst others.⁴² The adjective *epistolary* has its genus in the word *epistle* meaning thereby any of the letters in the new testament of the Bible and as such the adjective *epistolary* generally means an expression made in the form of a letter. This has its qualifying characteristics from the jurisdiction known as 'Sua moto' so also *Public Interest Litigation (PIL)*.⁴³

Bhagwati J. posits that epistolary jurisdiction is a jurisprudential advancement arising from Public interest litigation or Social action litigation as termed originally.⁴⁴ It is in light of the above development that epistolary jurisdiction has times been equated or termed as Public interest litigation.⁴⁵ Whereas epistolary jurisdiction and public interest litigation are closely linked, the two are not exactly the same for reasons which this paper shall expound on later.

⁴¹ State of the Judiciary and the Administration of Justice Annual Report (2012-2013), Pg. 48

⁴² Sunil Batra v. Delhi Administration (1978) 4 SCC 494; See also K.G. Balakrishnan, 'Judicial Activism under the Indian Constitution', address at Trinity College Dublin, Ireland, October 2009, Pg.5 & 18.

⁴³ A.F.M. Abdur Rahman, 'Upholding human rights of the poor; epistolary jurisdiction could be instrumental' pg.1, http://www.hrbp.org.bd/images/PDF_File_%20RPB/Justice%20A%20F%20M%20Abdur%20Rahman.pdf on 16th December 2015

⁴⁴ P.N. Bhagwati & C.J. Dias, 'The Judiciary in India: A Hunger and Thirst for Justice', 5 National University of Juridical Sciences (NUJS) Law Review, (2012), Pg. 20 of the article.

⁴⁵ Mumbai Kamgar Sabha v. Abdul Bhai (1976) 3 SCC 832.

4.1 History of Epistolary Jurisdiction

Epistolary jurisdiction is a specialised branch of public interest litigation. It resulted from jurisprudential advancements in public interest litigation.⁴⁶ It was first exercised in America in the landmark case of *Gideon v Wainwright*⁴⁷ whereby a postcard from a prisoner was treated as a petition. Whereas this jurisdiction has been exercised in other countries which shall be stated, the experience of Indian Courts is outstanding. They have explored this concept at length and depth up to the point of institutionalisation of epistolary jurisdiction.

In so far as enforcement of human rights is concerned, the Indian Courts found sanctuary under articles 32 and 226 of the Indian Constitution.⁴⁸ Article 32 guarantees the right to move the Supreme Court by appropriate proceedings in so far as enforcement of fundamental rights is concerned. Further, pursuant to article 226, the High court has power to issue orders or any other directions it deems fit against any person or authority including the government for the enforcement of fundamental rights.⁴⁹

Whereas these Articles of the Constitution are couched in the widest of terms possible they meant little to the bulk of the Indian population for a considerable amount of time, as the Court was, for a long time, used only by those who were wealthy and affluent and who were repeat players of the litigation game. The poor were priced out of the judicial system and they had become what one would call 'functional out-laws'. 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.⁵⁰

Additionally, beyond the above stated obstacles the traditional rule of *locus standi* stood as a barrier in the quest for accessing justice by the poor and downtrodden in Society. This rule provides that only a person who has suffered a specific legal injury by reason of an actual or threatened violation of his legal rights or legally protected interests can bring an action for judicial redress and that no other person can file an action to vindicate such right.

⁴⁶P.N. Bhagwati & C.J. Dias, 'The Judiciary in India: A Hunger and Thirst for Justice', 5 N.U.J.S Law Review, (2012), Pg. 20 of the article.

⁴⁷372 U.S. 335 (1963)

⁴⁸ Dr. Ben Kunbor, "Epistolary Jurisdiction of the Indian Courts and Fundamental Human Rights in Ghana's 1992 Constitution: Some Jurisprudential Lessons", Law, social justice and global development Journal, Issue 2001(2), Pg. 5. Also available at https://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_2/kunbor/ on 16th December 2015.

⁴⁹ The Indian Constitution of 1950 as amended.

⁵⁰P.N. Bhagwati & C.J. Dias, "The Judiciary in India: A Hunger and Thirst for Justice", 5 N.U.J.S Law Review, (2012), Pg. 177.

In a bid to address these traditional difficulties, the Supreme Court adopted a broad interpretation of Article 32 in *M C Mehta v. Union of India* whereby it held that Article 32 not only grants it power to issue various orders in enforcement of fundamental rights but also lays a constitutional obligation on the court, to protect fundamental rights of the people including the power to forge new remedies and fashion new strategies designed to enforce fundamental rights.⁵¹

The above interpretation led to the departure from the traditional rule of *locus standi*. Therefore where a legal wrong or a legal injury is caused to a person or to a class of persons by reason of violation of their constitutional or legal right, and such person or class of person is 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 can institute an action on his or their behalf.⁵²

The Supreme Court also felt that when any member of the public or bona fide social organisation espouses the cause of the poor and downtrodden, he should be able to move the court by just writing a letter. Thus, the Court evolved what came to be known as '*epistolary jurisdiction*.'⁵³

The exercise of the above jurisdiction has been affirmed and reaffirmed by the Supreme Court through numerous decisions upon which it has acted on non-formal petitions especially letters sent to the court by any person or organization engaged in the cause of upholding human rights, treating the letter as a writ petition.

One of such is the case of *Bandhua Mukti Morcha -Vs- Union of India*.⁵⁴ The petitioner, an organization acting on behalf of bonded laborers faced the difficulty of meeting the *locus standi* test which was requisite to invoke the court's jurisdiction be it formally or informally. Their lordships examined the relevant provision of Article 32 of the Indian constitution and found that no specific method of proceeding has been provided in invoking the writ jurisdiction of the Indian Supreme Court and as such the Supreme Court of India is empowered to initiate writ proceeding either though formal or non formal petition.

⁵¹M C Mehta v. Union of India (1987) 4 S.C.C. 463

⁵²P.N. Bhagwati & C.J. Dias, 'The Judiciary in India: A Hunger and Thirst for Justice', 5 N.U.J.S Law Review, (2012), Pg. 177

⁵³P.N. Bhagwati & C.J. Dias, 'The Judiciary in India: A Hunger and Thirst for Justice', 5 N.U.J.S Law Review, (2012), Pg. 177

⁵⁴ SCC 426/97 Also accessible at <http://indiankanoon.org/doc/842624/>

In the Landmark case of *Sunil Batra v. Delhi Administration*,⁵⁵ where 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, while issuing various directions, opined 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*”

In *Upendra Baxi(Dr) vs. State of UP*,⁵⁶ the Supreme Court accepted a letter written by two law professionals as a matter of public interest litigation and treated 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.

In *Parmanand Katara v. Union of India*,⁵⁷ the Supreme Court accepted an application by an advocate that highlighted a news item titled “*Law Helps the Injured to Die*” published in a national daily, *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 procedural formalities were completed in these medico-legal cases. The Supreme Court directed medical establishments to provide instant medical aid to such injured people, notwithstanding the formalities to be followed under the procedural criminal law

So was the case in *Nilibati Behra v State of Orissa and Ors*,⁵⁸ where 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.

In Pakistan the epistolary jurisdiction was first exercised in the case of *Darshan Mashhi - v the State*,⁵⁹ where a telegram received from a bonded labor Darshan Mashhi was treated as a writ petition and proceeding was initiated to redress the bonded laborers who were under the inhuman condition under their master.

⁵⁵(1978) 4 SCC 494

⁵⁶(1983) 2 SCC 308.

⁵⁷ (1989) 4 SCC 286

⁵⁸(1993) 25 CC 746.

⁵⁹PLD (1990) 513

4.2 Exercise of Epistolary Jurisdiction

The Supreme Court of India on the 1st of December 1988 acting on its administrative powers issued a notification on what matters are to be entertained as Public interest litigation, epistolary jurisdiction encapsulated therein.⁶⁰ This notification provided that only letter petitions falling under certain categories alone would be entertained. These include matters concerning bonded labor, 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 could also be entertained. The notification also set out matters which ordinarily were not to be entertained as public interest litigation such as landlord-tenant disputes, service matters and admission to medical and other educational institutions.

In order to avoid misuse of letter petitions under the guise of public interest litigation, the public interest litigation and information cell has been set up on Supreme Court of India with a full-fledged staff to deal with its epistolary jurisdiction.⁶¹ The notification also provided the following directions which are to be pursued to give proper direction to the letters received, to be put before the Supreme Court;

1. The letters are first scrutinized by the staff, employed exclusively for this purpose.
2. Letters addressed by or on behalf of persons in custody or for vindication of fundamental rights of women, children or other class of groups of disadvantaged persons, who an account of poverty, disability or socially or economically disadvantaged position cannot approach the courts of justice, such letters are placed before the court by way of Public Interest Litigation.
3. Where it is found that the letter complains of infraction of fundamental right but is on behalf of an individual, it is sent to the Supreme Court Legal aid committee for appropriate action.

⁶⁰ Sangeeta Ahuja, "People, Law & Justice; Cases and Materials on PIL," Orient Longman, Delhi, 1996, Vol II, 860; Also available at <http://www.publishyourarticles.net/eng/articles2/epistolary-jurisdiction-a-brief-analysis/2095/> on 12th of December 2015

⁶¹ Sangeeta Ahuja, "People, Law & Justice; Cases and Materials on PIL," Orient Longman, Delhi, 1996, Vol. II, 860; Also available at <http://www.publishyourarticles.net/eng/articles2/epistolary-jurisdiction-a-brief-analysis/2095/> on 12th of December 2015

4. Where a letter complains of infraction of a legal right as distinct from a fundamental right, the Public Interest Litigation (PIL) cell sends it to appropriate Legal Aid Board for the purpose of contacting the person who had written the letter and providing him legal aid assistance for enforcing his right.
5. The PIL cell also provides information to the Litigants about their cases which are pending or which they wish to file in the Supreme Court and also gives to the members of the public whatever assistance they require in regard to the procedure for filing of cases in the Supreme Court. Through this all, practice of sending anonymous letters, vague allegations can be prevented.⁶²

Whereas the courts acknowledge the essentiality of allowing persons to invoke its jurisdiction through an informal mechanism it does not mean to avoid old age procedure of the system. It has already been settled in Indian jurisdiction that even if the epistolary jurisdiction is available to an appropriate petitioner, the formal system of proceeding of writ must be followed where it is possible to follow.⁶³ Further, there arose a concern that such ease of access could open an avenue for some litigants to indulge in forum shopping and abuse of the court process.⁶⁴ The judges themselves were divided with doubts being expressed in separate judgments so much so that the chorus of doubts and inconsistencies having serious institutional implications resulted in the problems of epistolary jurisdiction being treated as issues to be determined by Court in *Sudip Majumdar v. State of Madhya Pradesh*.⁶⁵

Addressing the above concern, the Court (Pathak J.) stated in the *Bandhua Mukti Morcha* case by positing that when jurisdiction of the court is invoked, it is the jurisdiction of the entire court and not that of one judge. Further, as to which judge will hear a given matter is exclusively upon the court to determine using its internal regulations.⁶⁶

⁶²Sangeeta Ahuja, "People, Law & Justice; Cases and Materials on PIL," Orient Longman, Delhi, 1996, Vol II, 860; Also available at <http://www.publishyourarticles.net/eng/articles2/epistolary-jurisdiction-a-brief-analysis/2095/> on 12th of December 2015

⁶³A.F.M Abdur Rahman, 'Upholding human rights of the poor ; Epistolary jurisdiction could be instrumental' pg.3, http://www.hrp.org.bd/images/PDF_File_%20RPB/Justice%20A%20F%20M%20Abdur%20Rahman.pdf on 16th December 2015

⁶⁴ Desai & Muralidhar, "Public Interest Litigation; Potential and Problems", Supreme but not Infallible – Essays in Honour of the Supreme Court of India (New Delhi: Oxford University Press, 2000), pg. 163.

⁶⁵*Sudip Majumdar v. State of Madhya Pradesh* (1983) 2 5CC 258

⁶⁶ (1984) 3 SCC 161 at 188

The Chief Justice of India in the year 1986 formulated a number of principles to be followed in exercising epistolary jurisdiction which is now being under follow in the Indian jurisdiction.

These are;

1. To invoke Epistolary jurisdiction informal petition by way of letter, telegram or by laying information before the court must be addressed to the court and not to a particular Judge.
2. Informal petitions containing allegation regarding violation of human rights should only be treated as writ petition when such informal petition is preferred on behalf of socially in advanced people or class of people when such people or class of peoples suffers from any sort of disability; monetary or physical especially when such person is a detainee.
3. There should be a public distress cell within the Supreme Court administration, which will consider these informal petitions and send the same to the appropriate bench for consideration of the same as writ by the Judges on their leave.
4. When any such informal petition on behalf of people in taken as writ, general notification in the newspaper must be made allowing impleading parties in the writ either in favor or against the cause.
5. The court shall appoint *amicus curie* in the case and on public hearing decide the matter.
6. If any of the Judges desires to act on any information published in the newspaper he must act through the Chief Justice.⁶⁷

Right of access to justice is a basic human right which is to be assured by every legal system. Treating letter petition as a writ petition in appropriate situations can make the concept of liberty and justice for all more effective. In order to protect and preserve social justice, epistolary jurisdiction can have a better impact.

⁶⁷A.F.M Abdur Rahman, 'Upholding human rights of the poor ; Epistolary jurisdiction could be instrumental' pg.3, [http://www.hrpb.org.bd/images/PDF File %20RPB/Justice%20A%20F%20M%20Abdur%20Rahman.pdf](http://www.hrpb.org.bd/images/PDF_File_%20RPB/Justice%20A%20F%20M%20Abdur%20Rahman.pdf) on 16th December 2015

4.3 Criticisms of Epistolary Jurisdiction

There are two mainstream criticisms against the adoption of epistolary jurisdiction. These are;

First, by extending its jurisdiction, the court is trying to bite more than it can chew. As a result, this might ultimately spell a total collapse of the judicial system as it would open floodgates of litigation. Chief Justice Sabyasachi Mukherji in the case of *Chhetriya Pradushan Mukti Sangharsh Samiti v. State of Uttar Pradesh and others* observed that whereas it is the duty of the court to enforce fundamental rights, it also has a duty to ensure this power pursuant to Article 32 is not misused or abused preventing genuine violations from being considered by the courts.⁶⁸

Second, epistolary jurisdiction and public interest as a whole disturbs the constitutional balance between the legislature, the executive and the judiciary. In fact, such judicial activism has been condemned as lawless and ‘usurpation’ of the rightful spheres of the executive and the legislature.⁶⁹ Indeed, there is a real danger in courts abandoning their customary role. The Judiciary was neither equipped nor intended to do the work of other political branches.

In conclusion, the right of access to justice is a basic human right which is key to the success of any legal system. Adoption and utilization of epistolary jurisdiction where appropriate will go a long way in realization of the above basic human right. Like any other legal system, epistolary jurisdiction also has its challenges, however, the benefits derived from its adoption far outweighs the challenges. Nonetheless, as elaborated in this chapter and as evident in the Indian scenario these concerns and criticisms have equally been addressed successfully.

⁶⁸ AIR 1990 SC 2060 at 2062, Para 8

⁶⁹ T.R. Andhyarujina, “Judicial Activism and Constitutional Democracy in India,” Tripathi(ed.), pg.34

CHAPTER 5: THE PLACE OF EPISTOLARY JURISDICTION IN KENYA'S CURRENT LEGAL FRAMEWORK.

The Constitution of Kenya being the supreme law of the land,⁷⁰ lays a solid foundation for the exercise and institutionalization of epistolary jurisdiction, not to mention the realization of access to justice.

The Constitution posits under Article 48 that; “*The State shall ensure access to justice for all persons and; if any fee is required; it shall be reasonable and shall not impede access to justice.*” The question of access to justice as discussed in Chapter 2 is a rather wide one. The honorable Courts pronounced themselves on this subject matter through various cases that have been before them.

In the case of *Paul Pkiach Anupa & Another v Attorney General & Another*⁷¹ the High Court interpreted the right of access to justice as articulated in Article 48 to include infrastructure necessary to ensure justice is available to all persons. Further that it entails physical access to courts, the personnel, information, process and procedures that relate to them including access to information about the justice system.

A position affirmed by Justice Majanja in the case of *Kenya Bus Services Limited and Anor v Minister of Transport & 2 others*⁷² where he posits that by incorporation of the right of access to justice, the Constitution mandates the courts to look beyond the dry letter of the law. Moreover, that Article 48 invites the courts to consider conditions which clog and fetter the right of persons to seek the assistance of courts of law

⁷⁰ Article 2(1), Constitution of Kenya

⁷¹[2012]eKLR

⁷²[2012] eKLR

Additionally, in the case of *Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another*,⁷³ the Court reaffirmed the importance of the courts sticking to the rule of law despite the fact that the mighty and powerful may at times ignore its decisions or the public wanting the contrary, the courts must continue to give justice to all irrespective of their status in the society.

The above decisions best illustrate the essence our honorable courts attach to the right to access justice. In the same vein, epistolary jurisdiction being a mechanism to realize the above right should be accorded the same recognition.

The Constitution under Article 159 (d) further provides that justice shall be administered without undue regard to procedural technicalities.

Justice Merete defined a technicality in the case of *James Mangeli Musoo v Ezeetec Limited [2014] eKLR* as follows, "A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute."

Epistolary jurisdiction is in itself a product of informal applications which otherwise would be struck out on the basis of procedural impropriety. The court's interpretation of article 159(d) has varied rather on a case to case basis.

In the case of *Raila Odinga v. I.E.B.C & others (2013) eKLR* the Court reiterated its earlier decision when it warned itself against blanket invocation of Article 159. The Court further observed that Article 159(2) (d) only means the courts should not pay undue attention to procedural technicalities at the expense of substantive justice and that it never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.

However, Kiage J. warns against the invocation of article 159 to circumvent the process of judicial adjudication. In the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others*

⁷³Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77

[2013] eKLR which was before the Court of Appeal he 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.

Whereas the inclusion of article 159 in the Constitution was meant to cure the defect of over-reliance on procedural technicalities to defeat justice as witnessed in the previous era under the old Constitution, from the foregoing pronouncements the Courts are weary of wrongful exploitation of the same. This article was meant to facilitate access to justice and it would be contrary to its purpose if it's used to defeat the same defect it sought to cure. Epistolary jurisdiction is in line with both the letter and spirit of article 159, resulting thereof adoption of the same will go a long way in achieving the purpose envisaged by the drafters of article 159.

The Constitution further provides under Article 22(3) that; *“The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria*

that—

(b) 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;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities”

In this respect the court in *Centre For Human Rights and Democracy and Others v The Judges and Magistrates Vetting Board and Others*,⁷⁴ stated that it is part of and core of 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.

True to the above holding and in exercise of the power conferred upon him by article 22 the Chief Justice made rules to this effect on the 28th of June 2013 pursuant to legal notice 117 of

⁷⁴Nairobi Constitutional Petition 11 of 2012(Unreported)

2013.⁷⁵ For the first time in Kenya, epistolary jurisdiction was formally adopted into the judiciary's procedural rules.

The 'Mutunga rules' under Rule 2 define informal documentation as follows; "includes any legible document in any language that is simple, does not conform to any particular form or rules of grammar and conveys information;"

Rule 10 of the 'Mutunga rules' posits that "Subject to rules 9 and 10, 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"

Further, the rules provide that parties may apply to the court for conservatory orders, stay of execution and waiver of fees by way of informal documentation.

Whereas encapsulation of epistolary jurisdiction in our procedural rules is a big step towards easing access to justice the response from the courts in the few cases that have appeared before them in which parties sought to invoke epistolary jurisdiction of the courts is far from impressive. Justice Emukule in the case of *Republic v Francis Kariko Kimani [2010] eKLR* which was before the High Court held that whereas epistolary jurisdiction is very much welcome, such jurisdiction be used sparingly.

The Court further struck an application in which a petitioner had petitioned it by way of a miscellaneous application relying on the epistolary jurisdiction of the court in *David Kanjai Keter & 9 others v Ethics and Anti-Corruption Commission & another [2014] eKLRI*. While doing so the learned judge held that even if the action was commenced by way of an epistolary (informal) application, which must disclose denial, violation, infringement or threat to a right or fundamental freedom a miscellaneous Application cannot be equated with an epistolary application.

Despite the above holdings of the High Court, the Court of Appeal endorsed the exercise of epistolary jurisdiction in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR* where the formal competency of a petition was raised. The court took cognizance of the fact that so long as there is 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

⁷⁵ The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Also Known as the "Mutunga Rules"

or relief if merited, careful not to defeat substance at the altar of procedure. In fact the court drew noted the proactive approach taken by the Indian courts in enforcing the fundamental rights and freedoms in the name of 'epistolary jurisdiction' before proceeding to hold that the petition in question satisfied the requisite formal competency.

Resulting thereof from the above holding of the Court of Appeal we can rightly deduce that for as long as there is sufficiency of information, as to the constitutional right violated with particulars supplied in a given petition then a court of competent jurisdiction ought to take up the matter, investigate and provide the requisite relief to the affected member of the society.

In conclusion, the Constitution has provided the requisite foundational framework for the exercise of epistolary jurisdiction in a bid to enhance access to justice.

However, as Bhagwati J. once posited in the Indian case, whereas the Articles of the Constitution are couched in the widest of terms possible they mean little to the bulk of the Kenyan population for as long as the courts fail to embrace the invocation of such jurisdiction. Furthermore, as evidenced by the number of cases instituted informally there is little knowledge by the public of the existence of such jurisdiction through which they may use to come before the courts. Additionally, compared to India, Kenya's legal framework on the exercise of epistolary jurisdiction is rather shallow and should the public exploit this avenue effectively our judicial system might collapse due to floodgates of suits. Moreover, as it stands the current framework on epistolary jurisdiction might be abused by fraudulent litigants to bring about frivolous claims which might be time consuming and costly resource-wise to dispense with. There is, therefore, need for additional guidelines to effectuate the exercise of this jurisdiction.

CHAPTER 6; CONCLUSION AND RECOMMENDATIONS

*“Today we find that in the third world countries there are a large number of groups that are being subjected to exploitation, injustice, and even violence. In this climate of violence and injustice, judges have to play a positive role and they cannot content themselves by invoking the doctrines of self-restraint and passive interpretations.”*⁷⁶

True to the above assertions of Bhagwati J., the Judiciary being the custodian of delivering justice to the general public and by virtue of the sacred position it holds in rendering justice, it needs to undertake a positive role in ensuring access to justice. One such way is through the institutionalization of epistolary jurisdiction.

Whereas these jurisdiction is already open for exercise by Kenya’s judicial system little has been done to see it become a reality. As it stands, neither is our legal framework to this effect sufficient nor is our utilization of the few guidelines in place.

As stated by the Court in *Paul Pkiach Anupa & Another v Attorney General & Another*, access to justice for all, irrespective of socio-economic status, disability, race or gender is a major hallmark for any democratic society as it is only within such an environment that the rule of law can flourish.⁷⁷

As discussed in Chapter 1, according to an economic update on Kenya released by the World Bank on June 2013, Kenya’s poverty rate is estimated to be in the range of between 34

⁷⁶ P.N. Bhagwati & C.J. Dias, ‘The Judiciary in India: A Hunger and Thirst for Justice’, 5 N.U.J.S Law Review, (2012), Pg. 173

⁷⁷Paul Pkiach Anupa & Another V Attorney General & Another [2012] eKLR

and 42 percent.⁷⁸ This, therefore, means at least 13.6 million Kenyans are living on less than 1.25 dollars a day. Consequently, considering the link between poverty and access to justice this means that potentially 13.6 million Kenyans would face difficulties trying to access justice through the court system, otherwise known as the formal justice system.⁷⁹

To remedy this vexing state of affairs the courts as well put by the learned judge in *Centre For Human Rights and Democracy and Others v The Judges and Magistrates Vetting Board and Others*, as part and core of their Constitutional and statutory obligations have to innovate new methods and devise new strategies for purposes of providing access to justice to all persons who are or were or about to be denied their basic fundamental and human rights.⁸⁰ Epistolary jurisdiction is one such innovation.

Arising thereof, the following are various recommendations on how to better our utilization and adoption of epistolary jurisdiction as a country;

One, Education of the Judges, Magistrates and judicial officers of its applicability.

The Mutunga Rules provide that where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application (either formal or informal) to the High Court in accordance with these rules.⁸¹ As a matter of practice, the office of the registrar of the Court is in charge of entering the said petition into the Courts record and assisting in other matters pertaining institution of a petition. Being a new concept many may not be conversant with the existence of epistolary jurisdiction hence the risk of not acting upon the same on account of non-compliance with procedural requirements. Additionally, the judges as witnessed in various cases might strike down applications which fail to meet procedural requirements should they not have a deep understanding of epistolary jurisdiction.⁸² Therefore judicial education on the same will go a long way in institutionalizing the exercise of epistolary jurisdiction.

⁷⁸ The World Bank, 'Kenya Economic Update: Time to shift gears; Accelerating growth and poverty reduction in the new Kenya', Edition No. 8, June 2013.

Available at <http://www.worldbank.org/content/dam/Worldbank/document/Africa/Kenya/kenya-economic-update-june-2013.pdf> on 11th November 2015

⁷⁹ Magdalena Sepúlveda Carmona and Kate Donald, 'Access to justice for persons living in poverty: a human rights approach' in Elements for Discussion Series, Ministry for Foreign Affairs of Finland (Erweko Oy), pg. 7

⁸⁰ Centre For Human Rights and Democracy and Others v The Judges and Magistrates Vetting Board and Others, Nairobi Constitutional Petition 11 of 2012 (Unreported)

⁸¹ Rule 4 of the Mutunga Rules

⁸² David Kanjai Keter & 9 others v Ethics and Anti-Corruption Commission & another [2014] eKLRI

Two, establishment of an epistolary jurisdiction cell in each of courts. As discussed earlier, as it stands the existing legal framework on epistolary framework is very susceptible to abuse and exploitation by fraudulent litigants which might be costly and time consuming. Further, should the public come to know of the availability of such avenue it might result to a floodgate of litigation. Given that the High Court has the jurisdiction to hear all matters pertaining to human rights,⁸³ there is need to establish an epistolary jurisdiction cell which would sort such informal applications in their order of urgency and the Courts best placed to hear whichever matters. This would go a long way in preventing abuse of the process and wastage of judicial time and resources.

Three, enactment of additional rules and guidelines. The existing legal framework is insufficient and as already stated it is open to abuse. The Chief Justice, therefore, ought to give additional guidelines on specific nature of matters which may be instituted by way of epistolary jurisdiction as was the case in India in 1986.

In conclusion the following words by the learned Krishna J. in the case of *Mumbai Kamgar Sabha vs. Abdul*, are instructive “procedural prescriptions are handmaids, not mistresses of justice and failure of fair play is the spirit in which the courts must view processual deviances.”⁸⁴ Whereas procedural rules such as *locus standi* a times inhibit access to justice, their original purpose for which they were meant for was to facilitate the process of justice delivery. It is, therefore, necessary that the existing procedures within the formal system be followed where possible and that epistolary jurisdiction only serves to supplement the existing formal justice system less we run the risk of facing the same challenges epistolary jurisdiction was meant to avoid. Nonetheless, the existing legal framework on epistolary jurisdiction is for sure a step towards the right direction but a lot more needs to be done to institutionalize it.

⁸³ Article 23 of the Constitution of Kenya, 2010

⁸⁴ *Mumbai Kamgar Sabha vs. Abdul Bhai* (1976) 3SCC 832.

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