CLS 203 (CIVIL PROCEDURE AND PRACTICE)

LECTURE NOTES

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2. WHAT IS CIVIL PROCEDURE LAW?

Civil procedure Law is the body of law that sets out the rules and standards that courts follow when adjudicating civil lawsuits (as distinguished from criminal cases).

3. CIVIL PROCEDURE AS PROCEDURAL LAW

Laws can be classified in several ways. One of the major classifications distinguishes between procedural law and substantive law. Substantive Law is concerned with the rights and duties of the subject. A good example of substantive law is the law of contract. The law of contract creates rights and duties for the contracting parties. But it does not tell us how those rights and duties are enforced. Procedural, or adjectival law as it is sometimes called, is concerned with the process of enforcing those rights and duties. A party to a contract seeking to enforce any rights and duties in the contract will look to procedural law to provide the means by which those rights and duties are enforced. Civil procedure is a good example of procedural Law. Other examples of procedural laws are the law of evidence, criminal procedure, mediation or arbitration law.

4. CIVIL PROCEDURE AS CIVIL LAW

Another way of classifying laws distinguishes between civil law and criminal law. Civil law is concerned with regulating the relationships between individuals inter se. When civil law regulates the relationship between the state and the individual, the state is treated as an individual. Criminal law is concerned with regulating the relationships between the individual and the public generally (or the state as the state represents the public interest)

Wrongs against the individual are classified as civil wrongs. Wrongs against the public generally (or the state on behalf of the public) are classified as criminal wrongs. Of course there are many overlaps and a wrong against an individual can be both a civil wrong and a criminal wrong. And the law allows for civil and criminal remedies in such a situation to proceed simultaneously. That's the purport and import of section 193A[1] of the Criminal Procedure Code which provides that criminal and civil proceedings arising from the same set of facts can proceed simultaneously. Similarly Section 175 of the CPC allows a court which has convicted a person for a criminal offence to order for compensation to the victim to the same extent as the victim would recover in civil proceedings[2]. This is an exception to the subjudice rule which bars courts from adjudicating over a matter that is substantially in issue in another case, civil or criminal.

[1] **193A.** Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings

[2] (2) A court which- (a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and (b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the "injured party"), may order the convicted person to pay to the injured party such sum as it

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Disputes between individuals inter se are classified as civil disputes. Disputes between the individuals and the sate are typically classified as criminal disputes. Civil Procedure law, as the name suggests, is concerned with the process of adjudicating civil disputes

5. CIVIL PROCEDURE AS A UNIT IN THE DEPARTMENT OF PRIVATE LAW

By now you must have realized that civil procedure is a unit in the department of private law. Criminal procedure on the other hand is in the department of public law. This mirrors the other classification of Law into Public and Private Law. Public law regulates the relationships between the state and the individual or the state and other states. Private law regulates the relationship between the individuals inter se or between the state and the individual but in such event; the state is treated as an individual (a juristic person)

6. PURPOSE OF CIVIL PROCEDURE LAW

As indicated above, procedural law is concerned with the process of adjudicating disputes. Civil procedure law is concerned with the process of adjudicating civil disputes. The goal of civil procedure law is to provide a just and fair means of resolving disputes and to promote efficiency in dispute resolution. This is done by ensuring that the parties have a shared understanding on how the court will proceed and what the court requires of them.

7. HISTORY OF OUR CIVIL PROCEDURE RULES

Our civil procedure law is deeply rooted in our colonial past and is strongly influenced by English and Indian Civil Procedure Laws. The Landmarks are as follows;

- 1863 Foreign Jurisdictions Act
- 1884 Zanzibar Order In Council
- 1887 the East Africa Order in Council granted protectorate status to Kenya.
- 1888 grant of Royal Charter to BEAC which became BEA Co
- 1889 Concession to IBEA by the Sultanate of Zanzibar
- 1889 African Order In Council
- 1890 The Berlin Conference
- 1895 Kenya as a protectorate
- 1897 East Africa Order in Council reception clause applied English Law as at 12th August 1897.
- 1905 East Africa Order In Council
- 1920 Kenya Colony Order in Council
- 1963 Independence
- 2010 Civil Procedure Rules 2010 and CoK 2010

considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.

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The starting point is the 1863 Foreign Jurisdiction Act by which the British Parliament authorised the application of English Law to British overseas territories, whether protectorates or colonies. The 1884 Zanzibar Order In Council applied English law to all British subjects residing in the East African protectorate then part of the Sultanate of Zanzibar. In 1887 the British East Africa Association was granted a royal charter over the Sultan's possessions. This was initially limited to the coastal strip but in 1889 the Sultan gave the IBEA Company a 50 year concession over the mainland dominions as well. In 1890 the British declared a protectorate over the territory administered by the IBEA Co. In the same year (1890), a British Court was set up in Mombasa to administer English Law over the territory. In 1895, the Royal Charter was withdrawn and the British took direct control over the territory following the bankruptcy of the IBEA Co. over all of the sultans dominion in what was to become (British East Africa)(Kenya and Uganda). A protectorate court was set up as a district court of Bombay presidency and provincial subordinate courts set up as courts for small causes under the Indian Civil Procedure Code of 1882. In 1897 the East Africa Order In Council (1897) formally received English Law into the territory and permitted further legislation by reference. This allowed the colonial office to import and apply to the territory various Indian Acts such as the Evidence Act 1883 and subsequently the 1882 Indian Code of Civil Procedure which later became the Civil Procedure Ordinance. In 1927 a Rules Committee was established under section 83 of the Civil Procedure Ordinance for purposes of making detailed rules under the Act . The Rules Committee borrowed liberally from both English and Indian Civil Procedure Rules. Upon Independence virtually all the colonial laws transited into the laws of independent Kenya. Piecemeal amendments to the Act and the rules were made between 1963 and 2010 but the substance of the colonial Act and the Rules remained largely intact. In the year 2010, in response to a massive outcry in the legal profession and the public generally, the rules committee undertook a comprehensive review of the rules. The output was the 2010 Civil Procedure Rules which came into force in September 2010 by Legal Notice No 151 of 2010 published in Gazette Supplement No 65 Legislative Supplement No 42 of 10th September 2010 just shortly after the promulgation of the Constitution 2010 on 27th August 2010. The constitution and the 2010 Rules, and an amendment to the Appellate Jurisdictions Act made dramatic changes the most important of which was perhaps the paradigm shift captured by Article 159 CoK 2010, Section 1A Civil Procedure Act and 3A appellate Jurisdiction Act on the place of rules of procedure in the dispensation of justice.

8. THE PHILOSOPHY AND OBJECTS OF OUR CIVIL PROCEDURE LAW

The philosophy of our civil procedure law is well captured in article 159 of the Constitution, in Section 1A and 3A of the Civil Procedure Act and in Section 3A of the Appellate Jurisdiction Act. That philosophy is charecterise as the Overriding Objective or the Oxygen principle. It requires that civil disputes be determined on the basis of substantive justice and without undue regard to technicalities of procedure.

This philosophy is borne out of historical experiences with a sub-optimal dispute resolution process that appeared to focus more on the procedural technicalities than on the substance of the case. For a long time the courts developed a notorious reputation for determining cases on technicalities rather than on the merits.

The Tyranny of Rule 85 Court of Appeal Rules

The most notorious example of the tyranny of procedure came from the Court of Appeal. A significant proportion of the appeals were dismissed because the record of appeal was not prepared in accordance with the rules 85.Typically, that meant that a document was either missing from the record, or, even more comically, the one on record had some typographical error. The then Rule 85 of the Court of Appeal Rules provided for what were referred to by the court as 'primary documents'. Rule 85 provided as follows;

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> "85(1) For the purpose of an appeal from a superior court in its original jurisdiction, the Record of Appeal shall, subject to the provisions of sub-rule (3), contain copies of the following documents:
> (a) an index of all documents in the Record …
> (b) statement showing the address for service …
> (c) the pleadings
> (d) the final judge's notes of the hearing …
> (e) the transcript of any shorthand notes …
> (f) the affidavit read and all documents put in evidence …
> (g) the judgment or order
> (h) the certified decrees or order
> (i) the order, if any, …
> (j) the notice of appeal
> (k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:
> Provided that the copies referred to in the paragraphs (d), (e) and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.
> (3) A judge or registrar of the superior court may, on the application of any part direct which documents or parts of documents should be excluded from the record. Application for such direction may be made informally."

To appreciate the challenges of Rule 85 it is necessary to read it together with Rule 89

> "89(1) If a respondent is of opinion that the Record of Appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a Supplementary Record of Appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal."

Rule 89 appeared to give parties a backdoor method of bringing in omitted documents without seeking the intervention of the court under Rule 85(3). And on many occasions counsel actually filed supplementary records under Rule 89 to introduce omitted or indeed defective documents. The courts interpreted rule 85 very strictly. If any of the primary documents was missing from the record or the one on record had typographical errors, the court would strike out the appeal. The jurisprudence from the court was unanimous that defects or omissions could not be cured by an amendment of the defective document or with the filing of a supplementary record of appeal. A few examples will suffice in illustrating this jurisprudential tragic-comedy..And that Rule 89 provided no relief as it was in direct contradiction with Rule 85(3) which gave the discretion to the court to allow a supplementary record where the document in issue was not a primary document under Rule 85(1). See Omega Enterprises (Kenya) Ltd v Kenya Tourist Development Corporation & 2 others CIVIL APPEAL NO. 59 of 1993 [1994] eKLR.

In Republic vs Managing Director Kenya Posts & Telecommunications Corporation [1999] eKLR the extracted Order in the notice of appeal stated that the final determination of the suit was made by **Mr Justice Khamoni and not Mr Justice Githinji** who gave the ruling disposing of the suit on 16th November, 1998. The court found that 'This admitted mistake in the Order in respect of the judge who made the decision, **is not a minor clerical error** or one that as suggested by leading counsel for the appellant, could be cured by this Court under

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section 100 of the Civil Procedure Act or section 3 (2) of the Appellate Jurisdiction Act. The defect is a serious and fundamental one in a primary document like the Order, which certified or otherwise, or accidental or otherwise, deprives the Order of any validity for the purposes of the present appeal as an order which is mandatorily required by rule 85 (1) (h) of our Rules to be included in the record of appeal. This alone makes the present appeal incurably incompetent and should be struck out.

In reference to a defective or omitted notice of appeal, the court was equally emphatic in restating the consequences of non-compliance.

> ' a notice of appeal being a primary document within the context of rule 85 (1) of our Rules and not one of those specified in rule 85 (2A) of our Rules which can be filed by way of a supplementary record of appeal or an affidavit if omitted from the record of appeal, a notice of appeal could not be amended in any way to correct any mistake contained therein. A notice of appeal which contained a mistake rendered the record of appeal defective and which in turn, made the appeal itself, incurably incompetent'

In Commercial Bank of Africa Ltd vs Ndirangu [2000] 1 EA 29 The court of appeal had this to say about the consequences of failing to include the documents required by rule 85(1) in the record of appeal

> "Rule 85 (1) above, enumerates documents to be included in a record of a first appeal to this Court. The documents are of two categories, primary and secondary. The omission of any or parts of a document in the primary category renders an appeal incurably defective and therefore incompetent…… The trial court's notes whether or not either party considers them relevant and essential to the determination of the appeal, provided they were made before the decision appealed from are primary documents and unless specifically excluded by a judge's direction given under rule 85(3) aforesaid, their omission from the record, as is the case here, **render the appeal incompetent**. Likewise all interlocutory applications and orders made pursuant thereto, and all exhibits must be included in the record of appeal unless excluded as aforesaid. A party in a suit has no discretion to exclude from the record of appeal any document, whether primary or otherwise in view of that provision. Had the rules-making authority thought otherwise, there would have been no necessity of specifically vesting the power on the superior court to give a direction in that regard."

In Commercial Bank of Africa Ltd v General Motors Kenya Ltd [1982] eKLR Miller, Madan, Porter JJA, the appellant failed to include a plaint in the record of appeal. The document was subsequently lodged in a supplementary record filed outside the 60 day period for lodging the record of appeal. The advocate for the appellant explained the omission was due to an oversight on his part. He also argued that rule 89(3) allowed the appellant to file a supplementary record to supply the omissions in the record of appeal. The court adopted a restrictive interpretation and found that rule 89(3) in fact did not allow the appellant to cure a defective record by filing a supplementary record of what the court found to be a 'necessary document' as opposed to "further documents or any additional parts of documents which are … required for the proper determination of the appeal". The court found that the rule does not give the appellant 'a right to lodge at any time documents which **should have been lodged** within the stipulated time as part of the Record of Appeal. (Interestingly the rules (which then appeared to give the appellant to cure the defect in a record of appeal) were subsequently amended to restrict the right to file a supplementary record). The appeal was struck out with costs.

In Stephen E.C. Ngala v Burka Ahmed Salim & another CACA 311 of 2003 [2006] eKLR, the Court of Appeal struck out with costs an appeal on the basis that the pleadings and proceedings from the trial court were not included in the record. The court found that the failure to include any primary document in the record of appeal renders the appeal incurably defective.

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Once the appeal was struck out, the appellant had to start the process of appeal all over again by filing an application for leave to appeal out of time. These applications, if filed without delay would be routinely allowed and a new cycle of the appeal would commence. (See Ngoni-Matengo Co-operative Marketing Union Ltd v Alimohamed Osman [1959] EA 577)(Belinda Murai & 9 others v Amos Wainaina [1978] eKLR This state of affairs worked great injustice as it increased the costs of litigation and resulted in unnecessary delays in the resolution of civil disputes. A better approach would have been to either file a supplementary record to include the of amend the impugned document already on record to correct the defects.

The High Court was not left behind in striking out suits for failure to comply with some comically inconsequential procedural technicalities. A few example wills suffice for now;

Gayatri Industries Ltd v Harambee Sacco Ltd[2004] eKLR concerned the consequences of non-compliance with section 35 of the Advocates Act. That section provides;

> 35. (1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in section 34 (1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate:
>
> Provided that, in the case of any document or instrument drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm

In Gayatri, the affidavit filed in support of the application did not indicate the name and address of the advocate who drew it. A preliminary objection was raised on the competence of the application before court. Curiously, the affidavit was annexed to an application under order 39 which clearly stated the name and address of the advocate who prepared the application. It followed that it was pretty obvious who had prepared the affidavit. In response to the preliminary objection the advocate for the applicant called the attention of the court to several cases which appeared to suggest that a defect of this nature was not fatal. The court was far from impressed by the argument. The court found that;

> 'The very thing that is missing in the case before me is the name and address of the advocates who prepared the affidavit. That omission has been criminalized by statute. I cannot see how this court can be expected to wish away that omission. I am therefore unable to assume that just because the application has the name and address of a firm of advocates, and because it states that it is supported by the affidavit of Alnoor Amlani, the said affidavit must have been drawn by the same advocates. Such a presumption is probable but not necessarily true.. If I permit the applicants to rely on the affidavit in issue, I would be giving them the benefit of a document that not only flouts procedural requirements, but one which has been criminalised by statute. I cannot do so, in line with the decision of the Court of Appeal for Kenya, in Civil Appeal No. 144 of 2001 Robert Njenga Ndichu V Brush Manufacturers Limited. Although I must also add that I do recognize the fact that whilst the appellant in that case was guilty of a deliberate disobedience of statutory provisions, there is no suggestion that in the case before me, the Plaintiffs or their advocates deliberately disobeyed the provisions of Sections 34 and 35 of the Advocates Act. However, whether or not the omission to put the name and address of the advocate was willful or inadvertent, it is nonetheless criminal. I therefore uphold this Preliminary Objection'

The consequence was that the application was dismissed with costs.

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Johann Distelberger v. Joshua Kivinda Muindi & Another, H.C. Misc. Civ. Appl. No. 1587 of 2003, Justice Nyamu took a similarly uncompromising stand

> "If it is drawn by an unqualified person for the purpose of legal proceedings it is prohibited by s.34 (1) of the Advocates Act. Under s.35 (1) of the Advocates Act both [the advocate] and [the unqualified person] commit offences under the section which attract fines of Kshs.5,000/= in the case of [the] unqualified person and Kshs.500 in the case of the [advocate]. The offence as defined in the section is failure to endorse thereon the drawer's name and address, or the name and address of the firm [of advocates] ... I hold and find that failure to comply makes the two affidavits unavailable for the purpose of legal proceedings such as this. The two affidavits are hereby struck out and expunged from the record, and the ultimate consequence is that the application is also struck out with costs to the respondents."

Similarly in Re the Estate of Gregory Kyengo Maluila [2004] eKLR Justice Wendoh struck out a matter because the affidavit did not comply with the mandatory requirements of section 35 of the Advocates Act

These and many other examples which you can get by reading the pre 2010 decisions are spectacular examples of the draconian consequences of unquestioning adherence to technicalities of procedure. Indeed the Court of Appeal appeared to recognize the undesirability of a fastidious reliance for technicalities of procedure. In Delphis Bank Limited (Now Oriental Commercial Bank Ltd) v Channan Singh Chathe & 5 others [2009] eKLR, while dismissing an application to strike out an appeal because the omitted document was not a primary document the court made some somewhat out of character but nonetheless forward looking remarks.

In rejecting an application to strike out an appeal on the basis the record was defective; the court found that the particular defect was one of the curable ones. The court then went on to express displeasure with sticklers to the rules of procedure.

> 'That should or ought to **satisfy any stickler for rules of procedure unless such rules are to be treated as rituals which must be undergone by anyone who wishes to appeal.** (Emphasis ours) There is no merit in the motion before us and it is our hope that these unnecessary applications will cease so that the appeal itself can be listed for hearing. We order that the motion dated and lodged in the Court on 22nd September, 2008 be and is hereby dismissed. Each part to the motion shall bear their own costs thereof. Those shall be our orders.'

Subsequent to the amendment of the rules and the introduction of the Overriding Objective, the courts stopped striking out suits and appeals because of such technicalities. A good example of how the courts moved away from the hitherto draconian adherence to technicalities of procedure can be seen in the Court of Appeal decision in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates CA CA No 169 of 1999 [2013] eKLR Githinji, Nambuye Koome JJA, decided on the 11th of October 2013.

Let us now examine the statutory provisions that capture the philosophy and objectives of our civil procedure law

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Witness of Life I Prayer I Truthfulness I Honesty I Excellence I Commitment I Competence

9. The Constitution of Kenya 2010, Article 159 CoK 2010

Article 159 CoK 2010
(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
(a) justice shall be done to all, irrespective of status;
(b) justice shall not be delayed;
(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
(d) justice shall be administered without undue regard to procedural technicalities; and
(e) the purpose and principles of this Constitution shall be protected and promoted

10. The Appellate Jurisdiction Act

3A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.
(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

11. The Civil Procedure Act 1A Civil Procedure Act

Objective of Act
(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

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12. Section 3A Civil Procedure Act

> **Saving of inherent powers of court**
>
> Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

What then can we say is the philosophy of our civil procedure rules? The overriding Objective captures this philosophy in words that cannot be substituted. The philosophy is expressed as the objective of the Act

> Objective of Act
>
> The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1). A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

13. JUDICIAL INTERPRETATIONS OF THE PHILOSOPHY OF OUR CIVIL PROCEDURE LAW

Let us see how the courts have interpreted the provision

Long before the enactment of section 1 A, an English judge set the tone that the courts somehow chose not to follow in practice. In Collins M.R, in Re Coles [1907] 1 K.B. 1, 4 had this to say about the place of procedure in the administration of justice;

> "Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of the rules of practice to the work of justice is intended to be that of a handmaid rather than mistress, and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in a particular case

Locally a pre -2010 judge echoed the sentiments of the learned Master of Rolls. Hancox J Githere vs Kimungu5 (1976-1985) EA 101 had this to say;

> "The relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case

After 2010, the Court of Appeal in Mradula Suresh Kantaria and Surech Nanillal Kaptaria CA Civil Appeal No.277 of 2005 captured the mood of the moment in the following words "In this regard we believe one of the principal purposes of the double „OO principle" is to enable the court to take case management principles to the

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center of the court processes coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap.

But like with all good things, there is always a downside. The advent of the overriding objective seems to have heralded the onset of careless disregard for the rules. Realising the danger that this misconception of the rule posed to the orderly conduct of judicial proceedings with attendant costs and delays, the courts were quick to sound the appropriate warnings to practitioners

In Wilfred Korir v Faridun Suleiman Abdalla & 4 others [2012] eKLR the High Court cautioned against carelessness in the conduct of proceedings and warned that the Overriding Objective was not available to practitioners who negligently conducted judicial proceedings

> Where there is negligence or indolence on the part of a party or their advocates the court would not use the Overriding Objective of the provisions of article 159 to assist such a party. Article 159 of the CoK 2010 requires that there should be no undue regard to technicalities of procedure but it also requires that there should be no undue delay

Even the law society needed a reminder that the rules were made to be obeyed. In Law Society of Kenya v Martin Day & 3 others Civil Suit No. 457 OF 2013 [2015] eKLR the High court declined to accommodate a suit where the advocates for the society inexplicably to take out summons to enter appearance within the stipulated period.

> In my view the provision for sanctions where summons have been issued and not served within twelve months thereby invalidating them was meant to do away with suits which are filed for the sake of speculation. Secondly, the elaborate procedure for service of summons outside the jurisdiction of the court is intended to invoke the jurisdiction of the court to try a case against a foreigner residing outside Kenya, without which the court is devoid of any jurisdiction to hear and determine the dispute against the foreigner. In the end, I find that non compliance with the stipulated rules for service of summons, which summons are nonetheless invalid renders

Neither will the courts tolerate conduct the effect of which is to stand in the way of procedural justice. Accordingly as was stated in Johana Kipkemei Too v Hellen Tum [2014] EKLR the courts will not allow parties to disregard rules which are intended to give the counterparty adequate notice of the case against them;

> There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the Constitution under Article 50 (1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing

And in Mahat Carl Johnson V Marlborough Properties Ltd [2012] eKLR the court compared a failure to adhere to procedure to an abuse of the process of court**.**

> It is clear that where there is a clear procedure of redress of any particular grievance prescribed by the constitution or an Act of parliament that procedure should be strictly followed. To fail to adhere to a

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> procedure provided, in my view, would amount to abuse of the process of the court which may invite the wrath of the inherent jurisdiction of the Court.

14. Duty of Court

Section 1 B of the Civil Procedure Act requires the court to approach civil proceedings with the philosophy and objects of the rules in mind;

> Section 1B of the civil procedure Act prescribes the means by which the court can achieve the overriding objective**.**
> (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
> (a) the just determination of the proceedings;
> (b) the efficient disposal of the business of the Court;
> (c) the efficient use of the available judicial and administrative resources;
> (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
> (e) the use of suitable technology.

It can therefore be argued that if a court conducts civil proceedings otherwise than in accordance with the philosophy purpose and objects of the Act, that would be a violation of section 1B and possibly a ground for appeal from the decision of the court.

15. PRE-2010 VS POST-2010 JUDICIAL PARADIGMS ON PROCEDURAL TECHNICALITIES

16. Pre-2010

Broadly speaking, one can argue that the pre-2010 era was charecterise by heavy reliance on technicalities of procedure. This was the dominant tend. There were however no shortage of progressive voices.

In Apollo, JA, in Sebei District Administration –vs- Gasyali (1968) EA 30 "I think a distinguished equitable judge has said: blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. I think the broad equitable approach to this matter is that unless there is fraud or intention to over-react, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline"

In Githere V. Kimungu [1976 – 1985] E.A. 101, "……..the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case.

You may also wish to look up the following cases where technical objections were raised to the verifying affidavits. Progressive jurisprudence in the decisions took the position that objections to the validity of verifying affidavits are mere technicalities and are the defects were curable

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- Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR)(Ringera j)(as he then was)
- James Njoroge Karagu -vs- Hannah Njoki. Commissioner of Assize Visram (as he then was) (Nairobi HCCC No 713 of 1996
- The Matter of Central Bank of Kenya and Reliance Bank Limited. Commissioner of Assize Gacheche (Milimani Misc. Application No 427 of 2000)
- KARI vs Farah Ali & anor 2011 EKLR
- Kodak EA Ltd v Isaiah Ngotho 2004 EKLR
- Trust Bank vs Amalo Company Ltd 2009KLR 63

And then there were sticklers for procedure as has been shown above; And they were clearly in the majority

17. Post 2010

We can safely conclude that the dominant trend is to subordinate technicalities to the overriding objective and dispense substantive justice. However the courts have also warned that the rules of procedure have a purpose and reckless disregard for the rules will not be tolerated

Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No Nai. 263 of 2009, Court of Appeal

> "The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

Johana Kipkemei Too v Hellen Tum [2014] EKLR

> There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the Constitution under Article 50 (1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.

Skair Associates Architects v Evangelical Lutheran Church of Kenya & 4 others [2015] eKLR

> The court has moved from the practice of striking out plaints on the ground that a Verifying Affidavit is defective in view of the provisions of Article 159 (2) (d) of the Constitution of

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Kenya, 2010 that mandate the court to administer justice without undue regard to procedural technicalities

Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR

Any authorised officer of a corporation can swear a verifying affidavit. The objection(about a verifying affidavit) is a technicality and should be refused under the Constitution of Kenya, 2010. See the case of Kamani vs. Kenya Anti-Corruption Commission (2010) e KLR, where the Court of Appeal departed from its earlier obstinate stance on technicalities and applied the Oxygen principle.

And my take on the objection to the supporting affidavit is this. Under the rules, an affidavit will not be defeated merely because an authority under the seal of a corporation has not been filed contemporaneously with the application. The requirement of the law is that such authority should be filed before the hearing. Therefore, it is sufficient, in an interlocutory application, for the deponent to depose in the affidavit that he has the authority to swear the affidavit on behalf of the corporation

Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009);

The application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness

Grace Wairimu Mungai v Catherine Njambi Muya [2014] eKLR

Failure to take out and serve STEA is no technicality. It is fatal

- 'The provisions of order 5 Rule 1 are couched in mandatory terms and cannot be taken casually and/or lightly. In my view service of summons on a defendant is a vital step in initiating the litigation against a Defendant and until a summons is properly served on the Defendant there is no valid invitation to the Defendant to defend the suit'. Having regard to the applicable provisions which I have highlighted above it is my view that order 5 Rules 1 and 2 set out a very elaborate procedure of how summons are to be processed issued and served and where there are difficulties of serving within the prescribed time frames an equally elaborate procedure for extending the validity of the summons is out lined. I am unable to accept that order 5 Rule 1 would, fall to be considered as providing a mere procedural

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technicality as suggested by the plaintiff. It does in my view substantively provide the procedure under which a Defendant is called to answer to a suit and is thus core to the initiation of a suit as far as a defendant is concerned and it would be my holding that where no summons have been issued in accordance with order 5 and appropriately served on the Defendant there cannot be a competent suit against a defendant. The provisions of order 5 Rule 1 are couched in mandatory terms and cannot be taken casually and/or lightly. In my view service of summons on a defendant is a vital step in initiating the litigation against a Defendant and until a summons is properly served on the Defendant there is no valid invitation to the Defendant to defend the suit.

Abdalla & 4 Others Wilfred Korir v Faridun Suleiman [2012] eKLR

Where there is negligence or indolence on the part of a party or their advocates the court would not use the Overriding Objective of the provisions of article 159 to assist such a party. Article 159 of the CoK 2010 requires that there should be no undue regard to technicalities of procedure but it also requires that there should be no undue delay

Mahat Carl Johnson V Marlborough Properties Ltd [2012] eKLR

It is clear that where there is a clear procedure of redress of any particular grievance prescribed by the constitution or an Act of parliament that procedure should be strictly followed. To fail to adhere to a procedure provided, in my view, would amount to abuse of the process of the court which may invite the wrath of the inherent jurisdiction of the Court.

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

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

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The general trend, following the enactment of Sections 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, is that courts today strive to sustain rather than to strike out pleadings on purely technical grounds as will shortly be demonstrated. This trend has now been adopted by recent legislations and procedural rules

18. JURISDICTION

19. Meaning

Jurisdiction denotes sphere of authority; the limits within which any particular power may be exercised, or within which a government or a court has authority. It can also be seen as the authority of a sovereign power to govern or legislate; the right of making or enforcing laws; the power or right of exercising authority. With regard to the courts, it is the 'legal power, right, or authority of a particular court to hear and determine causes, to try criminals, or to execute justice; judicial authority over a cause or class of causes; as, certain suits or actions, or the cognizance of certain crimes, are within the jurisdiction of a particular court, that is, within the limits of its authority or commission[3]

20. Types of jurisdiction

There are three broad categories of jurisdiction

- **Personal jurisdiction** (*jurisdiction in personam)*
- **Territorial jurisdiction** (*jurisdiction in locum*),
- **Subject matter jurisdiction** (*jurisdiction in rem /subjectam)*

There are several variants of those three.

- Universal jurisdiction
- Exclusive jurisdiction
- Concurrent jurisdiction
- General jurisdiction
- Limited/Special jurisdiction
- Original jurisdiction jurisdiction
- Appellate jurisdiction
- Review jurisdiction

[3] http://thinkexist.com/dictionary/meaning/jurisdiction

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- Revisionary Jurisdiction
- Sentencing jurisdiction
- Relief jurisdiction
- Procedural jurisdiction

The most celebrated case on the issue of jurisdiction is the court of appeal decision in Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] KLR 1, 14 per Nyarangi JA) "Jurisdiction is everything. Without it, a Court has no power to make one more step."

The primary source of jurisdiction is the constitution. Article 162 provides for the structure of the courts

> 162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
> (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
> (a) employment and labour relations; and
> (b) the environment and the use and occupation of, and title to, land.
> (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
> (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article

The constitution then proceeds to confer jurisdiction on the Superior Courts and then leaves it for parliament to supplement that jurisdiction and to confer jurisdiction on the courts of coordinate status with the High Court and the subordinate's courts and other tribunals.

21. The Supreme Court

> **Article 163 CoK 2010**
> (3) The Supreme Court shall have—
> (a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and
> (b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from—
> (i) the Court of Appeal; and
> (ii) any other court or tribunal as prescribed by national legislation
> (4) Appeals shall lie from the Court of Appeal to the Supreme Court—
> (a) as of right in any case involving the interpretation or application of this Constitution; and
> (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).
> (6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government

The provisions are to be read together with parts III IV and V of the Supreme Court Act and the Supreme Court Rules, 2011(LN 141 of 2011 revoked by LN 123 OF 2012) Supreme Court, 2012 LN 123 of 2012 and LN 14 of 2013 Supreme Court (Amendment) Rules 2016, (LN 14 of 2016) Supreme Court (Presidential Election Petition) Rules, 2013 (LN 15 of 2013) Supreme Court (Presidential Election Petition) Rules, 2017 (LN 113 of 2017)

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22. The Court of Appeal

Article 164. CoK 2010
(1) There is established the Court of Appeal, which—
(a) shall consist of the number of judges, being not fewer than twelve, as may be prescribed by an Act of Parliament; and
(b) shall be organised and administered in the manner prescribed by an Act of Parliament.
(2) There shall be a president of the Court of Appeal who shall be elected by the judges of the Court of Appeal from among themselves.
(3) The Court of Appeal has jurisdiction to hear appeals from—
(a) the High Court; and
(b) any other court or tribunal as prescribed by an Act of Parliament.

This provision is to be read together with the Appellate jurisdiction Act, The Court of Appeal Rules, Relevant Provisions of the Civil Procedure Rules Court of Appeal Practice Direction - Civil Appeals and Applications 2015, Court of Appeal Election Petition Rules 2017.

23. The High Court

Article 165. CoK 2010
(1) There is established the High Court, which—
(a) shall consist of the number of judges prescribed by an Act of Parliament; and
(b) shall be organised and administered in the manner prescribed by an Act of Parliament.
(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
(3) Subject to clause (5), the High Court shall have—
(a) unlimited original jurisdiction in criminal and civil matters;
(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under
Article 144;
(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
(i) the question whether any law is inconsistent with or in contravention of this Constitution;
(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
(iv) a question relating to conflict of laws under Article 191; and
(e) any other jurisdiction, original or appellate, conferred on it by legislation.
(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
(5) The High Court shall not have jurisdiction in respect of matters—
(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

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(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration

These provisions are to be read together with the Judicature Act, the Civil Procedure Act, Practice Directions for the High Court and the High Court (Organization and Administration) Act 2015

24. Environment and Land Court

Article 162 CoK 2010
(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
(a) employment and labour relations; and
(b) the environment and the use and occupation of, and title to, land.
(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

This provision should be read together with the Civil Procedure Act, the Environment and Land Court Act No 9 of 2011 and the Practice directions on proceedings relating to the Environment and the use and occupation of, and title to Land (GAZETTE NOTICE NO. 13573) (and 5178) (16268 transitional provisions)

25. Employement and Labour Relations Court

Article 162 CoK 2010
(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
(a) employment and labour relations; and
(b) the environment and the use and occupation of, and title to, land.
(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

This provision is to be read with the provisions of the Employment and Labour Relations Act No 20 of 2011 the Employment and Labour Relations Court (Procedure) Rules, 2016,Civil Procedure Act, the

26. Subordinate Courts

169. (1) CoK 2010
The subordinate courts are—
(a) the Magistrates courts;
(b) the Kadhis' courts;
(c) the Courts Martial; and
(d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).

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(2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).

This provision is to be read together with the Magistrates Courts Act, the Civil Procedure Act and Section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015

27. Kadhi Courts

Article 170 CoK 2010
(1) There shall be a Chief Kadhi and such number, being not fewer than three, of other Kadhis as may be prescribed under an Act of Parliament.
(2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person—
(a) professes the Muslim religion; and
(b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.
(3) Parliament shall establish Kadhis' courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5).
(4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within Kenya.
(5) The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

This provision is to be read together with the Kachi Courts Act and the Civil Procedure Act

A question may be posed if parliament could by law confer jurisdiction in respect of the matters mentioned in Article 162(2), namely land and environment or employment and labour relations matters on courts other than article 162 courts.

Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others CACA 287 of 2016 [2017] eKLR

Following its enactment by Parliament, The Statute Law (Miscellaneous Amendments) Act, 2015, Act No. 25 of 2015 received Presidential assent on 15th December 2015. Under Section 2 thereof, several laws were amended as indicated in the schedule thereto.

One of the amendments introduced a provision in section 26 of the Environment and Land Court Act which provided as follows

(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.

Other related amendments were made to Section 101 of the Land Registration Act which was amended by inserting the words **"*and subordinate courts*"** immediately after the expression "2011" and Section 150 of the Land Act that was amended by deleting the words **"*is vested with exclusive jurisdiction*"** and substituting therefor the words "***and the subordinate courts as empowered by any written law shall have jurisdiction.*"**

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The Magistrates" Courts Act, Act No. 26 of 2015, an Act of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of the Constitution was enacted to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. It received Presidential assent on 15th December 2015. It was to commence on 2nd January 2016. Section 9 of that Act deals with claims in employment, labour relations claims; land and environment cases and provides that:

> **"A magistrate's court shall —**
>
> **(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —**
>
> **(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
>
> **(ii) compulsory acquisition of land;**
>
> **(iii) land administration and management;**
>
> **(iv)public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
>
> **(v) environment and land generally.**
>
> **(b) in the exercise of the jurisdiction conferred upon it under section 29 of the Industrial Court Act, 2011 (No. 20 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations."**

The Magistrates" Courts Act, Act No. 26 of 2015, an Act of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of the Constitution was enacted to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. It received Presidential assent on 15th December 2015. It was to commence on 2nd January 2016. Section 9 of that Act deals with claims in employment, labour relations claims; land and environment cases and provides that:

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> **(iv)public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
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> **(v) environment and land generally.**

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(b) in the exercise of the jurisdiction conferred upon it under section 29 of the Industrial Court Act, 2011 (No. 20 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations."

The High Court (Emukule, Chitembwe, Thande, JJ) delivered on 11th November 2016 in which the court decreed that Section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015 "*in relation to the jurisdiction of the subordinate courts, in respect of matters relating to environment and the use, occupation of and title to land is inconsistent with Article 162(2) of the Constitution, and therefore null and void*."

The appeals arise from the judgment of the High Court .The main question for determination in these consolidated appeals is whether it is within the power of Parliament to confer, by legislation, jurisdiction on magistrates" courts to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land or whether the jurisdiction to determine such disputes is the preserve of the courts of equal status (specialized courts) established under Article 162(2) of the Constitution. In other words, do the specialized courts have exclusive jurisdiction to determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land

Held

By parity of reasoning, although under Article 162 (2) of the Constitution Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrate"s courts to hear and determine disputes stipulated under Article 162 (2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases.

We think we have said enough to demonstrate that we are unable, respectfully, to agree with the interpretation accorded by the High Court to Articles 162(2) and 169 in relation to the power of Parliament to enact legislation conferring jurisdiction on magistrates" courts with respect to disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.

The other question is whether a judge of the environment and land court or a judge of the employment and labour relations court can be administratively transferred to sit and hear civil and criminal matters in the High Court. In the Malindi Law Society case, the Court of Appeal agreed with the High Court that this was not possible.

In addition to the statutes cited above, there are many Acts of parliament conferring jurisdiction on various Courts and Tribunals. The Law of Succession Act confers jurisdiction in succession matters, the Marriage Act confers jurisdiction on matters related to marriage and divorce, the Rent Restrictions Act confers jurisdiction on the Rent Restrictions tribunal in respect of controlled tenancies for residential premises. The Landlord and Tenant(Shops Hotels and Catering Establishments Act confers jurisdiction on the Business Premises Tribunal in respect of controlled tenancies for Business premises. The cooperatives Act creates and confers jurisdiction on the Cooperatives tribunal in respect of matters related to cooperative societies. There is a Capital Markets Tribunal(Capital Markets Act), Retirement Benefits Tribunal(Retirement Benefits Act) , Insurance Tribunal (Insurance Tribunal),Sugar Arbitration Tribunal(Sugar Act) all created for specific purposes by Acts of parliament with specialized jurisdiction.

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Consistent with the decision in Owners of the Motor Vessel 'SS Lillian' it is crucially important to determine which court or tribunal has jurisdiction over a civil dispute and which court has jurisdiction to review or hear appeals from the court of first instance. No court or tribunal will entertain a matter in respect of which it has no jurisdiction

28. Ouster of Jurisdiction

Parliament can oust the jurisdiction of a court in a civil or indeed any other dispute. The courts are traditionally jealous of any attempt to oust their jurisdiction but where the words of the statute are clear, the courts will give effect to the intention of parliament. There are a number of cases dealing with ouster of jurisdiction. The following examples will suffice

Gladys Mwaniki (Regional Club) & 6 others v Gordon Oluoch & 7 others [2015] eKLR

The High Court accepted that it is possible for parliament to limit the courts power on Judicial Review through the use of an ouster clause. The court cited with approval several local and foreign cases accepting the legality and constitutionality of ouster clauses such as

- Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728,
- The Speaker of the National Assembly vs. Karume [2008] 1 KLR 426 (EP),
- Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887,
- Diana Kethi Kilonzo & Another vs. IEBC and 10 Others Constitutional Petition Number 359 of 2013 [2013] KLR ,
- Francis Mutuku vs. Wiper Democratic Movement – Kenya & 2 Others [2015] eKLR,
- Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000,
- Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010

the Court should allow the bodies established by law to perform their roles

Diana Kethi Kilonzo vs. IEBC and 2 Others (supra):

> We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."

Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887

> where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement.

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The Speaker of the National Assembly vs. Karume [2008] 1 KLR 426 (EP),

> where there is a specific procedure provided for redress of grievances, that procedure ought to be strictly followed.

Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010

> It is not only the Constitution that can limit/confer jurisdiction on the court but that any other law may by express provision confer or limit that jurisdiction. In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal forums.

In Gladys Mwaniki (Regional Club) & 6 others , the court found that the statute did not provide an alternative remedy and in any event, the alternative forum lacked the jurisdiction to grant the relief sought by the applicants.The court held that for an ouster clause to be accepted certain conditions must be met

> The language of the statute ousting the jurisdiction of the court must be clear. There will be no ouster by implication
>
> The alternative remedy must be adequate

Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728,

> ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In the said case the learned Judge recognised that the Court's jurisdiction may be precluded or restricted by either legislative mandate or certain special texts.

Examples from the decisions of section 76 of the Cooperatives Act also illustrate the approach of the courts to ouster clauses.

Section 76 provides

> 76. Disputes (1) If any dispute concerning the business of a co-operative society arises— (a) among members, past members and persons claiming through members, past members and deceased members; or (b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or (c) between the society and any other co-operative society, it shall be referred to the Tribunal. (2) A dispute for the purpose of this section shall include— (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or

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not; (c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

Gerald Wambua Makau vs Lukenya Ranching & Farming Co-Operative Society Ltd & Anor [2004] eKLR

The High Court declined jurisdiction because the dispute before it was covered by the s 76 the Cooperatives Act which ousted the jurisdiction of the court

A similar decision was reached by the court in Musa Kaminja Kinyanjui v Munyaka Marketing Co-operative Society Limited [2005] eKLR

The court found that where an arbitrator had made an award under section 80 of the Cooperatives Act, the court only had appellate but not original jurisdiction over the dispute,

Alex Malikhe Wafubwa & 7 others v Elias Nambakha Wamita & 4 others [2012] eKLR

There was a preliminary objection based on section 76 of the Cooperatives Act. Despite the objection that the dispute was covered by section 80 of the Cooperatives Act, the court found that the issues raised implicated constitutional rights violations and the court, not the tribunal had jurisdiction

Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010

Where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable

29. Choice of forum

Sometimes parties to a dispute will oust the jurisdiction of civil courts by choosing a preferred dispute resolution forum. This is typically done by including a dispute resolution clause in a contract between the parties. The most popular of such clauses are arbitration or ADR clauses. Sometimes, the parties will chose to litigate in a foreign court. Article 159 encourages Alternative Dispute Resolution processes and the courts will give effect to such clauses unless the dispute is one which the law specifically excludes from such processes or where the court finds the agreement contrary to public policy

30. Arbitration

Section 6 of the Arbitration Act requires the court to stay and refer to arbitration any dispute where there is an arbitration clause provided certain conditions are met. Kenya is also a signatory to the 1958 New York Convention which is now part of our laws by virtue of article 2 of the constitution. The convention requires signatory states to give effect to arbitration clauses in transnational dispute resolution and to enforce the decisions of arbitrators made in signatory states.

Courts typically defer to such clauses and would decline jurisdiction whenever confronted with such a clause unless there are compelling grounds for assuming jurisdiction.

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