UNIVERSITY OF NAIROBI

SCHOOL OF LAW

THE DOCTRINE OF JUDICIAL PRECEDENT (*STARE DECISIS*): A CRITICAL APPRAISAL OF RECENT DECISIONS MADE BY THE HIGH COURT AND THE COURT OF APPEAL OF KENYA

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A Research Project submitted in partial fulfillment of the requirements for the award of The Degree of Master of Laws [LL.M]

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DECLARATION

I, NJOROGE REGERU hereby declare that this study is my original work and has not been presented for a degree in any other University.

Signed: _____ Date: 24th August, 2012.

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DEDICATION

This study is dedicated to our last born son, Waiyaki, also my "twin", whose passing birth days, year after year, inspired me to soldier on and to complete this study.

ABSTRACT

This study seeks to appraise critically a number of selected decisions handed down in the recent past by the High Court and the Court of Appeal of Kenya with a view to demonstrating that far too often, those Courts do not abide by the doctrine of judicial precedent or *stare decisis*.

As will be readily appreciated, the failure to observe the tenets of the said doctrine inevitably leads to decisions lacking in consistency, uniformity and predictability. This places legal practitioners and the clients whom they advise in a serious predicament, thereby undermining not just effective articulation and advice of legal issues to clients, but by extension, also the under-lying business and economic activities in which those clients engage. The perception of judicial arbitrariness and inconsistency thereby created has the undesirable effect of undermining respect for the rule of law and the institutions which serve it. This is not to say, however, that Courts should be oblivious of the social, political, economical and technological changes which take place in society all the time. The law ought to be dynamic so as to meet new realities and challenges as they arise but this need not result in judicial decisions driven by whimsical and capricious considerations. Unbridled judicial activism ought to be avoided whilst at the same time formulating such rules as permit Courts to reach decisions which address new situations in a logical, sensible and legally defensible manner.

The main objectives of the study will be firstly to define and bring out the meaning of the doctrine of judicial precedent or *stare decisis* and to trace its evolution to the present time. Next will be to identify selected decisions which have emanated from the High Court and the Court of Appeal of Kenya and to subject those decisions to scrutiny against the requirements of the doctrine of judicial precedent. It is intended to bring to focus the conflicts and inconsistencies which frequently afflict those decisions. The cause of this malady will be investigated and with reference to best practices in selected Commonwealth countries, possible solutions will be suggested. Finally, conclusions will be drawn and recommendations as to what measures could be taken to remedy this untenable state of judicial affairs will be offered.

The methodology to be employed will be research-based, drawing on secondary sources which will principally be text books, journals and decided cases, reported and otherwise.

The main findings to be extracted from the study are that for a myriad of reasons, judicial decisions are not always consistent, uniform or predictable. Lack of proper or effective law reporting of decided cases is one of the key causes for this. Other causes include lack of diligence and thoroughness in legal research by the parties concerned, ignorance of material facts and legal provisions, judicial ineptitude and extraneous considerations which are allowed to creep in and affect judicial appreciation of the applicable facts and law.

The conclusions drawn from the study are that firstly, consistency, uniformity and predictability of judicial decisions is critical and that, secondly, every effort should be made to attain the same, within the well established principles of *stare decisis*. The need for comity and predictability in judicial decision making is not grounded merely on theoretical considerations, but on legal and economic imperatives which cannot be

ignored if, ultimately, the rule of law is to be upheld and the judiciary, which is a key pillar thereof, held in esteem and respect.

The study will recommend that law reporting be enhanced so that the latest decisions, from every nook and cranny of the country, are collected, pooled together and reported in a comprehensive, effective and timely manner. Access to those reports by the relevant parties including judicial officers, lawyers, legal scholars and clients is critical. However, those dispensers and recipients of justice in the form of judicial decisions must be encouraged to go out there to research, procure and rely on past decisions pertinent to the respective cases. If there has to be departure from those decisions, the study recommends that there ought to be clear guidelines which the particular Court must apply and abide by, the overall objective of promoting and enhancing the rule of law being borne in mind at all times. In addition, the study recommends continuous training and re-education of judicial officers at every level of our court system. For legal practitioners, continuous legal education and awareness is key. Diligence and thoroughness in research would thus be enhanced, thereby uplifting the standards of advocacy on the one hand, and the quality of judicial decisions on the other hand. The ultimate result would be enhancement of the rule of law through a well respected judiciary whose hallmark is consistency, uniformity and predictability.

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The Supreme Court Rules, 2011

ABBREVIATIONS

AIR.....All India Reporter

ANPPCAN..... ..African Network for the Prevention and Protection against Child Abuse and Neglect

C.L.E.....Continuing Legal Education

CLARION.....Centre for Law and Research International

CRADLE.....Children Rights Advisory Documentation and Legal Centre

E.A.C.A.....East African Court of Appeal

E.A.L.R.....East African Law Reports

F.A.L.M..... Free Access to Law Movement

FIDA.....Federation of Women Lawyers Kenya

H.L.R.....Harvard Law Review

ICJ.....International Commission of Jurists

ISCLR.....Indian Supreme Court Law Reporter

JT.....Judgments Today

J.T.I.....Judicial Training Institute

K.L.R.....Kenya Law Report

L.S.K.....Law Society of Kenya

N.C.L.R.....National Council of Law Reporting

OFFLACK.....Oscar Foundation Free Legal Aid Clinic Kenya

O.J.L.S.....Oxford Journal of Legal Studies

RCK.....Refugee Consortium of Kenya

SCA.....Supreme Court Almanac

SCC.....Supreme Court Cases

SCR.....Supreme Court Reports

U.C.L.R.....University of Colorado Law Review

CHAPTER ONE
INTRODUCTION

1.1 BACKGROUND TO THE PROBLEM

It is a basic principle of the administration of justice that like cases should be decided alike.[1] This seems to be sufficient justification for the fact that, in almost every jurisdiction, a judge tends to decide a case in the same way as that in which a similar case has been decided by another judge.[2] As will be appreciated, this tendency varies greatly. According to R. Cross and J. Harris in their afore-cited book, it may be little more than an inclination to do as others have done before, or it may be the outcome of a positive obligation to follow a previous decision in the absence of justification for departing from it. Judicial precedent has some persuasive effect almost everywhere because *stare decisis* (keep to what has been decided previously) is a maxim of practically universal application. The peculiar feature of the English doctrine of precedent is its strongly coercive nature.[3] English judges are sometimes obliged to follow a previous case although they have what would otherwise be good reasons for not doing so.

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[1] R. Cross and J. Harris, "Precedent in English Law" 4th Edition Oxford University Press, London, 1991, page 2

[2] David Lyons, "The Rule of Precedent" Vanderbilt University, Tennessee, 1985, page 495
Theodore Benditt "The Rule of Precedent," in precedent in Law, ed. by Laurence Goldstein, Clarendon Press, Oxford, 1987 pages 89-106

[3] The strong coercive nature of the English doctrine of precedent is due to rules of practice, called 'rules of precedent', which are designed to give effect to the far more fundamental rule that English law is to a large extent based on case-law. 'Case-law' consists of the rules and principles stated and acted upon by Judges in giving decisions. In a system based on case-law, a Judge in a subsequent case *must* have regard to these matters; they are not, as in some other legal systems, merely material which he may take into consideration in coming to his decision. The fact that English law is largely a system of case-law means that the Judge's decision in a particular case constitutes a 'precedent'. If we place ourselves in the position of a Judge in a later case, there may be said to be many different kinds of precedent. The Judge may simply be obliged to consider the former decision as part of the material on which his present decision could be based, or he may be obliged to decide the case before him in the same way as that in which the previous case was decided unless he can give a good reason for not doing so. Finally, the Judge in the instant case may be obliged to decide it in the same way as that in which the previous case was decided, even if he can give a good reason for not doing so. In the last-mentioned situation the precedent is said to be 'binding' or of 'coercive effect' as contrasted with its merely 'persuasive' effect in the other situations in which the degree of persuasiveness may vary considerably.

Although the doctrine of precedent can be said to be presently in a state of flux in England, as will be apparent further on in this study, there are, however, three golden strands which are easily discernible. These are the respect paid to a single decision of a superior court, the fact that a decision of such a court is a persuasive precedent even so far as courts above that from which it emanates are concerned, and the fact that a single decision is always a binding precedent as regards courts below that from which it emanated.

Like their colleagues in England, Kenyan judges are bound by the doctrine of judicial precedent, meaning that there ought to be broad uniformity and predictability in their decisions.

This study has been provoked by the inconsistency and conflict that one so often witnesses in the various decisions handed down by the courts in Kenya. However, the study shall focus primarily on the High Court and the Court of Appeal, and identify, and analyse various decisions which are in conflict and inconsistent with other decisions handed down by the said courts, at different times, in respect of similar issues of fact and/or law.

The study will necessarily deal with the doctrine of judicial precedent (*stare decisis*) prior to delving into case law and appraising the same for consistency and predictability. The said doctrine is a central pillar of the Kenyan legal system and it is therefore critical that the same be comprehended fully before subjecting to scrutiny various decisions handed down by Kenyan courts from time to time on diverse subjects.

1.2 STATEMENT OF THE PROBLEM

The problem which has been discerned and which has necessitated this study is the lack of consistency, uniformity and predictability, all too often evident, in various decisions emanating from Kenyan courts. Granted, uncertainty in the applicable law, particularly in some statutory provisions, may

contribute to the inconsistency but it is in the decided cases that the uncertainty and inconsistency crystallise and become manifest. The lack of certainty, predictability and uniformity in any country's case law has such adverse and far-reaching consequences as should be easily appreciated at first glance. It is not just a question of a legal practitioner being unable to make an informed prediction as to how the court might determine a particular case. It also means that the legal practitioner will be unable to advise his clients effectively. The clients so affected will include businessmen and prospective investors who, due to such uncertainty, will be unable to make informed decisions and will in the result be constrained to take their business and monies elsewhere. Indeed the absence of a cogent, credible, reliable and predictable legal regime in Kenya has often-times been cited as one of the key impediments to direct foreign investment.[4] Consistency and predictability in judicial pronouncements are a key plank in the rule of law. Subjects are more likely to accept a particular system of law, and to subject themselves to it, if the decisions handed down are consistent and predictable, thereby ensuring that subjects will more likely resort to the courts than to illegal methods of dispute resolution, including self help measures. A regulated and accepted system of dispute resolution therefore promotes law and order, thus ensuring that the rule of law is upheld for the orderly and peaceful conduct human affairs. That the doctrine of judicial precedent has not always been upheld in our courts means that the rule of law is under threat. There is therefore a clear and present problem which this paper shall focus on.

A consistent and predictable pattern in judicial pronouncements and decisions attracts confidence, respect and credibility for the particular judicial system. Such a system is then perceived as grounded on law, not fiat, reason not whim and objective justice, not caprice or arbitrariness. Would it not be desirable that the citizenry and others, in the conduct of their affairs are assured of a robust

[4] The Kenya Government Vision 2030, Government Printer, 2007 states at page 132 that the vision is ``adherence to the rule of law applicable to a modern, market-based economy in a human rights-respecting state" and commits itself to enact and operationalise the necessary legal and institutional frameworks.

and solid judicial system whose decisions are characterized by an appreciable sense of justice, consistency and predictability?

1.3 RESEARCH QUESTIONS

The questions which this study shall be concerned with and which will be researched on are as follows:-

(a) What is the rationale of the doctrine of precedent (*stare decisis)* and are there any benefits to be gained from court decisions which abide by the doctrine and are therefore consistent and predictable?

(b) What causes departure from the doctrine of precedent and is this departure evident from an analysis of the cases selected from the Kenyan High Court and Court of Appeal?

(c) Are there any benefits to be derived from departure from the doctrine of *stare decisis* and how is such departure to be harmonized with the overriding need to secure consistency, uniformity and predictability in court decisions?

(d) What are the adverse effects of departure from the doctrine of *stare decisis* and how do such effects undermine the administration of justice and the rule of law?

(e) What conclusions can be drawn from the analysis of selected cases drawn from the High Court and Court of Appeal of Kenya and what recommendations can be made to promote adherence to the doctrine of precedent and thereby enhance the administration of justice and the rule of law?

1.4 THE OBJECTIVES OF THE STUDY

The objectives of this study may be summarized as follows:-

(a) To bring to focus the meaning of the doctrine of judicial precedent, *(stare decisis),* trace the evolution of the doctrine both in Kenya and England where the bulk of Kenyan law is rooted and to highlight the purpose that the doctrine serves in effective and efficient administration of justice.

(b) To recognise those instances in which the courts are sometimes constrained to depart from the dictates of the *stare decisis* doctrine for various reasons and to propose how such departure should be harmonized with the overall need for consistency and predictability in court decisions.

(c) To identify and analyse critically some of those decisions, selected randomly, which have over the years emanated from the High Court and the Court of Appeal of Kenya, which decisions have breached the doctrine of judicial precedent as the same are in conflict and inconsistent with each other.

(d) To investigate and determine what the cause of such conflict and inconsistency might be.

(e) To come up with recommendations which could remedy the situation so that compliance with the doctrine of judicial precedent becomes more the rule than the exception.

1.5 JUSTIFICATION OF THE STUDY

That there is such manifest conflict and contradiction in decisions handed down by the High Court and the Court of Appeal in Kenya on diverse issues, and on a regular basis, is deemed to be sufficient justification for the study. It is hoped that focus on and highlight of these inconsistencies and their extremely far-reaching consequences may provoke a deliberate effort at harmonization and certainty in future. Such an eventuality would be of great benefit to virtually every person and sector in Kenya, the law being so pervasive that it affects the daily lives and activities of all persons who are subject to it. The immediate

beneficiaries, however, are those persons whose pre-occupations and professions touch directly and continually on the law including law students and scholars, legal practitioners, litigants who daily come before our courts and judicial officers whose noble duty is to resolve disputes and conflicts.

It is also anticipated that the recommendations made including much needed judicial reforms, if implemented, would go a long way in enhancing the administration of justice, a key component in the realisation of a just society which cherishes the rule of law. If such a reality were to dawn on the Kenyan society, this study would have been vindicated and justified.

1.6 METHODOLOGY OF RESEARCH

This study will draw its content principally from secondary data. The approach adopted will be essentially qualitative and will draw principally from such sources as text books, journals and law reports.

As is evident from the foregoing, the bulk of the research which will go into this study will be library-based, drawing on the various sources as outlined above.

1.7 LITERATURE REVIEW

The study has had due regard to available material pertinent to the issues under consideration and has also reviewed past studies relevant to the field of investigation. Having done so, the study is satisfied that its chosen area of investigation is largely unexplored and that the study will fill a critical gap as far as the analysis of breach of the doctrine of judicial precedent by the Kenyan judicial system is concerned.

A distinction of the peculiar issues covered by this study, and of the other issues, albeit related, contained in other material and past studies may be summarized as follows:-

1.7.1 Textbooks

1.7.1.1 R. Cross and J. Harris *Precedent in English Law.*[5]

This book, as the title suggests, concentrates almost exclusively on English law and the decisions emanating from English courts. It bemoans the fact that the English doctrine of precedent is strongly coercive in nature and the fact that the Judges in common law jurisdictions, unlike their counterparts in many other jurisdictions, are bound and ``must have regard to" the previous decisions of higher courts and will be bound to follow the same even if there may be good grounds for not doing so.

The idea of the doctrine of precedent creating an occasion for judicial lawbreaking is treated by Cross and Harris with near bewilderment. The question of what ought to be done about a judge who flagrantly abuses the doctrine does not tax the authority for the simple reason that, according to them, judges do not behave thus. Although a formal sanction could be applied to a judge for eschewing precedent, the likelihood of this occurring is remote because concerns about reputation and fear of informal criticism motivate Judges to treat precedents as binding upon them. There is nothing naïve about Cross and Harris's assessment. The 'rules' of precedent are prudential rules; Judges apply them so as to maintain a system of case-law rather than fear breaking them in case they are punished. Where judges do not wish to follow a precedent it is commonly assumed that they will either distinguish the precedent from the present case or, when permissible, overrule the precedent on the basis of an especially compelling reason or set of reasons. Neither judges nor jurists pay much attention to the question of what should happen to the judge who is manifestly disrespectful towards and neglectful of precedent, probably because that judge rarely, if ever, exists outside fictional literature. This therefore leaves out the question of instances where Judges actually go against the principle of *stare decisis.* In

[5] Supra (Note No. 1)

Nicholas R.O Ombija v Kenya Commercial Bank Limited,[6] the Applicant, himself an honourable member of the bench, was seeking damages for defamation against the defendant bank. Before judgment on quantum of damages was delivered the bank instituted an application for stay of proceedings pending appeal in *Kenya Commercial Bank Limited v Nicholas Ombija,*[7] which order was granted by a three judge bench of the Court of appeal. The trial judge however, in blatant disregard of this order of stay, went ahead, against the principle of *stare decisis*, to award damages against the Defendant bank.

Similarly, in a matter before the Court of Appeal[8], the court noted with concern that an earlier order it had given for stay of proceedings in the High Court had been disregarded and proceedings taken in the superior court. To forestall repetition of disobedience, the Court of Appeal directed that its order be extracted and served on the superior court forthwith.

To gain a better understanding of the obligation that courts have to follow previous decisions, Cross and Harris start by stating that the obligation is based on a well defined practice whose efficacy depends on the internal aspect of the rule of *stare decisis.*

The book under consideration is limited to the English position and does not address the Kenyan situation at all. Moreover, Cross and Harris fail to deal with the issue of instances where judges do go against the doctrine of stare decisis as the authors are of the view that no judge would go against set precedent. The reality, however, as we have seen above is that judges can and do in fact go against the doctrine of precedent. The study will address this gap.

1.7.1.2 Neil Duxbury, *The Nature and Authority of Precedent*[9]

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[6] Civil Case 547 of 2008
[7] Civil Application 153 of 2009
[8] Civil Application No. NAI 79 of 2010 (UR 56/2010) *Superiorfones Communications Limited –vs- Piedmont Investments Limited, Standard Assurance Kenya Limited (under Statutory Management) and Ufanisi Capital and Credit Limited.*
[9] Cambridge University Press, London, June, 2008

This book examines the force and the limitations of the arguments for and against the doctrine of precedent and shows that although the principal requirement of the doctrine of precedent is that courts respect earlier judicial decisions on materially similar facts, the doctrine also requires courts to depart from such decisions when following them would perpetuate legal error or injustice. Professor Duxbury seeks to explain how precedent operates as a common-law doctrine.

The book answers the following major questions: Why do judges in common law jurisdictions have a doctrine of precedent? What does it mean to say that prior rulings of a court have authority to bind judges, either on the same court or inferior ones? Are there good reasons to follow precedent? If so, what reasons will suffice for not doing so?

Professor Duxbury explains the issue of distinguishing and overruling precedents and how they coexist with a doctrine that regards precedents as binding. Distinguishing a past decision, he argues, recognizes that a precedent controls. Overruling a precedent that cannot be distinguished from the instant case, he submits, is an exercise in respect for precedent, for the overruling must be explained and justified.

Professor Duxbury examines the concept of precedent and the various justifications for its constraint on judges. He argues that the authority now granted to precedent began to emerge in England as "the focal point of the trial shifted from the pleadings to the decision''[10] forcing Judges to provide published reasons for legal decisions after the trial, rather than oral mediation advice to the parties before it. This focus, he notes, pushed judges to provide judgments that were ``consistent with the law as a whole"[11] Professor Duxbury sketches out consequential arguments for following precedent, but he ultimately makes the case that for precedents to serve their function in a common law system, they must,

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[10] Ibid page 42
[11] Ibid, page 49

sometimes, be disregarded. Asserting that the doctrine of precedent involves ``both constraint and creativity," Professor Duxbury lauds the act of distinguishing a case as ``contributing to the growth of the common law" and contends that overruling precedent is "peculiarly supportive of *stare decisis*"[12] In conclusion, Professor Duxbury admits that the justifications for following precedent are neither unitary nor airtight: ``The reasons for following precedents .....are, like precedents themselves, always defeasible."[13]

As will be readily appreciated from the foregoing, the Kenyan situation is not addressed at all, the book's focus and material being almost exclusively English. The book does, however, advance a plausible case for departure from previously decided cases if the justice of the case in hand so dictates. It is appreciated that the need for such departure will sometimes arise and when this does happen, the courts should be flexible enough to rise to the occasion and decide accordingly. However, this study will be submitting that as the courts exercise such flexibility, there should be clear, coherent and practical rules of effecting departure, thereby promoting consistency and predictability.

1.7.1.3 Kuloba, Richard *Judicial Hints on Civil Procedure*[14]

Kuloba reaffirms that the adherence to the principle of judicial precedent or *stare decisis* is of the utmost importance to the proper administration of justice in the courts in Kenya and thus to the conduct of the everyday affairs of its inhabitants; it provides a degree of certainty as to what the law of the land is and is a basis on which individuals can regulate their behaviour and transactions between themselves and also with the state. Kuloba stresses the importance of the fact that judicial precedent must be strictly adhered to by the High Court and that the court must regard itself as bound by the decision of the Court of Appeal on any question of law.

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[12] Ibid, page 27
[13] Ibid, page 30
[14] 2nd Edition, Law Africa, Nairobi, 2005

However, Kuloba fails to address the issue of instances where there are two or more conflicting decisions of the Court of Appeal or of the High Court to be followed by the lower courts. Further, the book does not condescend to particulars and deal with specific cases in which the doctrine of judicial precedent has been breached. These are gaps which will be addressed in this study.

1.7.2: **Journals**

1.7.2.1W. Barton Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Fall*[15]

This article criticizes the doctrine of *stare decisis* and in particular, its lack of flexibility. The writer terms the doctrine as a self-shackling rule. Leach traces the history of *stare decisis* to I898 when the Law Lords declared that they had no authority to overrule the prior decisions of themselves or their predecessors. Their Lordships regarded the use of precedent as an indispensable foundation upon which to decide what the law is and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Leach, in his article, notes that their Lordships nevertheless recognised that too rigid adherence to precedent may lead to injustice in particular cases and also unduly restrict the proper development of the law and he proposes, therefore that their Lordships ought to modify the present practice and, while treating former decisions of the House of Lords, as normally binding, to depart from a previous decision when it appears right to do so.[16]

Leach, however, gives the doctrine of precedent much less credit than it deserves. In answering the question whether the doctrine was approved by the profession, he states that he is unable to find in this century any wholehearted

[15] Harvard Law Review (HLR),Vol. 80, No. 4 Harvard Law Review Association Cambridge, Massachusetts, Feb. 1967, Pages 797-803
[16] Ibid, page 797

approval of the doctrine by anyone. This he attributes to the risk that making negative statements about the doctrine would have on both the bar and bench.[17]

Leach agrees to a small extent that the doctrine of *stare decisis* gives stability and continuity in all human activity. But when it is obvious that one's previous actions turned out badly, or that circumstances are essentially different, the intelligent human being reviews the problem anew; if, with due consideration to desiderata of stability and continuity, he concludes that something different should be done in the future, a different course is generally charted. Now the House of Lords, with grace and dignified simplicity, has removed the artificial block to judicial law reform set up by its predecessors.

Like most authors, Leach gives the positives of the use and application of the doctrine of *stare decisis* little or no relevance at all in the administration and dispensation of justice. Although the author has several legitimate observations which are useful, the article deals exclusively with the House of Lords within the context of *stare decisis.* No consideration whatsoever is given to Kenyan law and decisions of Kenyan courts which at times conflict and do not always seem to follow the basic principles of precedent. This deficiency is addressed in detail in this study.

1.7.2.2 **Jordan Wilder Connors** ***Treating Like Subdecisions Alike: The Scope of Stare Decisis as applied to Judicial Methodology***[18]

Connors focuses on *stare decisis* with respect to subdecisions about statutory interpretation to shed light on the broader issue of the scope of stare decisis. Connors explains subdecisions as ``necessary portions," that involve methodological questions and gives the example of instances when a case rests on

[17] Ibid, page 798
[18] Vol. 108 Columbia Law Review Columbia Law Review Association, New York,2008, page 681.

a subdecision about whether a court should consult legislative history in interpreting a statute. The effect of that opinion on future cases is unclear.

After describing the purpose and operation of *stare decisis*, Connors examines statutory interpretation subdecisions to determine whether the court gives them precedential effect and comes to the conclusion that the court applies *stare decisis* to some statutory interpretation subdecisions but not others, with no coherent principle explaining the inconsistency.

Connors uses the purposes of *stare decisis* to argue that the Court should apply it to all statutory interpretation subdecisions. Connors looks at the application of *stare decisis* in the United States jurisdiction, which borrowed the doctrine from its English counterpart, and which is still very alive in the United States.

In her argument, Connors draws inspiration from William Lile,[19] who stated that *stare decisis ``means not that the rule which is to be followed in the future is to be found in the language of the court, but in the principle necessarily resulting from the decision."*

The journal gives a different view of the consistency in adjudication of cases, hence *stare decisis*. According to Connors, similar educational and professional backgrounds in the U.S. legal tradition also might explain consistency. Supreme Court Justices have a lot in common. Virtually all of them attended one of a handful of elite law schools and either taught at one of these same schools, practised with an elite law firm, or served in one of a handful of sought-after government positions. This consistency in background might contribute to consistency in adjudication.

The article's focus is on the American experience and does not deal with either the English or the Kenyan situations. In contrast, this study focuses

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[19] W.M. Lile, Some Views on the Rule of Stare Decisis, 4 Virginia Law Review, University of Virginia School, 1916, pages 95,97

specifically on the decisions of Kenyan courts and how the decisions have at times failed to follow the doctrine of precedent.

1.7.2.3 Barrett, Amy Coney, *Stare decisis and due process*[20]

This paper deals with the issue of whether one can treat unpublished opinions as devoid of precedential effect and the related question whether *stare decisis* is a doctrine of constitutional stature or merely of judicial discretion. The use of unpublished opinions, the article argues, may be attributable, at least in part, to the rigidity of *stare decisis*. Because it is so difficult to overrule a published opinion, the courts of appeal in the United States, sometimes use unpublished opinions to avoid precedential effect. The author explains the rigidity of *stare decisis* by giving an example of instances where judges publicly assert that they are following published decisions as precedent despite disagreement with either its reasoning or the result it commands.[21]

The author takes the position that courts and commentators conceive *stare decisis* as a doctrine that binds judges rather than litigants. Barrett, in her paper, observes that the concerns driving the debate about *stare decisis* include whether *stare decisis* is efficient, whether overruling precedent harms the public's perception of the judiciary, and whether certain kinds of social reliance interests should count more heavily than others in a court's overruling calculus. What misses from the discussion as the author outlines, is an appreciation for the way that *stare decisis* affects individual litigants. This holds true as in the same way *stare decisis* binds judges, it inevitably binds litigants as well. Indeed, when viewed from the perspective of an individual litigant, stare decisis often functions like the doctrine of issue preclusion—it precludes the relitigation of issues decided in earlier cases. This preclusive effect is real, and it can affect an individual

[20] University of Colorado Law Review, (UCLR), Volume 74 Columbia Law Review Association, New York, 2003, page 1011
Source: Available at SSRN:http//ssrn.com/abstract=904362
[21] Ibid, at page 1024

litigant dramatically. Courts and commentators, however, generally fail to focus on the way that *stare decisis* precludes individual litigants, much less on the question that occupies most of the discussion in the parallel context of issue preclusion: whether preclusion of litigants, particularly nonparty litigants, offends the Due Process Clause[22] which requires that a person receive notice and an opportunity for a hearing before a court deprives them of life, liberty or property.

Barrett argues that the preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality. In the context of preclusion, courts have translated this requirement into the general rule that a judicial determination can bind only the parties to a dispute, for only the parties have received notice of the proceeding and an opportunity to litigate the merits of their claims. Barrett argues the case for issue preclusion as preclusion literature summarily asserts that this ``parties only" requirement does not apply to *stare decisis* because prior judicial determinations do not ``bind" nonparties through the operation of *stare decisis*; *stare decisis*, in contrast to issue preclusion, is a flexible doctrine permitting error correction.

Yet *stare decisis*, she observes, often functions inflexibly in the federal courts, binding litigants in a way indistinguishable from nonparty preclusion. Barrett argues that the rigid application of *stare decisis*—when it effectively forecloses a litigant from meaningfully urging error-correction—unconstitutionally deprives a litigant of the right to a hearing of the particular claim on its merits. To avoid the due process problem, Barrett argues that *stare decisis* must be flexible in fact and not just in theory.

Barrett, differing from other scholars on *stare decisis* argues the case for issue preclusion as it is less rigid than *stare decisis* and instead of paying much attention to the Judge adjudicating cases, gives more focus to the rights of the litigant. The author offers that *stare decisis* and issue preclusion operate in much

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[22] Ibid, page 1012

the same way: Both are judge-made doctrines that use the resolution of an issue in one suit to determine the issue in later suits.

In arguing the case for issue preclusion, the author makes an interesting observation. She states that while courts impose no due process limit on the application of stare decisis, they have imposed significant due process limits on the application of issue preclusion. The Due Process Clause requires that a litigant receive notice of a proceeding and an opportunity to be heard in it before she is bound to any determinations resulting from it.

The article deals generally with the doctrines of *stare decisis* and issue preclusion, providing useful insights. As will be appreciated, the article does have a strong American flavour and is thus not particularly relevant as far as English or Kenyan laws and decisions are concerned. However, as this study analyses selected decisions as handed down by the High Court and the Court of Appeal of Kenya, some of the issues raised in the article, such as inflexibility in decision making, will become apparent.

1.7.2.4 Stephen R. Perry *Judicial Obligation, Precedent and the Common Law*[23]

Perry looks at the nature of judicial obligation with regard to *stare decisis*. The author provides two fundamentally different approaches to understand the nature of judicial obligation. According to the first approach, the obligation of a judge coincides with a duty to apply whatever source-based positive rules are recognized within the relevant legal system to be laws, where the most important potential sources of law would generally be legislative enactment, precedent, and custom (either among the population at large, or among a special group such as the judiciary). The author further states that where a court is not bound by such a rule its decision always involves an exercise of discretion rather than compliance with

[23] Oxford Journal of Legal Studies (OJLS), Vol 7, No 2, Oxford University Press, United Kingdom Summer 1987, pages 215-257

any kind of obligation imposed by law. The second approach to law and judicial obligation supposes the function of law to be, at least in part, the institutionalized adjudication and resolution of disputes in accordance with principles of justice or fairness, where the requisite principles need not be source-based in the positivist sense. The obligation of the Judge is to apply such principles-which may include some that require him to give special consideration to what legislatures and courts have done in the past-to the facts of particular cases brought before him. He is not generally to be regarded as having the freedom to make discretionary decisions, even when the reach of statute law and precedent has been exhausted.[24]

The author states that the most fundamental obligation of a common law court is to settle disputes in accordance with the applicable principles of morality, so that even though judges systematically weigh their assessment of the balance of reasons in favour of continuity with the past, they should never lose touch with those substantive principles in doing so.

Perry gives a different view of the obligation of judges to follow set law and states that the most basic obligation of the common law judge is not to evaluate the conduct of individuals in accordance with exclusionary rules which were created, as the positivist interpretation of *stare decisis* would have it, by a judicial procedure that closely resembles statutory enactment. Instead, the Judge is taken to be obligated to decide the cases that come before him on the basis of whatever principles of justice and other relevant dimensions of morality properly apply in the resolution of disputes of that kind.[25]

As is evident from the foregoing, Perry does not address Kenyan law and decisions from Kenyan courts at all, a subject which is the focus of this study.

1.7.2.4 Hutcheson, J.C. Jr, *Stare decisis, res judicata and other selected essays*[26]

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[24] Ibid, page 215
[25] Ibid, page 240
[26] Havard Law Review, Vol. 45, No. 1 Sage Publications inc ,Cambridge, Massachusetts, November, 1931, pages 212-217

Hutcheson reaffirms the well stated principle that *stare decisis*, is followed because it is necessary in the interests of administration of justice and to facilitate the closure of litigation so that the rights of litigants, once decided, remain decided. *Stare decisis*, he observes, is a generalized doctrine of the binding force of precedents, applying not only to those in whose case it is declared, but as well to all others, is held to because of the theory that it is well that the law should be reasonably definite and reasonably certain. It deals with rules and principles of law.

Hutcheson's point of focus is of course American law and decisions handed down by American Courts. This study, on the other hand, will consider both English and Kenyan law and based on the same analyse critically some of the decisions which have emanated from the High Court and the Court of Appeal of Kenya in the recent past, with a view to determining whether their decisions follow the doctrine of precedent.

1.7.2.5 Kane, John, *Justice, Impartiality and Equality*[27]

The underlying theme of this article is that the concept of justice does not necessarily presume equality. Kane argues that the failure to make valid distinctions between people will result in injustice just as surely as will the making of invalid or arbitrary ones. He asserts therefore that justice is often pre-occupied with this determination of valid moral distinctions between, for example, the deserving and the undeserving and the guilty and the innocent so that justice, it seems, must discriminate if it is to be worthy of the name.

The concept of justice to which Kane subscribes is an ancient and fairly simple one, succinctly expressed by the Roman jurists as *suum cuique tribuens*, "giving to each their due", the calculation of dues depending typically upon the

[27] *Political Theory*, Vol. 24 No.3 Sage Publications inc, London, August, 1996, pages 375-393.

application of a principle, not of equality but of equivalence, that is, on the Aristotelian doctrine of proportionality.[28]

Kane's arguments may have their own merits and it is not the intention of this study to evaluate or critique the same. However, even if the principle of proportionality as advocated by Kane is accepted, the key factors of consistency, uniformity and predictability in the application of the principle would still arise. These are fundamental issues which Kane's article does not address and which this study will deal with substantially.

1.8 THEORETICAL FRAMEWORK

This study prescribes to the rule of law theory which rests on at least three distinct though kindred conceptions:-[29]

The first of these three pillars of the rule of law theory is that no man is punishable or can be lawfully made to suffer in body or property except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.[30] This is intended to be a safeguard against whimsical, arbitrary rule.

The second concept of the rule of law theory is that no person is above the law, meaning that every person, whatever his standing in society, is subject to the ordinary jurisdiction of the ordinary courts.[31]

The third concept of the theory is seen as resting on progressive judicial decisions determining and enforcing the rights of private persons through the

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[28] J.E.C Welldon, The *Nichomachean Ethics* of *Aristotle*, macmillan, London, 1923, Book V, Chapter 6, pages 143-4

[29] Prof. Albert Venn Dicey, The Law of the Constitution, Edition 10, Palgrave Macmillan, London, 1959.

[30] Ibid, at page 188

[31] Ibid, at page 193

enforcement of such constitutional rights as personal right, the right to a fair hearing and so on.[32]

It becomes evident from the foregoing that the courts of law are pivotal and occupy a central place in the rule of law theory. The courts are cast as the anti-thesis of whimsical, arbitrary power, as the enforcer of law on equal footing to all citizens regardless of their status and as the universally accepted arbiters of disputes amongst citizens. The courts are thus elevated to a lofty height from which they order the conduct of virtually all human affairs. This theme is akin to that expounded by Sir John Salmond that ``the law consists of the rules recognized and acted on by courts of justice".[33] Although this view is much broader than that advanced by Prof Dicey, the essence of the courts being key to the rule of law is clear. Sir Salmond's position seems to extend to the argument that the law is what the courts of justice declare and enforce as law, no more, no less. Perry defines the legal theory advanced by Prof. Dicey and Sir Salmond as adjudicative[34] as opposed to the positivist concept of law.[35] Perry opines that there exist certain types of legal institutions of which positivism presents a deficient account, and that any adequate general theory of law must consequently incorporate certain of the insights of the adjudicative approach.

It is axiomatic that the ultimate objective of the doctrine of *stare decisis* is to do justice to the parties who go before the courts; hence the theory of justice. In his article entitled *Justice, Impartiality and Equality,*[36] John Kane characterises the fundamental concept of justice as being concerned with people's relations to certain tangible and intangible "things" – namely, goods, means, honours, positions, powers, rewards, privileges, burdens, punishments,

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[32] Ibid, at page 195
[33] P.J. Fitzgerald *Jurisprudence,* 11th Edition, Sweet & Maxwell, London 1966, page 41
[34] Supra, Perry pages 216-219
[35] As propounded by, *inter alia*, Ronald Dworkin in *Taking Rights Seriously* 2nd edition, Cambridge, Mass, 1978, Chapters 2-4
[36] Supra, No. 25 at page 379

penalties and so on – in respect of which they may have various moral rights, entitlements, obligations and liabilities. Kane is of the view that judgments of justice are a matter of deciding what, with respect to these things, is rightly due to or from persons, and that the practice of justice consists of treating people in accordance with their dues, these being typically calculated upon a formal principle of proportionality.

The thesis of this study therefore advances the view that for the rule of law to hold, the courts must play their role as postulated above. If the courts abdicate their responsibility and give way to whim and caprice and if they do not apply the law as it is, with equality and certainty, then they endanger the rule of law. This is the meeting point with the doctrine of judicial precedent which, at the very minimum, embodies the virtues of consistency, uniformity, equality, certainty and predictability. Observance of and adherence to these virtues assures the rule of law, whilst the opposite would result in a complete breakdown of law and order, resulting in a total disintegration of the rule of law.

1.9 HYPOTHESES

This study sets out to prove and reaffirm that if a well informed and current judiciary will ensure consistency, predictability and uniformity in decision-making, then an uninformed and out-of-date judiciary will all too often hand down inconsistent, conflicting and therefore unpredictable decisions. A related hypothesis is that if adherence to the doctrine of judicial precedent (*stare decisis)* enhances the rule of law, then departure from the doctrine will inevitably result in a serious erosion of the rule of law.

1.10 CHAPTER OVERVIEW

CHAPTER ONE

Chapter one introduces the topic of the research study by first setting out the broad context of the study, the statement of the research problem, the research questions, the objectives of the study, the justification of the study, methodology of research, literature review, the theoretical framework, the hypothesis of the study and the chapter overview which provides a breakdown of the issues to be addressed by each chapter.

CHAPTER TWO

This chapter will be devoted to the doctrine of *stare decisis* and will address such issues as the origins of this doctrine, the meaning of the doctrine, the object and purpose of the doctrine and the benefits that are to be derived from observance of and compliance with the doctrine. The practical importance and desirability of the doctrine will be explored as will the principles which have been developed over time to govern the application and observance of the doctrine. How the English and Kenyan Courts have dealt with and applied the doctrine over time will be considered as will the consequences of non-compliance with the principles which define the doctrine. The chapter will also address instances in which the courts are constrained to depart from the doctrine of *stare decisis,* the grounds upon which such departure might be justified and how harmony might be achieved between the two contrasting approaches.

CHAPTER THREE

This is the core chapter of the study and it discusses the various decisions handed down from time to time, on diverse issues, by the High Court and the Court of Appeal in Kenya. The decisions to be analysed will be drawn from subjects selected randomly which are on the winding up of

companies, judicial review proceedings, review of Orders recorded in court by consent of the parties and decisions which demonstrate the perennial contest between substance and mere technicalities. The chapter will endeavour to demonstrate that all too often, decisions emanating from the said courts are not always consistent and uniform; rather, that the same conflict and contradict with each other in material respects. As may well be appreciated, the body of case law which could be drawn from in this chapter is extremely wide. Consequently, the chapter will undertake an analysis of only some decisions which have been selected randomly, on the subjects of law enumerated above, to address the problem already identified of inconsistent and often contradictory decisions. The undesirable consequences thereof to legal practitioners and their clients alike, will then become all too clear. The chapter will suggest the causes and reasons for such decisions and in the process endeavor to prove the hypothesis of the study.

CHAPTER FOUR

In this chapter, the study will highlight best practices as far as the doctrine of *stare decisis* is concerned. In this regard, the study will consider the doctrine as practised in a number of countries. Due to the common parentage of Kenyan law and the law in other commonwealth countries, the study has selected three commonwealth countries, namely, the United Kingdom, India and Australia. It is hoped that the best practices as demonstrated in the judicial systems of the selected countries may spur Kenyan courts to emulate those practices for the enhancement of the administration of justice and the rule of law.

CHAPTER FIVE

The final part of the thesis will include concluding remarks and recommendations as to how the challenge of inconsistent and conflicting decisions in the Kenyan courts generally, with particular emphasis on the High Court and the Court of Appeal, ought to be addressed and redressed.

CHAPTER TWO

"The great body of the law is unwritten, determined by precedent, and founded on the eternal principles of right and morality. This, the courts have to declare and enforce"[1]

THE ORIGIN, DEVELOPMENT AND RATIONALE OF THE DOCTRINE OF *STARE DECISIS*

2.0 INTRODUCTION

One of the cornerstones of the English Common Law is the doctrine of precedent which is expressed in the Latin maxim: *stare decisis et non quieta movere* meaning "maintain what has been decided, not alter that which has been decided" or put more succinctly, "to stand upon decisions, to abide by precedents".[2] Loosely translated, the doctrine of precedent means that cases involving similar circumstances should be decided by the application of similar principles of law. The resultant decisions would therefore be characterized by harmony, uniformity and consistency.

There is a general tendency in almost every jurisdiction for a judge to decide a case in the same way as that in which a similar case has been decided by another judge. However, the extent of this tendency will vary from jurisdiction to jurisdiction, the same being determined by, *inter alia,* little more than an inclination to do as others have done before, or as a result of a positive obligation to follow a previous decision in the absence of jurisdiction for departing from it. Whatever the reason, judicial precedent has some persuasive effect almost everywhere because *stare decisis* is a doctrine of universal application. Under English law and practice, however, the doctrine has a strongly coercive nature, binding English judge to decide in a particular way. This chapter examines the Kenyan situation and will investigate instances when the High Court and

[1] Former U.S President Taft, as cited in W.E. Willoughby's *The Government of Modern States,* D. Applenton-Century company, incorporated, University of Michigan, 1936, pages 433-434

[2] *Trayner's Latin Maxims*, Fourth Edition, W. Green, Edinburgh 2008, page 585

the Court of Appeal of Kenya, have not been true and faithful to the doctrine of *stare decisis.* By analysing selected decisions on the chosen subjects of law, it will be demonstrated that Kenyan courts have not always been consistent and predictable in their decisions.

2.1 THE MEANING AND RATIONALE OF THE DOCTRINE OF *STARE DECISIS*

Stare decisis which is derived from the Latin phrase *Stare decisis et non quieta movere which means,* ``Maintain what has been decided and do not alter that which has been established" is the legal principle by which judges are obliged to obey the precedents established by prior decisions. As alluded to above, s*tare decisis* is the policy of the court to stand by precedent.

A precedent is a judgment or decision of a court, normally recorded in a law report, used as an authority for reaching the same decision in a subsequent case. The application of this doctrine has the effect that every court is bound to follow the decisions made by the court above it and, on the whole, appellate courts also have to follow their own decisions. In common law jurisdictions, court opinions are legally binding under the rule of *stare decisis.* That rule requires a court to apply a legal principle that was set forth earlier by a court of the same jurisdiction dealing with a similar set of facts.[3] The principle of *stare decisis* can be divided into two components, namely binding precedent and persuasive precedent.[4] Generally a common law court system has trial courts, intermediate appellate courts and a supreme court.[5] The inferior courts conduct almost all trial proceedings. The inferior courts are bound to obey precedents established by the appellate court for their jurisdiction, and all Supreme Court precedent.

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[3] Cross R and Harris, J, "Precedent in English Law", *4th Edition, Oxford University Press*, New York, *1991,* page 4

[4] Ibid, page 6 Binding Precedent (also known as mandatory authority) stipulates that a decision made by a superior court is binding on an inferior court and the latter is bound to follow and uphold the decision.
The second is the principle that a court should not overturn its own precedents unless there is a strong reason to do so and should be guided by principles from lateral and inferior courts. The second principle, regarding persuasive precedent is an advisory one which courts can and do ignore occasionally.

[5] Ibid, pages 5-6

Probably the first and foremost attribute of the doctrine is that it ensures certainty in the law. People are able to order their affairs and come to settlements with a certain amount of confidence when the outcome of litigation can be predicted by referring to previous decisions of the courts.

It will be readily appreciated that certainty and uniformity in the law enables lawyers to predict possible outcomes and thus to advise their clients accordingly. Clients, including business people and investors, are then able to make informed decisions which impact directly on their businesses.

The doctrine also ensures impartiality and transparency of judges. Generally, a judge is bound to follow the law enunciated in a previous case unless he or she can overrule or distinguish it. This helps to avoid judicial whim and arbitrariness as judges are constrained to abide by and generally follow previous decisions pertinent to the issues of fact and law canvassed before them.

Further, the doctrine offers opportunities for the development of the law and the evolution of jurisprudence which cannot be provided by Parliament. The courts can more quickly lay down new principles, or extend old principles, to meet new circumstances. Paradoxically, the courts, by pursuing this objective, could be said to be departing from the strict rules of the doctrine of precedent. By stepping "outside the box" and laying down new principles aimed at addressing new circumstances, judges could be said to be departing from the dictates of *stare decisis*. Proponents of such bold and innovative moves by judges advance the argument that the doctrine of precedent stifles judicial expression, compelling judges to think "inside the box" and leading them therefore to be impervious to the social, political, economic and technological changes which are taking place all the time. In this context, *stare decisis* is seen as imprisoning judicial discretion in the interpretation and application of the law, thus hindering development in various spheres of human endeavours.

Some distinguished legal scholars contend that in any legal system, there will always be certain legally unregulated cases in which on some point no decision either

way is dictated by the law and the law is accordingly partly indeterminate or incomplete.[6] In such cases, Hart argues that if the judge is to reach a decision and is not to disclaim jurisdiction or to refer the points not regulated by the existing law to the legislature to decide, he must exercise his discretion and make law for the case instead of merely applying already pre-existing settled law. Hart therefore concludes that in such legally unprovided-for or unregulated cases the judge both makes new law and applies the established law which both confers and constrains his law-making powers.

Hart sounds a warning though, by submitting that in exercising his law-making powers, the judge must not act arbitrarily, that he must always have some general reasons justifying his decision and he must act as a conscientious legislator would by deciding according to his own beliefs and values. Hart is of the further view that if the judge satisfies these conditions he is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases.

Hart's view on judicial law making may be criticized as undemocratic as in a democracy, the general view is that only the elected representatives of the people should have law-making powers. But Hart has a ready answer to this. That judges should be entrusted with law-making powers to deal with disputes which the law fails to regulate may be regarded as a necessary price to pay for avoiding the inconvenience of alternative methods of regulating them such as reference to the legislature; and the price may seem small if judges are constrained in the exercise of these powers and cannot fashion codes or wide reforms but only rules to deal with the specific issues thrown up by particular cases.[7]

From the American legal scene, we have the argument couched in the following words:-

> "In the light of the foregoing premises, is it not evident that, if all common law rules are to be reexamined in the light of cold reason a very considerable portion of our law hangs today in the balance? Furthermore,

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[6] H.L.A Hart "The Concept of Law", W. Green, United Kingdom, August 1998, page 272
[7] Ibid, page 275

> the question may be asked in all seriousness not merely whether it is practicable or expedient, but whether it is even possible to cut loose from tradition and precedent and establish our law upon a basis which shall be purely logical?[8]

The author supports such departure from the beaten path and further submits that when it is clear to the court that the interests of will be benefited considerably more than injured by departure from precedent, then in such cases only is such a departure desirable. That in other words, the test is social utility, not reason or logic.

In our own jurisdiction, there has been a steady and sustained departure from precedent as far as the issue of locus standi in public interest litigation is concerned. In a recent case,[9] the development of judicial precedent on the issue of locus standi was traced, and a conclusion arrived at, that in matters of public interest courts have moved away from the previous restrictive position that a petitioner, other than the Attorney General, must show that the matters of public interest complained of, injured him over and above the general public. The approach now preferred is a broader and more purposeful approach giving locus standi to anyone acting in good faith and more purposeful approach giving locus standi to anyone acting in good faith with minimal personal interest in a matter of public interest, to seek judicial intervention to ensure the sanctity of the constitution.

It is clear from the foregoing that the challenge is to strike a fine balance so that due regard is had to past decisions not merely because it is desirable that consistency and uniformity be maintained, but because, on a broader plane, the particular decision makes sense, is logical and embodies social utility. If the latter factors are not catered for in the particular decision, a strong case may be made for departing from, or modifying as necessary, that decision. However, care must always be exercised to ensure that any such departure or modification is not motivated by whim or caprice but is dictated by either

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[8] H.W. Humble, Departure from Precedent, Michigan Law Review, Vol 19, No. 6, Michigan Law Review Association, Michigan, April, 1921, pages 608-614.

[9] *Priscilla Nyokabi Kanyua –vs- the Attorney General*, Constitutional Petition No. 7 of 2010 (unreported).

changed circumstances which the court must deal with or where slavish adherence to precedent would result in an absurd or unjust outcome.

Ultimately, observance of the doctrine of precedent, or departure from it when the particular circumstances warrant, should always be guided by the objective of promoting and enhancing the rule of law at all times.

2.2 THE ORIGINS AND DEVELOPMENT OF THE DOCTRINE OF STARE DECISIS IN ENGLAND

In their consideration of the subject of the historical development of the doctrine of judicial precedent, Cross and Harris attribute the same principally to the advancement of law reporting, the placement of the judicial functions of the House of Lords in the hands of eminent lawyers and the stabilisation of the hierarchy of courts in England.[10] The earliest case that the authors record is that of *R –v- Millis*[11] in which the House of Lords, for doubtful historical reasons, adopted the rule that the presence of an episcopally ordained priest is essential, at common law, to a valid marriage in England or Ireland, with the result that an Irish Presbyterian marriage was held void. This decision caused untold trouble to many couples, wreaking havoc to many marriages in which couples lived happily for many years, believing to be lawfully wedded, having procreated children but who, on account of the decision in *R –vs- Millis* were in a voidable marriage.

It came as little surprise, therefore that in *Beamish –vs- Beamish,*[12] Lord Campbell implored his brethren to reverse the decision in the *R-vs- Millis* case, which they promptly did. Despite this, the former rule that the House of Lords was absolutely bound by its past decisions was not completely settled until the end of the nineteenth century.[13]

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[10] Supra, Cross and Harris, pages 24-25
[11] (1844) 10 CL. & F. 534
[12] (1861) 9 HLC 274, see specially Lord Campbell at 338
[13] *London Tramways –vs- LCC* (1898) AC 735

As regards the Court of Appeal in England, the rule that that Court is, in general, bound by its past decision is the product of this century[14] and it is only in the present century that the Divisional Courts have come to apply the principle of *stare decisis* in its full rigour to their own past decisions

A more detailed examination of the application of the doctrine of judicial precedent under each of the English Courts is discussed in the following paragraphs:-

2.2.1 **House of Lords**

The doctrine of binding precedent or *stare decisis* is central to the English legal system, and to the legal systems that derived from it such as those of Australia, Canada and New Zealand and the entire Commonwealth of which Kenya is a part.[15] The House of Lords was bound by its own previous decisions until 1966 when Lord Gardiner LC announced a change of practice.[16]

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[14] *Young –vs- Bristol Aeroplane* Co. Ltd (1944) KB 718

[15] This was by virtue of the East African Order in Council 1897, Article 11(a) whereof stipulated, *inter alia,* that the substance of the common law, the doctrines of equity and the statutes of general application which were observed in England before this date were to apply so far as the circumstances of Kenya and its inhabitants permitted, and subject to such qualifications as those circumstances rendered necessary.

[16] In a practice statement published in (1966) 1 weekly L.R, 1234, the Lord Chancellor, in a volume appropriately entitled *Law Reform Now* decreed as follows:-

> ``Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House".

The newly created power of the House of Lords was exercised soon thereafter, as in the cases of *Conway – vs- Rimmer (1968) AC 910 and British Railways Board –vs- Herrington, (1972) AC 879.* But whether the previous case is overruled or merely distinguished is not very clear. Happily, this power has been used sparingly.

A decision of the House of Lords binds all lower courts. Previously, the House of Lords in the *London Street Tramways v. London City Council*[17] case had held that its precedents were binding except in three instances.[18]

2.2.2 Court of Appeal (Civil Division)

The Court of Appeal is bound by decisions of the House of Lords even if it considers them to be wrong. There are, however, exceptions to this rule. The first is where there are conflicting decisions and the second is where a decision was made *per incuriam,* for example in *Broome v. Cassell.*[19]

In *Young v Bristol Aeroplane Co Ltd,*[20] the Court of Appeal held that it was bound by its own previous decisions subject to several exceptions, namely, firstly where its own previous decisions conflict, the Court of Appeal must decide which to follow and which to reject. Secondly, the Court of Appeal must refuse to follow a decisions of its own which cannot stand with a decision of the House of Lords even though its decision has not been expressly overruled by the House of

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[17] (1894) A.C. 489

[18] *Stare Decisis in the House of Lords*, Gerald Dworkin, Modern Law Review, Vol 25 No 2 (March 1962). The author lists those instances as follows:-

(a) Where the decision was made in ignorance of a statute

(b) Where there were conflicting decisions, for example *Caledonia Railway v. Walker's Transport Co.* [1882] 7 App. Cas. 259 at 275.

(c) Public Policy: Decisions based on some public policy particularly commercial, was not binding if social conditions changed as was the case in *Nordenfeld v. Maxim Nordinfeldt Co.* [1894] AC 533 at page 553.In his judgment in this case, Lord Watson noted:

> "A series of decisions based upon grounds of public policy, however eminent the Judge by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal."

[19] (1971) 2QB 354. In this case, the Court of Appeal refused to follow the decision made by the House of Lords on the principles for the award of exemplary damages in tort. They based the refusal on the ground that *Rookes v Barnard* [1969] A.C 1129 was wrong and decided per incuriam, in ignorance of two previous decisions of the House. When *Broome v Cassell & Co. Ltd* reached the House of Lords, the Law Lords castigated the Court of Appeal for its disloyalty.

Lord Hailsham said:

> "It is not open to the Court of Appeal to give gratuitous advice to Judge of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable.... The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers."

[20] [1944] KB 718

Lords. Thirdly, the Court of Appeal need not follow a decision of its own if satisfied that it was given *per incuriam* (literally, by carelessness or mistake). This was held in the case of *Morelle v. Wakeling.*[21]

Fourthly, where a decision is disapproved by the Privy Council. The Court is not bound to follow its own decision if the decision has been disapproved by the Privy Council.[22] Finally, in the Criminal Division one additional exception is that the court may depart from its previous decision if the law was misapplied or misunderstood and if to follow the decision would lead to a conviction in the present case.

The Court of Appeal is also bound by decisions of the old court of coordinate jurisdiction, i.e Court of Exchequer Chamber.

Decisions of the Court of Appeal itself are binding on the High Court and the county courts.

2.2.3 Court of Appeal (Criminal Division)

In principle there is no difference in the application of *stare decisis* in the civil and criminal divisions of the Court of Appeal. In practice, however, in addition to the exceptions in the *Young* case because a person's liberty may be at stake, precedent is not followed as rigidly in the criminal division.

In *R v Taylor*[23] the Court of Appeal held that in ``questions involving the liberty of the subject" if a full court considered that "the law has either been misapplied or misunderstood" then it must reconsider the earlier decision. This rule was followed in *R v Gould*[24] and *R v Newsome.*[25]

Although the hierarchical principle gives general guidance to the operation of precedent as between higher and lower courts, it gives no guidance when

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[21] [1955] 2 Q.B. 389 at 406

[22] This was as per Denning, M.R. in *Worcester Works Finance Company Limited –vs- Cooden Engineering, [1972] 1QB 210*

[23] [1950] 2 KB 368

[24] [1968] 1 All ER 849

[25] [1970] 2 QB 711

questions of precedent arise at the same hierarchical level i.e as to whether a single judge is bound by the decision of another single judge in the same court, and particularly as to whether a superior court is bound by its own prior decisions. In *The Vera Cruz (No 2) (1880),* the great English Judge William Balliol Brett (later Lord Esher) explained that, while the old common law courts had in practice accepted their own decisions and each other's decisions as binding, that practice was based on ``no statute or common law rule", but only on ``judicial comity". It follows that the extent to which a court is bound by its own previous decisions depends on the practice adopted by that court.

2.2.2 The High Court

The High Court is bound by the decisions of the Court of Appeal and the House of Lords but is not bound by other High Court decisions. However, they are of strong persuasive authority in the High Court and are usually followed. Decisions of individual High Court judges are binding on the county courts.

A Divisional Court is bound by the decisions of the House of Lords and the Court of Appeal and normally follows a previous decision of another Divisional Court but may depart from it if it believes that the previous decision was wrong: *R v Greater Manchester Coroner, ex parte Tal.*[26]

2.2.5 Other Courts

Decisions made on points of law by judges sitting at the Crown Court are not binding, though they are of persuasive authority. Therefore, there is no obligation on other Crown Court judges to follow them.

The decisions of these courts are not binding. They are rarely important in law and are not usually reported in the law reports.

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[26] [1985] QB 67

2.3 THE DEVELOPMENT OF THE DOCTRINE OF *STARE DECISIS* IN KENYA

The Kenyan legal system is modeled along the Common Law System which has its origins in England. One of the fundamental doctrines of the Common Law is the doctrine of precedent captured in the Latin maxim: *stare decisis et non quieta movere,* meaning: it is best to adhere to decisions and not to disturb questions put at rest.

By dint of the new Constitution,[27] the highest court in Kenya is the Supreme Court whose decisions would be binding on all courts below it. However, the Supreme Court is not bound by its own decisions.[28] Before the creation of the Supreme Court, the Court of Appeal was the highest court in Kenya. Its decisions are binding on the High Court and on the Magistrate's Courts. Only recently, the Court of Appeal had to assert its authority and remind the courts below it that its decisions are binding and no dissent would be entertained. In *National Bank of Kenya Ltd –vs- Wilson Ndolo Ayah* (2009) ekLR, the Court of Appeal noted that many High Court judges had failed to follow the precedent-setting decision in *Obura –v- Koome*[29] in giving decisions regarding advocates who act without practising certificates. The three-judge bench stated that

> ``if for any reason a judge of the High Court does not agree with any particular decision of this court, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter"

In Kibaki -vs- Moi[30] which was an election petition arising out of the 1997 Kenyan general election, it was contended before the five-judge bench of the

[27] Promulgated on 27th August, 2010
[28] Article 163(7) of the Constitution, 2010
[29] [2001] 1EA 173
[30] EALR [2000] 1 E.A 115

Court of Appeal that in dismissing the petition, the High Court had refused to follow various principles set out in previous Court of Appeal decisions regarding service of election petitions. Predictably the Court of Appeal reacted sharply, emphasizing that:-

> "The High Court had no power to overrule the Court of Appeal and was bound by the principles of precedent and *stare decisis*. Though it had the right and duty to critically examine the decisions of the Court of Appeal, it was, obliged to follow those decisions unless they could be distinguished from the case under review on some other principle such as *obiter dictum*".[31]

The Court of Appeal will normally also follow its own decisions unless it can overrule them so that they are set aside and cease to have the force of precedent. The decisions of the High Court are binding on the Magistrate's Courts but the decisions of the Magistrate's Courts do not in themselves create any binding precedent for any court.

Moreover, a lower court can decline to follow the decision of a court above it where the lower court finds that the circumstances of the case before it are peculiar and different to those in the previous case. This is called distinguishing a case. The processes of distinguishing and overruling previous cases act as checks on rigidity in the law and prevent bad decisions from acquiring the force of law.

Before the abolition of appeals to the Privy Council, that is before independence of the respective East African states, the decisions of the Privy Council were binding. The origin of the decision was not held to be important, particularly in three areas[32]

After abolition of appeals, that is after independence of the East African states, Privy Council decisions were maintained as part of existing law and were binding (As per Spry J.A. in *Rashid Moledina & Co (Mombasa) Ltd & Others* -

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[31] Ibid, at page 116

[32] The first was as regards Common Law, for example in the case of *Chacha s/o Wambura –vs- R*[1953] 20 EACA 339 the second was Mohammedan Law, for example in *Shallo v. Maryam Bakshwen v. R* [1949] 16 EACA 11 and the third was in pari materia, that is Privy Council decisions interpreting similar statutes in other courts of the empire.

vs- Hoima Ginners Ltd.[33] Later in *Dodhia v. National and Grindlays Bank Ltd & Another*[34] it was held that Privy Council decisions are not binding on the national courts.

As regards the application of English decisions before independence, useful insight is provided by O"Connor P. in *Kiriri Cotton v. Dewani*[35] who stated that ``established decisions"[36] on common law and doctrines of equity given before the date of receipt by the superior courts in England were binding.

A judge still had to look at English decisions after the reception date because of the special circumstances relating to the *per incuriam* rule and to criminal appeals as discussed below. In practice, the date is not important, but, subject to the proviso in the Reception Clause. English law only applies so far as circumstances of the particular country and its inhabitants permit and subject to such qualifications as local circumstances render necessary.

After independence, English decisions were held not to be binding. This was followed in, *inter alia*, the *Rashid Moledina* case,[37] in *Jivraj v. Devraj*[38] and in the *Dodhia* case.[39] In the *Jivraj* case the learned Judge stated:

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[33] [1967] EA 645
[34] [1970] EA 195
[35] [1958] E.A 239
[36] Ibid, the *Kiriri cotton case* at page 246, O'Connor P. went further to state as follows:-
"Established decisions" were decisions "which must be taken to have correctly declared the common law or the doctrines of equity at the date of reception because such decisions are either unreversed decisions of an appellate court; or being decisions of a superior court other than an appellate court, stand unreversed and have either been affirmed or approved by an appellate court or have been accepted as corrected in principle by other superior courts in England". That is to say:

(a) Single decision of House of Lords and the Court of Appeal in England unreversed at reception date was binding unless reversed or overruled by a decision after reception date.
(b) Single decision of House of Lords was not binding, that is, not established unless affirmed or approved by House of Lords, Court of Appeal etc.
(c) English decisions after the reception date had power to "disestablish", that is reverse or overrule, a decision given before the reception date.
(d) English decisions after the reception date had power to 'establish", that is affirm, approve or accept in principle, a decision given before reception date.

[37] Supra, *Rashid Moledina case (*per Spry, J)
[38] (1968) E.A. 263 (per Newbold, J)
[39] Supra, *Dodhia* case (per Sir Charles Newbold, P)

``There is a principle of law, however, that where a court has interpreted the law in a certain manner, particularly an interpretation which affects property rights, and that interpretation has been acted upon for a considerable time, then that interpretation should not be departed from unless it is clearly wrong and gives rise to injustices."[40]

Newbold, P. seemed to limit the power to depart from decisions on the common law to the circumstances of the country concerned.

In *Dodd v. Nanda,*[41] it was held that English law applied where it was reasonable, relevant and applicable. With regard to decisions interpreting statutes in pari materia, before independence, they were held to be binding as was the case in *Thimble v. Hill.*[42] After independence there were two views, as per Spry J. in the *Rashid Moledina* case.[43]

The second view is to be found in *National & Grindlays Bank v. Ballabhji*[44] in which, adopting Newbold's view in the Court of Appeal, it was held that:-

> "Regard would be had to them, but they were not binding and for those decisions to be followed, they must show consistent interpretation."

The East African Court of Appeal followed the practice of English Court of Appeal, set out in *Young v. Bristol Aeroplane Co*[45] that is, that its own decisions were binding, except where:

(a) There were conflicting decisions, where the court would have to choose between the two decisions.

(b) There was constructive overruling: where the court was bound to refuse to follow its own decisions if in conflict with a later Privy Council decision.

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[0] Supra, *Jivraj* case at page 266

[1] [1971] E.A. 58

[2] [1879] 5 A.C. 342

[3] Supra, *Rashid Moledina* case, at pages 656-657, Spry, J.A stated that "when the Kenyan Act was passed, the legislature was assumed to have English cases in mind"

[4] [1964] E.A 442 at page 446

[5] Supra, Note No. 20

(c) The decision was made *Per Incuriam* –The courts were not bound by decision given in ignorance or forgetfulness of statutory rule- *Riziki binti Abdulla v. Sharifa binti Mohamed Bion Hemed.*[46] In the event that there was conflict between (a) and (b), the first decision of two conflicting decisions must bind because the second one is *per incuriam.*

(d) Criminal Appeals: Additional exception – the court can depart from its own decisions if it considers it wrong and if to follow the decision would result in upholding an improper conviction as was the case in *Joseph Kabui v. R.*[47] The same principle applies in any case, civil or criminal where the liberty of the subject is involved as was in the case of *Shah –vs- Attorney General of Kenya*[48]

However, after the decision in the *Dodhia* case, it was held that the court's own decisions were not binding. The court was given power to depart whenever it appeared right to do so. However, in *Sango Bay Estates v. Dresdner Bank,*[49] the court refused to depart from a 35 year-old practice that was too well established.

In instances where the appellate court was asked to depart from its decision, a bench of five judges would be constituted. A full Bench (5 judges) has greater weight than a decision of three and can therefore overrule the latter.

In the case of *Trust Bank –vs- Eros Chemist*[50] the Court of Appeal constituted a five-judge bench and overturned an earlier decision of three judges regarding the competency of a law suit under the Law Reform Act, Chapter 26 Laws of Kenya when the personal representative instituting such action did not hold letters of administration. In the more recent case of *Echaria v Echaria,*[51] the court was asked to

[46] [1959] E.A. 1035
[47] [1954] 21 EACA 261
[48] [1955] 22 EACA 216
[49] [1971] E.A 17
[50] [2000] 2 EA 550
[51] [2007] ekLR

depart from its decision in a previous case (*Kivuitu v Kivuitu*)[52] and was asked to constitute a bench of five judges in accordance with the practice recommended in *Poole v R.*[53] The court, while normally regarding its own previous decisions as binding is nevertheless free in both civil and criminal cases to depart from such decisions when it is right to do so.

CONCLUSION

The chapter set out to consider the meaning and origin of the doctrine of *stare decisis* and why it is so important in the administration of justice and ultimately in upholding the rule of law both in Kenya and England. It has become evident in the process that the evolution of the doctrine, both at home and abroad, has been fairly troubled with the courts grappling with the challenge of, on the one hand, being true and faithful to previous decisions whilst, on the other hand, striving to meet the stubborn demands of new situations. The chapter has shown how various courts have dealt with the delicate balancing at when new situations and novel cases require them to depart from the strict dictates of the *stare decisis* doctrine. The challenge is, of course, felt most forcefully by the highest courts in both jurisdictions which have had to stamp their authority from time to time, but never so aggressively as they themselves often find the need and necessity to depart from their own previous decisions.

The next chapter will now consider several recent decisions of the High Court and Court of Appeal in Kenya with a view to analyzing the conflicts and inconsistencies that often-times bedevil the decisions emanating from those courts.

[52] Civil Appeal No. 26 of 1985
[53] [1960] EA 62

CHAPTER THREE

SELECTED DECISIONS OF THE HIGH COURT AND THE COURT OF APPEAL

3.0 INTRODUCTION

Having dealt with the meaning of the doctrine of judicial precedent (*stare decisis*) and its evolution and application under both the English and Kenyan court systems, the study will now focus exclusively on Kenya and appraise critically a number of cases selected randomly from the High Court and the Court of Appeal in the context of the doctrine of judicial precedent. The objective will be to demonstrate that given similar sets of facts, and applying the same legal considerations, the said courts have all too often arrived at conflicting or inconsistent decisions.

The cases which will be subjected to scrutiny will be selected randomly so as to cover diverse legal subjects. The choice of the subjects to be covered has been based on the obvious desirability of a wide sampling of cases so that the decisions analysed represent a fairly wide and diverse assortment of cases. Accordingly, three of the subjects covered relate to diverse issues arising out of the law and practice of winding up of companies in Kenya. The other subjects relate to judicial review proceedings which have their own peculiar features, the subject of consent orders recorded in court by parties to proceedings and the extent, if any, to which the court may review such orders and finally, the perpetual conflict between substance and legal technicalities in deciding cases. The chapter will appraise critically the grounds or reasoning which informed the respective decisions and comments thereon will be expressed. The inconsistencies in the various conflicting decisions should then be easily appreciated, as will the challenges which inevitably confront legal practitioners and their clients in the face of such decisions. In its appraisal of those decisions, the chapter will consider the causes and reasons which give rise to inconsistency in decision-making by the courts and in the process hint at what the possible solutions might be.

The following are the categories under which the various decisions of the High Court and the Court of Appeal of Kenya will be analysed:-

(a) The proper signatories to a statutory demand notice under Section 220 (a) of the Companies Act, Chapter 486 Laws of Kenya (hereinafter referred to as ``the Act") and to a winding up Petition under Section 221 (1) of the Act.

(b) The right of a party who has not filed a replying affidavit to be heard on a winding up petition.

(c) The "Just and Equitable" Rule in the winding up of companies.

(d) Leave to institute judicial review proceedings.

(e) Review of consent orders.

(f) Substance versus mere technicalities.

In the following paragraphs the decisions of the respective courts with regard to each of the above issues are analysed.

3.1 THE PROPER SIGNATORIES TO A STATUTORY DEMAND NOTICE UNDER SECTION 220 (A) OF THE ACT AND TO A WINDING UP PETITION UNDER SECTION 221 OF THE ACT.

A statutory demand is a written demand for payment of a sum due, served by a creditor on a company. Section 220 of the Act stipulates the grounds upon which a company may be deemed to be unable to pay its debts. Of particular relevance here is Section 220(a) which deals with the company's failure to pay a debt exceeding the sum of KShs.1,000/= after such debt has been duly demanded.[1]

[1] Section 220 (a) of the Act stipulates that: - "*if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand shillings then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the credit*" *(emphasis provided)*

On the other hand, section 221(1) of the Act[2] provides as to the presentation of a Petition against a company sought to be wound up.

In the UK, a statutory demand must be dated and signed either by the creditor himself or by a person stating himself to be authorized to make the demand on the creditor's behalf.[3] This rule, however, does not displace the general principle that a person may sign by the hand of another whom he has authorized to do so.[4]

Decisions by Kenyan courts on the issue of statutory notice have been contradictory. In some instances, the courts follow the pertinent provisions of the Act which require the demand notice to be under the hand of the petitioner himself and in other cases, it has been held that an advocate can properly sign a demand notice on behalf of the petitioner if the advocate has been properly instructed to do so. For instance, Justice Shah *In the Matter of Cheetah Contractors Limited*[5] dealt with the issue of validity of a petition. The respondent company had raised a preliminary objection to the validity of the petition on the ground that the petition was not signed by a director of the company but instead by the advocate for the petitioner. The judge interpreted section 220 of the Act and made reference to Lord Greene M R's words in *re A Debtor*[6] in which the Master of Rolls had inclined to a narrow and conservative

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[2] *The sub-section provides that "An application to the court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent, or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately"*

[3] Insolvency rules UK 1986 rule 6.1

[4] *In Re Horne, a bankrupt*(2000) 4 All ER. 550 it was held that

> "on its true construction, rule 6.1 of the Rules did not displace the general principles that a person may sign by the hand of another whom he has authorized to do so. Rather it was designed to ensure that the debtor received a demand which, purported on its face to be signed by the creditor or a person authorized by him. That purpose was served whether or not the person whose signature appeared on the demand, and who was stated to be authorized to make it on the creditor's behalf had signed it on his own name."

[5] Winding up cause 15 of 1994

[6] (1948) 2 All ER 533-536 in which Lord Green stated:-

> "if there is no rule of construction for statutes and other documents it is that you must not imply anything in them which is inconsistent with the words expressly used..... True it is that English is a flexible language but that does not mean that one can disregard the natural and ordinary meaning of the words used unless it is apparent that some other meaning was intended. If language is clear and explicit the court must give effect to it.".

interpretation and held that if language is clear and explicit the court must give effect to it.

Justice Shah, being guided by Lord Greene's pronouncement, concluded that section 220 of the Act is clear that notice to the debtor before commencement of winding up proceedings must be under the hand of the petitioner. The petition was therefore struck out for being invalid.

Similarly *In Re Container Clear And Transport Services Limited*[7] Justice Shah held that a petition was invalid for the fact that the statutory demand notice was not signed by the creditor. He referred to section 220 of the Act which he said expressly provides that the notice prior to winding up of a company must be under the hand of the creditor. It was held that it was clear that where a statute required personal signature an agent could not sign. This, he averred, was one of the exceptions to the general rule that what a person could do, he could do by an agent.

In *the Matter of Diamond Trust Bank Limited*[8] it was submitted on behalf of the respondent company that the statutory demand was invalid as the same was signed by the petitioner's advocate instead of the petitioner himself as provided under section 220 of the Act. Justice Hayanga stated that a statutory demand under the petitioner's hand was a condition precedent in winding up matters and if this was not met, the company would not be wound up. He went on further to give the definition of the phrase ``In one's own hand" as described in Blacks Law Dictionary as "a person's signature". As the demand was not so signed, the Judge struck out the petition for failing to comply with due process.

This view was later reiterated in *Kenya Cashewnuts Limited v National Cereals & Produce Board*[9] in which the validity of the statutory notice filed by the petitioner was challenged. Justice Aaron Ringera (as he then was) was of the view that the service of a valid statutory notice under section 220 (a) was a condition precedent to the success of a

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[7] Winding up Cause 8 of 1994
[8] Bankruptcy and Winding up Cause No. 3 of 1998
[9] [2002] 1KLR 652

creditor's petition grounded on the company's inability to pay its debts. The validity in this case was based on the fact that the notice was not signed by the petitioner himself. It was specifically held that

> ``the court must be satisfied that the notice served is a valid one for winding up a company is like passing a death sentence on an individual. It is a most drastic remedy. The court can only be so satisfied if it has the benefit of seeing the terms of the notice. In the instant matter, the terms of the notice served are neither set out in the petition itself nor is the actual notice annexed to the verifying affidavit. The annexure to that affidavit though described as demand letters and statutory notices are not the kind of demand letter or statutory notice envisaged by section 220 (a) of the Act. They are not under the hand of the company and they do not give 21 days notice. So although the company cannot be heard to say it was not served with notice, the petitioner has not shown that the notice served was a valid one within the contemplation of the law."(emphasis provided).

In the circumstances, the Judge held that the Petitioner had not shown that the notice served was a valid one within the contemplation of the law. The Petitioner had therefore not proved that the Company had failed to comply with a valid statutory notice in terms of section 220 of the Companies Act.

In re Prime Outdoor Network Limited[10] the respondent made a challenge against the statutory demand served on it by the petitioner. The basis of the challenge was that the demand was not under the hand of the petitioner but was signed by a firm of Advocates. The statutory demand was authored by a firm of advocates who clearly stated that they were acting on behalf of the petitioner. This, the respondent argued, was in contravention of section 220(a) of the Companies Act. Justice Azangalala was of the view that an Advocate acting on the instructions of the client was competent to issue a notice under section 220(a) of the Companies Act. He went on to state that the demand was made by an Advocate whose authority was not challenged. It was therefore held that the respondent had filed a valid statutory notice under section 220(1) of the Companies Act.

[10]Winding up 16 of 2005

Of the two approaches outlined above, it is submitted that Justice Azangalala's reasoning, though in the minority, is the more logical one. The law does recognize certain persons who may act as agents for and on behalf of parties engaged in litigation and an advocate is one such agent.[11] The various decisions which found a petition or statutory demand notice to be fatally defective merely because the same was signed by an Advocate, not his client, do not demonstrate why those documents are deemed to be of so special or unique nature that only the party, not its advocate, could sign. It is instructive to note that in none of those cases was the authority of the respective advocates challenged, which would have been a valid ground for objection. Objection was taken sorely and purely because the advocate, not his client, had signed. This approach makes nonsense of the entire principal-agent relationship as provided for and recognized in the law.

There is much merit, therefore, in the English position which does recognise the general principle that a person may sign by the hand of another whom he has authorised to sign on his behalf.

Moreover, Rule 202(1) of the Winding up Rules does provide that no proceedings under the Act or the said Rules shall be invalid by reason of any formal defect or any irregularity. The proviso to this, however, is that the defect or irregularity in question should not, in the opinion of the court dealing with the matter, occasion substantial injustice to the other party.

It is submitted that an advocate's signature on a document in lieu of his client's signature is not a material defect or irregularity. Certainly no injustice, substantial or otherwise, would be occasioned to the opposite party and none of the decisions considered above addressed the issue of any injustice to the parties concerned.

The catalyst for the conflicting decisions is, of course, the very wording of sections 220(a) and 221(1) of the Companies Act. Both contain wording to the effect that the statutory demand notice and the petition, respectively, should be signed by the party

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[11] Order 9 Rule 1 of the Civil Procedure Rules, 2010 made under the Civil Procedure Act, Cap 21 Laws of Kenya.

itself and not the advocate. There may have been a perfectly legitimate reason why that requirement was enacted but in view of the reasons already advanced, the requirement can no longer be justified. The continued existence of the requirement has the effect of introducing unnecessary questions of interpretations, with different judges coming up with different interpretations. Ultimately, therefore, there will be need to amend the two sections so as to eliminate the confusion and conflict which they have occasioned over the years. Such amendment would also result in the harmonization of statutory provisions relating to agents in litigation so that both the Companies Act and the Civil Procedure Act and Rules are consistent on the issue.

All in all therefore, there is no legally sound reason or basis why the statutory demand notice or winding up petition should be treated any differently from other pleadings and court documents. A plaint, for instance, is as serious and formal a pleading as one could get and yet the same is always signed by an Advocate in cases where the plaintiff is represented. There is no firm basis, and none has been shown by any of the decisions concerned, why the general principles of agency should not apply and an Advocate permitted to sign the statutory demand notice and winding up petition on behalf of his client. Logic and good sense ought to be reinstated as far as the two documents are concerned and, amongst other benefits, eliminate the conflicting decisions emanating from our courts on the subject.

3.2 THE RIGHT OF A PARTY WHO HAS NOT FILED A REPLYING AFFIDAVIT TO BE HEARD ON A WINDING UP PETITION

Rule 31 of the Companies Winding up Rules contains provisions regarding the filing and service of affidavits in opposition to a winding up petition.[12]

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[12] *Rule (31) 1 states*

> "Affidavits in opposition to a petition shall be filed within seven days of the date on which the affidavit verifying the petition is filed, and notice of the filing of every such affidavits shall be given to the petitioner or his advocate on the day on which such affidavit is filed."

Rule 31 (2) on the other hand requires that:

The all-important question as to whether a company which has not filed any affidavit in opposition to a petition to wind it up ought to be heard has been considered by the courts. In a number of cases, the High Court has held that failure to file the said affidavit in opposition to the petition disentitles the company from presenting any objection to the petition. The petition has thus been granted as a matter of course. This school of thought is represented by the decisions in such cases as *In the Matter of Multi Plastic Export Company Limited,*[13] *In the Matter of Sula Limited,*[14] *In the Matter of Global Tours and Travel Limited*[15] *In the Matter of Sal Healthcare Limited,*[16] *and In the Matter of International Homes Limited.*[17]

This school of thought has found support in the Court of Appeal. In *Shah v Midco Holdings Limited,*[18] the Court of Appeal held that a company intended to be wound up must show its opposition to the petition by filing an affidavit to that effect under rule 31, failing which, the company shall be in the same situation as a defendant who has not filed a defence in an action. Without such an affidavit, the court found, there would be no *locus standi* on the part of the company to participate in any proceedings attacking the petition including an application to strike out the petition.

In *Re Techpack Industries Ltd Ex Parte Correa*[19] Justice Ringera (as he then was) took a different position and was of the opinion that rule 31 did not expressly or by necessary implication exclude a company which had not filed an affidavit in opposition to a petition from being heard in opposition thereto or in any other proceedings attacking the petition. He stated that all the rule did was to require the company to file such affidavit, if any, within 7 days. The reason for this, he went on to explain, was because an affidavit is evidence and a company which is desirous of opposing the petition on strictly

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"An affidavit in reply to an affidavit filed in opposition to a petition shall be filed within three days of the date on which notice of such affidavits is received by the petitioner or his advocate."

[13] Winding-up Cause No. 8 of 1997
[14] Winding-up Cause No. 27 of 1997
[15] (2000) 1 E.A 195
[16] Winding-up Cause No. 6 of 2001
[17] Winding-up Cause No. 15 of 2002
[18] (2000) 1EA 204
[19] [2002] 2KLR 319

legal grounds may not necessarily wish to contest the facts as presented in the petition and verified by the verifying affidavit. In other words, the company was not obliged to file its version of the facts for it may very well not have had a different version. If it opted not to put in an affidavit in opposition to the petition, it did not *ipso facto* follow that it conceded to the petition. The company may well have been able to show that even if all the facts pleaded in the petition were correct, the petitioner was nonetheless not entitled to the relief sought in the petition. The court was of the view and held the opinion that the right to a fair hearing is a fundamental constitutional right under section 77(9) of the Constitution of Kenya (as then applicable) and cannot be overthrown by such a side wind as a rule of court which was not even explicit on the point.

It is submitted that Justice Ringera's reasoning is the more convincing of the two. It is trite law that affidavits will address issues of fact only, that is evidence, and indeed there is no room in affidavit for articulation of legal arguments. It should follow logically, therefore, that a respondent to a winding up petition may hinge his defence, not on factual, evidential matters, but on points of law. In such event, he should not be prevented from advancing his legal arguments merely because he did file an affidavit; after all any such Affidavit would have addressed factual, not legal, issues.

In yet another case, *Kenya Cashewnuts Limited –vs- National Cereals and Produce Board*[20] Justice Ringera remained consistent that a company which had not filed a replying affidavit under rule 31 need not be shut out, holding that:-

> ``Where the Company has not filed an affidavit in opposition to the petition, the Petitioner must nevertheless proceed to prove the petition on the usual standard of a balance of probabilities.....,"
>
> ``the Company may, if it wishes, be allowed to oppose the petition on strictly legal grounds"[21]

In relation to the foregoing, the Judge referred to the case of *In the Matter of Park Enterprises Limited*[22] and rejected the argument that a company which had not filed an

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[20] Supra, Note No. 9
[21] Ibid, at page 655

affidavit in opposition to a petition could not be heard and the suggestion that in such circumstances, a winding up order would be granted as a matter of course. Said the judge:

> ``Counsel for the company on his part submitted that although he had not filed an affidavit in opposition to the petition he was entitled to be heard in opposition thereto. He submitted that the winding up rules did not make it mandatory for the company or any party who wished to oppose a petition to file a replying affidavit. I ruled that there was nothing in the winding up rules to justify the proposition that a company which had not filed an affidavit in opposition to the winding up petition could not be heard. I took the view that a company which had not filed an affidavit in opposition to the petition could be heard on matters of law only. In my opinion although it is correct that failure to file an affidavit in opposition to a petition is like failure to file a defence to a suit, it does not inexorably follow that the company cannot be heard in opposition to the winding up or that the petition must inevitably succeed. Even in an ordinary suit, failure to file a defence does not, except in cases where liquidated demands are made, result in inevitable judgment. The suits are set down for hearing"

In his holding above, Justice Ringera was doing no more than re-stating his earlier position regarding replying Affidavits vis-à-vis legal defences to the Petition. This study reiterates its support for the reasoning which under-pinned Justice Ringera's decisions, as legal defences ought to be maintained and duly considered by the court even when no replying affidavit is filed. The respondent has an inalienable right to be heard, well grounded in the Constitution of the Republic and the same ought to be upheld to the fullest extent. The argument as to evidentiary material vis-à-vis legal defences and how the same ought to be presented is trifling in the circumstances and ought not to stand in the way of a party's substantive rights.

In Re Insight Technologies Limited,[23] the petitioner's petition was dismissed for non-attendance. The petitioner filed an application by way of chamber summons brought under section 3A of the Civil Procedure Rules and Rules 7(2) and 11 of the Companies Winding up Rules seeking to reinstate the petition. The petitioner argued that the respondent company, which moved the motion to dismiss the petition for non attendance

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[22] Winding-up Cause No. 50 of 1993
[23] Winding up Cause 25 of 2005

had no right of audience to so move the court as it had not filed an affidavit in opposition as required under rule 31 of the Winding up Rules. The court held that the respondent indeed lacked the right of audience for failure to file a replying affidavit under rule 31 of the Winding up Rules. The court, however, declined to reinstate the petition as the petitioner did not give sufficient reasons for non attendance during the hearing of the petition.

In Re Dogra Engineering Company Limited,[24] the company failed to file an affidavit in opposition as required under rule 31 of the Companies Winding up Rules and applied for an extension of time to file the affidavit. The principal grounds for the application were that the company director needed to consult with a director who was out of the country and that the company was at the same time preparing an application for striking out the petition and that in all this, time for filing the affidavit in opposition lapsed. The company submitted that the petitioner would not suffer any injustice if the application was granted. The court, in extending the time to file the affidavit was of the view that in as much as the reasons for delay were not convincing, the proposed affidavit in opposition to the petition seemed to answer all the averments in the petition and that it raised bona fide issues that should be resolved by a consideration of the same at the hearing of the petition. The Judge further stated that the petitioner would not be prejudiced at all in view of the fact that the winding up cause was still at its preliminary stages.

Similarly, in the matter of *Westmond Power (Kenya) Limited,*[25] the respondent failed to file its affidavit in opposition within seven days as is required by the rule 31 of the Rules. They therefore sought leave to file the affidavit out of time but this was strongly opposed by the petitioner. Justice Onyango Otieno (as he then was) took the view that the effects of winding up a company are devastating and if a company shows that it wants to contest such winding up proceedings, it would not be fair to shut it out on

[24]Winding up Cause 2 of 2006
[25] Winding up Cause No. 1 of 2002

points of procedural technicalities. The Judge used his discretion to allow the company to file its replying affidavit out of time.

In the Matter Of Yaya Kwik Fit Limited,[26] the Judge had an interesting view to the issue of replying affidavits. In this case, the company made an application to have the petition struck out on various grounds. The petitioner opposed the application stating that the company lacked *locus standi* to file the application or take any step in the matter as it had not filed an affidavit in opposition to the winding up petition. The Judge held that:-

> ``the company is in the same position as a legal person who has not been served with summons to enter appearance under the Civil Procedure Rules and therefore is under no obligation to file a defence. In the same vein the company is therefore under no obligation in law to file an affidavit in opposition to the petition. In my considered view pleadings will only close on the day the company files an affidavit in reply to an affidavit in opposition to the petition."

It is submitted that the foregoing position taken by the learned judge is completely untenable. The Judge seems to have mixed up the provisions relating to service of pleadings (specifically the summons to enter appearance) and closure of pleadings with those provisions governing winding up petitions and responses thereto. As expected, the result is disastrous in several respects, one of which is the implication that unless and until the company files a replying Affidavit, no steps can be taken in the petition.

In *Re Umoja Service Station*[27], the petitioner took up a preliminary point that counsel for the company and the contributor could not be heard as they had not complied with the provisions of rules 29 and 31 of the Companies (winding up) Rules. The Judge held that:-

> ``As regards rule 31, it is true that the company has not filed any affidavit in opposition. This does not, however, mean that it cannot be represented at the hearing. This point can only be raised at a later stage when the company intends to adduce evidence. It is premature. The Contributor filed his affidavit though out of time. This issue should also be taken at a later stage and at appropriate time."

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[26] Winding up Cause No. 42 of 1997
[27] [2000] LLR 1718 (HCK)

The Judge therefore held that the Company and the Contributor were properly before the Court. The petitioner's preliminary objection was therefore dismissed with costs.

It is submitted that the judge's approach in this case was absolutely correct and in accordance with the law. The mere absence of a replying affidavit does not bar a respondent from participating at the hearing of the Petition.

Regrettably, the Court of Appeal has not provided clarity and certainty on the matter. In the case of *Lilian Njeri Mungai –vs- Dr. Njoroge Mungai*[28] the Honourable Mr. Justice P.K. Tunoi, Judge of Appeal seems to have taken a position similar to that which Justice Ringera would take a few years later in the decisions considered above. Judge of Appeal Tunoi stated thus:-

> ``Though there is no reply by the respondent to the petition, it is plainly clear that the petition contained very grave allegations against him and in the circumstances the petition ought to have been heard so that the parties could have had an opportunity to have the disputed facts resolved.''

However, in the case of *Shah –vs- Midco Holdings Limited*[29] referred to elsewhere hereinabove, the Court of Appeal (Akiwumi, Tunoi and Keiwua, JJA) arrived at a different finding, holding that:-

> ``We think the Respondents were grossly mistaken in their belief that it was necessary for them to file an affidavit in opposition before taking step to have the petition struck out or their advertisement restrained. It is also our view that a company intended to be wound up must, to be entitled to take part in the petition, show its opposition to the petition by filing an affidavit to that effect under rule 31 of the Rules, failing which, the company shall be in the same situation as a defendant who has not filed a defence in an action.''

The Court of Appeal thus ended up sending conflicting signals as to how a judge ought to proceed when no replying affidavit is filed by a company sought to be wound up and which intends to oppose the petition. The confusion has arisen principally because of failure by the various courts to appreciate that there is a distinct difference between an

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[28] Civil Appeal No. 191 of 1995
[29] (2000) 1 E.A. 204

ordinary suit and the steps which a defendant ought to take so as to be heard on his defence and a winding up petition and the steps that a respondent ought to take in opposition thereto. In the former, the defendant must enter appearance and also file a defence. In the latter, a replying affidavit is necessary only if there are contentious factual issues, otherwise the respondent ought to be heard on strictly legal issues for which a replying affidavit is not required. It is regrettable that this distinction has not always been clear to the courts. In this instance, it is opined that the solution does not lie in any amendment of the law (the law being sufficiently clear on the point), but on the courts being diligent in applying the law as it stands. Naturally, the Court of Appeal should take the lead in this regard. If the Court of Appeal is firm and consistent in its application and interpretation of the law, then the courts below it would have no choice but to abide by its decisions. If, on the other hand, conflicting decisions emanate from the Court of Appeal, then the Courts below it would be justified in opting to follow one set of decisions as opposed to another, both or more sets of interpretations having been handed down by the court superior to the High Court. Although this study focuses on decisions handed down by the Court of Appeal and the High Court, one would naturally expect authoritative, firm and consistent leadership from the Supreme Court as the highest Court in the land.

3.3 THE "JUST AND EQUITABLE" RULE IN THE WINDING UP OF COMPANIES

In considering whether to order the winding up of a company on the "just and equitable" rule, the court will invariably have to take into account the relevant provisions of the company's articles of association and the provisions of the Act relating to the issue.

Articles of association are the constitution of the company. They contain rules and procedures to govern the affairs of the company which the directors and shareholders must observe in operating or dealing with the company or with each other. The articles

govern the relationships between the shareholders and directors of the company, and are a requirement for the establishment of a company.[30]

It has been observed that the memorandum and articles of association, when registered, bind the company and its members to the same extent as if they respectively had been sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles subject to the provisions of the Companies Act 1948.[31] This position is reflected in Section 22 of our own Act.[32]

Section 219(f) of the Act which provides that a company may be wound up by the court if the court is of opinion that it is just and equitable that the company should be wound up should be read together with Section 222(2) of the Act which delimits the Court's exercise of that power by providing that:-

> ``Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court, if it is of the opinion (a) that the petitioners are entitled to relief either by winding up the company or by some other means; (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up, shall make a winding up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are seeking to have the company wound up instead of pursuing that other remedy."(emphasis provided)

It becomes apparent from the foregoing that in considering whether a company should be wound up under the "just and equitable" rule, the Court is called upon to have regard to both the relevant provisions of the Companies Act and the applicable provisions in the particular company's articles of association. This has proved to be a fertile ground for judicial conflict and inconsistency in Kenyan courts. Some courts have emphasised the supremacy of the company's articles in considering whether the particular company

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[30] Sections 4(1) and 9 of the Companies Act, Cap 486 Laws of Kenya

[31] Halsbury's Laws of England, 4th Edition, Volume 7, para 116 at page 70.

[32] *The same at sub-section (1) stipulates that:- "Subject to the provisions of this Act the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles".*

should be wound up under the "just and equitable" rule and have relied on section 222(2) of the Act to decline to grant the order where the conditions imposed by the section have been met. On the other hand, some judges have held that Section 219 (f) confers a statutory right on an aggrieved party and they would not be held back by any provisions in the company's articles of association if they thought that a winding up under the section was merited.

The preponderant view expressed by various courts dealing with the "just and equitable" rule is that ultimately, the issue is one of the Court's discretion.[33]

It is noteworthy that the Kenya Court of Appeal in the case of *Lilian Njeri Mungai -vs- Dr. Njoroge Mungai*[34] has cited Justice Kneller's judgment in the aforecited case with approval.

Upon perusal of the various causes filed recently at the Commercial Division of the High Court at Milimani, it transpired that the bulk of petitions filed under the "just and equitable" rule were premised on the ground of various complaints by shareholders against their fellow shareholders. Three broad categories were identified under this head:-

(i) In the first category which contained the largest number of petitions brought under the clause in question, the respective petitioners complained that there had been a total and complete break-down in trust and confidence between the shareholders (who often-times also doubled as directors of the company) and that as the relationship between the parties had broken down irretrievably, it was no longer possible to carry out the objects for which the company had

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[33] A leading case in this regard is that of *Re Garnets Mining Company Limited [1978]* KLR 224 in which the Honourable Mr. Justice Kneller dealt with the issue succinctly, holding, inter alia, that:-

"Whether or not a company should be wound up by the court on the ground that it is just and equitable to wind it up under section 219(f) of the Companies Act is a matter of discretion. The court's discretion in this regard is wide and must be exercised judicially. Each case depends on its own facts as they are at the time of the hearing; but, generally, where a petitioner can show that he has lost confidence in the management of the company because it has a lack of probity, the court's discretion (in the absence of special circumstances) is likely to be exercised in his favour. A petitioner seeking to rely on just and equitable grounds must approach the court with clean hands."

[34] (1995) LLR 405

been formed in the first place. It was therefore felt that it was just and equitable that the company be wound up.[35]

(ii) The second category, also ranking second in the number of petitioners filed, centred on complaints of exclusion from the running and management of the affairs of the Companies involved.[36]

(iii) The third category of petitions is hinged on alleged oppression which is said to be manifested by fraudulent and dishonest management of Company affairs (usually by the majority shareholders) to the loss and detriment of the other shareholders.[37]

In exercising their discretion on the matter, various judges have approached the subject differently. *In the matter* of *Nationwide Electrical Industries Limited,*[38] Justice Njagi inclined to the view that the right conferred by statute for a member of a company to apply for a winding up of the Company on the "just and equitable" rule cannot be subordinated to the company's articles of association. The learned Judge held:

> ``.....every case must be considered on its own facts and peculiar circumstances. The right of a contributory to petition for the winding up of the company is statutory. It is conferred by statute and cannot be compromised by the articles of association. The jurisdiction of the court in this instance is equitable". (Emphasis added).

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[35] Some of the causes in this category were: *Re Trailways Auctioneers Limited (winding up cause No. 4 of 1996), Re Marketing & Airfreight Consultancy Limited (winding up cause No. 24 of 1996), Re Brookhouse Kindergarten Limited(winding up cause No. 25 of 1996, Re Produco Limited (winding up Cause No. 4 of 1994), Re Metchem (EA) Limited (winding up Cause No. 25 of 1997), Re Ruai Developers Limited (winding up Cause No. 15 of 1998) and Re Hill Farm Enterprises Limited (winding up cause No. 17 of 1998).*

[36] Examples of these are: *Re Madhu Paper International Kenya Limited (winding up Cause No. 12 of 1995) Re Ruffles & Petals Limited (winding up cause No. 19 of 1995), Re Gipsy Tours & Travel Limited (winding up Cause No.33 of 2000) and Re Eldoret Drycleaners Limited (winding up Cause No. 22 of 2000)*

[37] Examples of such petitions include Re Tusks Limited (winding up Cause No. 35 of 1996) and Re Lyoei Masaku Trading (K) Limited (Winding Up Cause No. 2 of 1997)

[38] Winding-up Cause No. 41A of 2000 (unreported)

Justice Njagi further found, citing an English decision, that even where an alternative relief exists in the company's articles, it may not necessarily be considered unreasonable to nevertheless apply for the winding up of the company. Said the learned judge:-

> ``In yet another case, Re A Company (1989) BCLC 579, the petitioner's refusal to accept an offer for his shares was held not to be unreasonable when there was a dispute as to the number of shares to which the petitioner was actually entitled. This is not the case here, but on a wider perspective, the court in that case found that the availability of relief, possibly wider relief does not itself make it plainly unreasonable to seek a winding up order so as to justify the striking out the petition".

In the matter of Ng'enda Location Ranching Company Limited,[39] Justice Kimaru struck a blow in favour of the company's articles of association, finding that the two minority shareholders who had petitioned the court on the conduct of the affairs of the company ought to have ventilated their grievances at the company's general meeting as the articles stipulated.

The court took a similar position *In the Matter of York House Properties Limited*[40] in which the petitioners sought an order for the winding up of the company on the ground that it was just and equitable that the company be wound up as the relationship between the members had completely broken down. The respondents in this case had offered to buy the petitioners' shares which the petitioners refused to accept. It was the respondents' submission that from the conduct of the petitioners as seen in the correspondence, the petitioners were not keen on pursuing alternative remedies available to them but were merely interested in the winding up of the company. The court in striking out the petition for winding up relied on the company's articles of association and held that the articles of the company recognized that there could be a transfer of shares after notice had been given to the members of the company. The articles of association of the company, particularly article 11, recognized that shares may be transferred to a member of the family of the transferor. Article 12 recognized that

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[39] 2005 eKLR, Winding-u p Cause No. 2 of 2004
[40] Winding up cause 10 of 2003 (UR)

transfer can be made to persons who are not members of the company or members of the family of the transferor so long as notice if given to the company of such desire to transfer the same. The court found that there was an alternative remedy and accordingly the petition could not stand.

In Vadag Establishment v Yashvin Shretta & 10 others,[41] the High Court had held that where there were alternative remedies the petitioner was not entitled to a winding up order. As the petitioner had an alternative remedy, the learned Judge concluded, the petitioner would not in the circumstances be entitled to a winding up order as prayed for in his petition. When the matter went on appeal, the finding of the High Court was approved though the matter had been taken to the Court of Appeal on a different issue. Omolo J.A. stated that even if the allegations contained in the petition were in the end to be found to be true they would not entitle the petitioner to a winding up order because there was an alternative remedy other than a winding up order which would effectively address the complaints raised by the petitioner. Clearly, the judge was thereby giving effect to the provisions of section 222 (2) of the Act. In the learned judge's words:-

> ``The proposition to be derived from case law is and must be that once there is an effective alternative remedy, that is, a remedy alternative to a winding-up, then even if the allegations contained in a petition are to be found to be true, the petitioner is nevertheless not entitled to a winding-up order as the court cannot conclude, under section 219(f) of the Act, that "it is just and equitable that the company should be wound up".
> It cannot be just and equitable to wind up the company over complaints which can be effectually resolved in an alternative manner".

In the case of Murri -vs- Murri & Another,[42] the Court of Appeal was consistent on the issue, holding that the court would not interfere with the internal management of a company acting within its powers.

In *Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 13 others*[43] it was argued by the appellant before the Court of Appeal that the respondents were using the

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[41] Civil Appeal No. 10 of 1997
[42] [1999], EA 212
[43] Civil Appeal No. 63 of 2001

winding up process to exert pressure on the majority to settle all family disputes on terms the respondent dictated. The respondents, on the other hand, urged the court to find that there was an alternative remedy and that therefore the petition ought to be struck out. The Court of Appeal held that the established principle in Kenya is that if a reasonable offer is made for purchase of minority share holding by the majority as provided in the company's articles, the company ought not to be wound up and that a proper formula ought to be provided for valuation of such shares so that the dissident share holders go out of the company, leaving it to the other share holders to run. The court further stated that at the stage when it comes to dealing with breaches of fiduciary duties and remedies sought in the petition the commercial court should down tools and say ``please go to a regular civil court by way of plaint".

Of the two conflicting approaches adopted by different judges dealing with similar issues arising out of winding up petitions filed under the just and equitable rule, the approach that gives precedence to the company's articles of association is to be preferred. The articles constitute a specific and express contract amongst the members of the Company and they should therefore be held to the same in the event of a dispute arising. Provided the articles are being followed strictly, in good faith, the Courts ought not to step into the internal management of the company or to give pre-eminence to statutory provisions of general application as opposed to the specific provisions of particular articles. Moreover, statute itself, in section 222 (2) of the Act, does stipulate in express terms that even where a winding up order may be warranted, the Court ought not to issue the same if there is some other alternative remedy which could redress the petitioner's grievances.

In the context of the foregoing, it is submitted that those judges who would give precedence to section 219(f) of the Act at the expense of the company's articles which contain an alternative remedy would be acting against express statutory provision as contained in section 222(2) of the same Act. If their preference of section 219(f) is premised on obedience to statute, their disregard and disobedience of the proviso contained in section 222 (2) of the same statute is baffling and unjustifiable. It is opined

that there is a perfectly good reason why the same Act provided for the "just and equitable" rule in Section 219(f) and then went further in a subsequent section and qualified that remedy specifically in instances where the grievances of the petitioners could be otherwise redressed. An appreciation of this position would have assisted the courts in reaching consistent decisions on the issue.

3.4 LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

The decisions considered under this subject provide an interesting perspective because there was so much confusion created by conflicting and inconsistent decisions by both the Court of Appeal and the High Court that an amendment was effected to the relevant rules so as to introduce certainty and consistency.

It is a mandatory requirement that a party seeking the prerogative orders of mandamus, prohibition or certiorari must first obtain the leave of court.[44] Under the old rules, Order LIII rule 1 (2) stipulated as to how such leave was to be applied for:-

> ``An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit."

The issue that has then arose was whether in considering such an application for leave, the judge had to deal with the application *ex parte* or whether he had discretion to order an *inter partes* hearing thereof. Different judges had taken different positions on the issue.

In Alpha Knits Limited & 2 others v Ruiru Municipal Council,[45] the applicants brought an application in the High Court seeking leave to file judicial review proceedings and further, that the leave granted do operate as a stay of the decision which was being

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[44] Order 53 rule 1 of the Civil Procedure Rules, 2010 stipulates that "No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule" This wording was identical in the old rule, namely Order LIII, rule 1.

[45] [2009] eKLR

challenged. The High Court ordered that the application be served on the respondent and set it down for hearing *inter partes*. However, counsel for the applicants later reported to the court that service was not effected on the respondent because, in counsel's view, the application was by law supposed to be heard *ex parte* and that the court was wrong in ordering a hearing *inter partes*. In support of his argument, counsel cited the Court of Appeal decision *in Republic v Commissioner of Co-operatives ex parte Kirinyaga Tea Credit Society Limited,*[46] where it was stated that if the application must be made *ex parte*, then it follows that it must be heard and granted or refused *ex parte*. If the application is granted, then rule 4 of order LIII must also be dealt with because it is at the granting stage that the judge is required to deal with the issue of whether leave granted shall act as a stay. Having regard to these provisions the Court in the *Kirinyaga Tea Credit Society Limited* case held that the Judge had no power to separate the granting of leave *ex parte* from the issue whether such leave shall act as a stay. Further it stated that there was no power to make one portion of it to be heard *inter partes*.

Similarly in *Oilcom Kenya Limited v Permanent Secretary, Ministry of Roads and Public Works,*[47] one of the arguments advanced on appeal was that the trial judge had erred in ordering *inter partes* hearing at the leave stage while the applicant had made an *ex parte* application. The Court of Appeal held that as the rule clearly provided, the application for leave was supposed to proceed *ex parte* and the Judge had no discretion to conduct the application on *inter partes* basis as the stage for *inter partes* hearing came under the main application.

The final case cited by counsel was *Judicial Commission of Inquiry into the Goldenberg Affair & 3 others v Kilach*[48] where it was emphasised that an application for leave should be made *ex parte* to a judge in chambers.

While appreciating these decisions of the Court of Appeal and admitting that indeed, he was bound by them, Justice Dulu, however, noted that the decisions of the

[46] [1999] 1 EA 245
[47] Nairobi Civil Appeal No. 10 of 2007
[48] [2003] KLR 249

Court of Appeal on the subject have not been uniform. He referred to the decision in *Shah v Resident Magistrate, Nairobi*[49] in which the Court of Appeal had appreciated what was stated in the *Kirinyaga Tea Credit Society Limited* case and concurred in the view expressed by Keiwua JA that:

> ``In my respectful view, it is within the discretion of a judge to adjourn the whole application for leave, and leave to operate as a stay of proceedings, for hearing inter partes, but I do not think that that discretion extends to enable such a judge to hear that application both ex parte and inter partes... ''

Justice Dulu, being faced with conflicting decisions of the Court of Appeal on the issue, was forced to make a choice. The judge took the view that it was the discretion of a judge to decide to hear the application *inter-partes*. Each case, he went on to state, had to be considered on its own merits, depending on the peculiar circumstances of the case, and the orders sought.

Justice Dulu was not alone in this school of thought. In the case of *Kenya Planters Cooperative Union Limited –vs- Commissioner of Cooperative Development and Marketing,*[50] Justice Nyamu (as he then was) had before him an application filed *ex parte* seeking leave to, *inter alia*, quash a decision of the Commissioner of Cooperative Development and Marketing ordering an audit of the financial and operational affairs of the applicant. It was contended on behalf of the applicant that the applicant having been granted dual registration under both the Companies Act and the Cooperative Societies Act, the said Commissioner lacked any power or authority to order the audit complained about.

Justice Nyamu took the view that the issues raised were so complex and substantial, impacting on an extremely important and sensitive sector of the national economy, that he ordered an *inter partes* hearing of the application for leave. In other words, the Judge was not prepared to risk granting leave *ex parte* only for such leave to

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[49] [2001] 1 EA 208
[50] High Court Misc. Civil Application No. 609 of 2007 (unreported)

subsequently be shown as having been unmerited in law. In the meantime, the Judge ordered that the *status quo* then prevailing be maintained pending the *inter partes* hearing. Ultimately, having heard both parties, the Judge granted the leave sought and also ordered that the same should operate as a stay of the Commissioner's decision pending the hearing of the substantive motion.

This study supports the view that a Judge before whom an application is sought seeking leave *ex parte* should have the discretion to decide whether to deal with the same *ex parte* or to order an *inter partes* hearing thereof. The exigencies of litigation are so extensive and unpredictable that it would be impracticable and undesirable to fetter the Judge's discretion and dictate that he must proceed in a particular way for all cases of a particular category, their peculiar facts and circumstances notwithstanding. After all, the supreme law of the land does grant the judge unlimited original jurisdiction in most matters.[51]

It was also unduly restrictive prior to the amendment alluded to that both issues of leave and stay under the old rule 4 of Order LIII had to be decided together and that the judge could not opt to deal with them separately. From a practical view point, such an approach was illogical and absurd because having decided that he should hear the parties *inter partes,* the judge was duty bound to make such further order or orders as preserved the subject matter of the proceedings pending the hearing and the court's determination thereon. Ordinarily, therefore, the court would make some form of "stay" order so as to suspend the operation of the impugned decision pending the *inter partes* hearing.

The approach recommended above also accords with the natural principle of affording a hearing to all parties before any order adverse to any of them is made. Whereas it is not recommended that all applications for leave under rule 1(2) must be heard *inter partes*, as that may defeat the whole purpose of the rule, it is nevertheless

[51] Article 165 (3) of the Constitution, 2010 deals with the extensive jurisdiction of the High Court which includes, subject to matters reserved for the exclusive jurisdiction of the Supreme Court and those reserved for specialised courts under Article 162(2), unlimited original jurisdiction in criminal and civil cases.

desirable that in those cases where the judge thinks that an *inter partes* hearing is warranted, for specific reasons to be recorded, then the judge ought to be allowed that lee way.

Little wonder, then, that sooner rather than later, the applicable rules had to be amended so as to eliminate the uncertainty and confusion that had reigned prior thereto. According to the Civil Procedure Rules, 2010[52] introduced a new rule 4 to Order 53 which now provides as follows:-

> "The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: provided that where the circumstances so require, judge may direct that the application be served for hearing *inter partes* before grant of leave. Provided further that were the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days".

The foregoing amendment has had the desired effect of introducing certainty as to how the court ought to proceed in considering applications under Order 53 rule 1(1) and (2) and this should result in great uniformity and consistency in court decisions on that issue. The amendment therefore serves to demonstrate that amendments effected to statutory provisions could be used to aid and advance the doctrine of *stare decisis* so that there is greater uniformity, consistency and predictability in court decisions.

3.5 REVIEW OF CONSENT ORDERS

Section 80 of the Civil Procedure Act[53] confers an unfettered right for parties to apply for review of any order or decree by which they are aggrieved.[54] Order 45 of the

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[52] The revised Civil Procedure Act and the rules made thereunder, came into force from 17th December, 2010.

[53] Cap 21 Laws of Kenya as revised in 2010.

[54] Section 80 of the Civil Procedure Act provides that " Any person who considers himself aggrieved:-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

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Civil Procedure Rules, 2010[55] then sets out specific rules to govern the review of court orders and decrees. Under the old Civil Procedure Rules, review of court decisions was order XLIV of the rules then prevailing.

The issue that has arisen is whether decrees or orders entered into by consent of the parties are subject to review. The Courts have taken conflicting positions on this issue:-

In *Flora Wasike v Wamboko*[56] in an application for review of a consent order, the Court of Appeal held that a consent order could be varied or discharged if obtained by fraud or collusion, by an agreement contrary to the policy of the court, if given without sufficient material facts or in general for a reason that would allow the court to set aside an agreement. Later the same court in *Easter Transportation Limited v Red Sea Star Company Limited*[57] held, while doubting the possibility of reviewing a consent order on final judgment that, ``attractive as it might be to review the consent order, that cannot be done under Order XLIV of the Civil Procedure Rules."

This finding seemed surprising in view of the decision in the case of *Kimita v Wakibiru*[58] where the court had already considered the possibility of review of a consent

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(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit. "

[55] On recommendations of the Rules Committee, and in amendments carried in the Statute Law (Miscellaneous) Amendments Act No. 6 of 2009, Parliament enacted sections 1A and 1B of the Civil Procedure Act. The new inclusions affirmed the overriding objective of the Act and the rules made pursuant to the Act being the facilitation of the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. The New Civil Procedure Rules 2010 were Gazettd on 17th September,2010 and came into force 90 days thereafter, that is from 17th December, 2010.

The New Rules have far reaching consequences on the practice of Civil litigation in this country, the main objective being to improve service delivery by empowering the courts to narrow down issues for determination, as well as set time lines within which activities relating to litigation in courts have to be undertaken. One notable change of the new rules is the removal of the Roman letters (e.g. Order XLIII) and replacement with numerical letters (Order e.g. 53).

[56] [1984] LLR 215 (CAK)

[57] [1986] LLR 1312 (CAK

[58] [1985] KLR 317

order and allowed an application because the applicants were illiterate and had been misled by the respondent. In that case, the court held that the phrase ``for any other sufficient reason" as a ground for review need not be analogous with the other grounds specified in rule 1 (1) (b), that is discovery of new matter or error on the face of the record.

However, several decisions of the High Court refusing applications for review, such as *Extracraft Agencies v Baragwi Farmers cooperative society*[59], still seem to construe this phrase *ejusdem generis*. In this case, the court held that the application for review was incompetent as there was no specific claim that the applicant had discovered any new and important matter or evidence and further that the applicant had delved into issues which were irrelevant and unconnected with what the court should be dealing with in an application for review.

This study is of the view that a consent order entered into by parties in any proceedings is very much in the nature of a contract between them. It follows therefore, as held in the *Flora Wasike* case, that a consent Order should be liable to review, with possible setting aside, on the same grounds that any contract could be set aside. These grounds include mistake, fraud and misrepresentation.

It is opined that much of the confusion which has arisen as far as review is concerned, vis-à-vis consent Orders, has to do also with the issue of the extent or scope of any particular court's powers to review its own decisions or parties' consent orders. Rule 1(1) of Order XLIV of the Civil Procedure Rules sets out the grounds upon which any decree or order of the Court may be reviewed[60]. It is the third of those grounds, namely, "for some other sufficient reason" which has vexed various courts, with resultant conflicting decisions.

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[59] Civil Case 1043 of 1999

[60] Those grounds are "discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made, or on account of some mistake or error apparent on the face of the record or for some other sufficient reason" (emphasis provided)

In *National Bank of Kenya v Ndungu Njau*[61] the Court of Appeal held that an erroneous conclusion of law is a good ground for appeal but not for review. However, in *Said Hemed v Karisa Maitha*[62] the same Court, in a case where the trial judge had held that there was error apparent on the face of the record and held that it was the Court of Appeal which had the right to correct the error on appeal, held that the right to review given by section 80 requires the learned judge to consider a review application where an appeal lies but none has been filed.

In *Fidelity Bank v Hussein*[63] the court held that an error of law can give rise to an error on the face of the record. In contrast, in *Fidelity Bank v Shah*[64] Mbaluto J held that an application for review must fall within the purview of the grounds given in Order XLIV(the old Rules) and that misapplication of the law was not one of these.

It is submitted that the phrase ``or for some other sufficient reason" (in the old rules) and "or for any other sufficient reason" (in the new rules) is so vague and wide as to cause utter confusion. The preceding two grounds are clear and specific and their rationale is easily appreciated. Regrettably, however, the third ground opens up the field completely, hence so many different and often conflicting decisions on the point. The respective courts cannot be faulted as they were merely exercising their discretion, as the ground so openly invites. An opportunity was, regrettably, lost to introduce certainty through the recent amendments. It is submitted that section 80 of the Act and, by extension, rule 1 (1) of order XLIV ought to be amended so as to either delete the third ground altogether or provide a precise definition of the extent or scope of the court's power to review. Introduction of certainty in section 80 will naturally extend to the Rules as the Act supercedes the Rules. While at it, the issue of consent Orders could also be tidied up, although it could be argued that a decree or order, whether passed by court or by consent of the parties, is ultimately a decree or order. But for the avoidance of any uncertainty, the point would be put to rest through a suitable amendment.

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[61] Civil Appeal 211 of 1996
[62] Civil Appeal 237 of 1999
[63] [1998] LLR 150 (CCK)
[64] [1998] LLR 760 (CCK)

In review applications, the courts have also been troubled with the question of jurisdiction to entertain applications for review. Way back in 1982, the Court of Appeal in *Kithoi v Kioko*[65] held that an appellate judgment of the High Court under section 71A(2) is final and therefore not subject to review. Three years later in *Haamzaali v Sulemanji*[66] the court held that a decision of the High Court under section 79B rejecting an appeal summarily is subject to review since it is a new cause of action. Then in *Odongo v Savings and Loan*[67] the Court held that the High Court had no jurisdiction to review its appellate decisions under the Rent Restriction Act because these decisions were final. The finality of an appeal cannot be set at nought by review, Apaloo JA held.

In *Earnest Mwai v Hashid*[68] the Court of Appeal affirmed that it had no power to review its own decisions. Then in *Easter Transportation v Red Sea Star,*[69] Platt concluded that the High Court had no inherent power, except under section 80 and Order XLIV, to review its own decision. However, in *Sapra Studio v Kenya National Properties*[70] the court interpreted rule 35 of the Court of Appeal Rules as diverting from the English practice that a court is *functus officio* once a decision is passed. In Kenya, the Appeal Court would in effect have power to set aside or alter its order even after a decree has been drawn up. This reasoning, as it relates to the High Court power of review, has been followed in other cases[71].

It is clear from the foregoing that the whole subject of review of court decrees and orders requires urgent attention. The underlying problem seems to lie in imprecise and unclear statutory provisions, hence the need to amend the same. At another level, the courts must endeavour to promote certainty and consistency in their decisions, hence the importance of elaborate case reporting and reference to that material by both legal practitioners and the courts. The higher tier courts, that is the Supreme Court and the

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[65] [1982] KLR 1
[66] [1985] LLR 1403 (CAK)
[67] Civil Appeal 22 of 2007
[68] [1995] LLR 2523 (CAK)
[69] [1986] LLR 1312 (CAK

[70] [1986-1989] EA 501
[71] Such as Njuguna –vs- Njuguna (1997) LLR 602 and Said Hemed –vs- Karisa Maitha (1999) LLR 1069

Court of Appeal, must take the lead and set the pace, thus enhancing certainty and predictability of judicial decisions.

3.6 SUBSTANCE VERSUS MERE TECHNICALITIES

It is in those cases where there is a contest between what one might call ``substantive justice" and ``technical justice" based on procedural issues that one finds striking inconsistencies in judicial decisions. This is probably because many of the issues to be decided in that contest hinge on judicial discretion as opposed to strict legal provisions. It is desirable that the courts ought to endeavour to maintain consistency and uniformity in their decisions, even where exercise of discretion is called into play.

There are numerous areas in which this contest between substantive and technical justice could be demonstrated. However, this study shall focus specifically on the subject of affidavits, both ordinary and verifying affidavits as this is one area which has spawned numerous conflicting and inconsistent decisions.

In various cases, objection has been taken as to the competency of affidavits which do not state at what place and on what date the oath or affidavit is taken or made.[72]

In *Eastern and Southern Africa Development Bank -vs- African Greenfields Limited and 2 others,*[73] the place where an Affidavit was sworn was not stated. Hewett J held that the omission of the words "At Nairobi" was fatal and the Affidavit was struck out. Similarly, Onyango-Otieno J (as he then was) in *Narok Transit Hotel Limited and Another -vs- Barclays Bank of Kenya Limited,*[74] held that if the place and date when the affidavit was sworn is not indicated, the affidavit is a non-affidavit and must be expunged from the record. He considered the argument that the rubber stamp of the Commissioner of Oaths indicated that the affidavit was made at Nairobi, but rejected such argument saying that '*the address in that stamp will remain the Commissioner's address even if the affidavit is taken outside Nairobi*'.

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[72] Section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya states that: "Every Commissioner of Oaths before whom an oath or affidavit is taken or made shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made".

[73] High Court Civil Case No 1189 of 2000

[74] High Court Civil Case No 12 of 2001

Similarly in *Jayantkumar Shah -vs- Chandulal Mohanlal Shah and Another,*[75] Ole Keiwua J (as he was then) had struck out an affidavit because the date and place where it was sworn had not been stated.

However, in *James Njoroge Karagu -vs- Hannah Njoki*[76] Visram Commissioner of Assize (as he then was) relied on Order XVIII rule 7 of the old Civil Procedure Rules[77] to get around the mandatory provisions of section 5 of the Oaths and Statutory Declarations Act. He accepted an affidavit notwithstanding the fact that the place where it was sworn had not been indicated in the jurat, arguing that to strike it out on such a technicality would defeat the ends of justice

Similarly Ringera J (as he then was) in *Tom Okello Obondo -vs- National Social Security Fund*[78] agreed with Visram's reasoning and held that ``the irregularity of form complained of is not fatal. The same can be excused by the Court in its discretion. And as I find no prejudice to the plaintiff occasioned by such error, I excuse the same and overrule the preliminary objection"

In Re Amarco Kenya Limited,[79] Amarco (K) Ltd filed a replying affidavit and a preliminary objection to resist the petition. It was the company's contention that the petitioners' verifying affidavit was fatally defective as it did not contain the deponent's true place of abode and that the deponent did not further disclose the sources of information and his grounds of belief. It was argued that since the verifying affidavit was fatally defective then the petition remained unverified, hence incompetent. The court held that the petition would not be rendered defective in the event that the verifying affidavit was struck out. The court in exercising its inherent power granted the petitioner leave to file a verifying affidavit within a given period of time.

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[75] High Court Civil Case No 1230 of 1997
[76] High Court Civil Case No 713 of 1996
[77] The Rule provided that:
"The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof"
[78] Civil Suit No. 1759 of 1999
[79] Winding up cause No 5 of 2005

In *Hamida K Kamalkhan -vs- Emad Abduljaleel Abdulbaker,*[80] an objection was raised to an affidavit on the ground that the jurat appeared separately on its own. Waki J (as he then was) held that the affidavit was not defective.

The confusion caused by the inconsistencies of the decisions referred to above is manifest. The Courts' approach to the defective affidavit has been anything but consistent or predictable. Some judges will strike out affidavits summarily merely because the jurat does not contain such details as the place and/or date where and when the affidavit was made. Others will save the situation by granting leave to file another affidavit to remedy the situation. Yet others will decline to go by technicalities and save the so-called defective affidavits. These inconsistencies leave legal practitioners and their clients in a most undesirable position, uncertain as to how the court might decide on any of the issues concerned. It is submitted in this regard that logically, substantive justice is to be preferred to cosmetic ``justice" which is dictated by technical and procedural concerns only, sacrificing substance in the process. As was so neatly put by Justice Ringera, as he then was in *Microsoft Corporation –vs- Mitsumi Computer Garage Limited and Another*[81]

> ``Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to falter or choke it"

Most defects in litigation are curable and usually, a suitable award as to costs serves to assuage the innocent party, whilst at the same time ensuring that substantive justice is meted out to all the parties concerned. As was observed by Bowen, L.J in the case of *Copper –vs- Smith:-*

> "I have found in my experience that there is one panacea which heals every sore in litigation and that it costs. I have seldom, if ever, been unfortunate enough to come across an instance where a party has made a

[80] High Court Civil Case No 5 of 2000
[81] HCCC No. 810 of 2001

mistake in his pleadings which has put the other side to such a disadvantage that it cannot be cured by the Application of the healing medicine."[82]

The above observation was adopted and followed by Justice Visram, as he then was, in the case of *Richard Kuloba –vs- James Ochieng Oduol*[83]

In the matter of Ni Kanini Farm Limited,[84] the company sought orders that the petition be struck as it was an abuse of the court process. This is because the petition was filed in court on May 19, 1998, while the verifying affidavit was sworn on May 4, 1998 contrary to rule 25 of the winding up Rules which requires the verifying affidavit to be filed not later than four days of filing the petition. The company also attacked the petition on the ground that it was not served as stipulated by the rules. Justice Moijo Ole Keiwua (as he then was), in striking out the petition for being defective held that:-

``I am aware that under Rule 202 of the winding up Rules, I shall not pay too much attention and undue attention to matters of formal defects and technicalities, as it is only matters that may lead to substantial injustice to the other side that I have to pay attention to and consider. Bearing this provision in mind, I am of the considered view that the cumulative effect of the non compliance with the Companies (winding up) Rules has constituted substantial injustice to the Respondent company, that I ought to accede to its application and strike the petition out with costs to the Respondent."

In Re City Cabanas Limited,[85] the same judge, seized of almost similar circumstances as the previous case had a different view. The company made an application to court seeking an order that the petition be struck out. The application was based on the ground that there had been no compliance with the rules as to verification of the petition by the petitioner and that the petition as drawn and filed was misconceived, incompetent and fatally defective. The judge declined to strike out the petition and had this to say:-

``.....Allegations of such abuse and of the petition being fundamentally flawed were more generalized than specific. I am fully aware of the provision of Rule

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[82] (1884) 26 Ch.D. 700
[83] HCCC No. 1 of 2001, Ruling given on 27th November, 2001
[84] Winding up Cause 19 of 1998
[85] [1999] LLR 2400 (CCK)

202 (1) of the Companies (winding-up) Rules whereby formal defects do not invalidate proceedings under the act or the rules unless the court is of the view that substantial injustice would be caused by the defect or irregularity and that such injustice cannot be remedied by any order of the court".

The foregoing conflicting decisions on similar issues, by the same judge, serve to illustrate the force and importance of judicial discretion in deciding cases. The Judge is certainly entitled to exercise his discretion as he deems fit having regard to the material before him and the applicable law. It is submitted, however, that even as they exercise their discretion, unfettered or otherwise, judges have a duty to ensure consistency and uniformity.

Further complications in the realm of Verifying Affidavits were introduced by Legal Notice No. 36 of 2000 which brought in an amendment, namely Order VII rule 1(2) which required the Plaintiff to verify under oath as to the correctness of the averments contained in the plaint. Rule 1 (3) provided that the court may on its own motion or on the application of the defendant order to be struck out any plaint which does not comply with the aforesaid requirement.

As might be expected, defendants took full advantage of the newly introduced rule 1 (2) and (3) and numerous applications were filed urging various courts to strike out plaints for alleged non-compliance with the said rules. Both the High Court and the Court of Appeal had occasion to deal with such applications, but not with any measure of consistency or uniformity. In *Carlos Santos –vs- Ndamper & Others,*[86] the Court of Appeal (Kwach, Tunoi and Shah, JJA), held in a ruling delivered on 9th October, 1998 that it would not condone a violation or flouting of the Civil Procedure Rules. The Court of Appeal relied on its earlier decision in *Provincial Insurance Company –vs- Morde Kai Mwanga Nandwa*[87] in which it had held that ``this Court will not allow any party to flout the rules of procedure". Ultimately, the three Judges of Appeal in an unanimous decision found that the non-compliance complained of in the *Carlos Santos* case ``is a violation

[86] Civil Appeal No. 218 of 1998 (unreported)
[87] Civil Appeal No. 179 of 1995, unreported

we cannot condone. We are under a duty to deal with it at once so that the authority of the courts is not undermined by anyone"

In another ruling delivered on 4th June, 1999, the same Court of Appeal [Kwach, Tunoi and Lakha, JJA) took a similar position, enforcing rules of procedure with uncompromising strictness and firmness. The learned judges of appeal held, *inter, alia*, that:-

> ``The rules are designed to facilitate justice and further its ends. They are not a thing designed to trip people up. They are not too technical. The Law Society of Kenya is adequately represented in the rules committee. But, due to rampant inefficiency, negligence, dishonesty, lack of diligence and general disregard for professional ethics on the part of the majority of advocates in this country, the rules are abhorred. The result is that the standards of advocacy have in the recent past considerably fallen"

The Judges further observed that ``*Unless the Rules, the hand maids of justice are observed, the administration of justice in this country will be eroded. This court will uphold the rules*".

Apart from the Court of Appeal, the High Court itself had been quite zealous in enforcing the requirements of rule 1(2) of Order VII of the Civil Procedure Rules as regards verification of plaints. In a great number of cases,[88] judges of the High Court had struck out offending affidavits, and therefore the accompanying plaints, on the basis that the requirements of the rule had not been met.

The absence of consonance and predictability on the issue by the High Court and the Court of Appeal was compounded beyond measure by the Court of Appeal decision [Tunoi, Bosire and Okubasu JJA] in *Josephat Kipchirchir Sigilai –vs- Gotab Sanik Enterprises Ltd & Others.*[89]. This was an Appeal against a decision by Etyang, J (as he then was) who had struck out a verifying affidavit, and therefore the plaint, for non-compliance with the requirements of rule 1(2) of Order VII.

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[88] For example, Ringera, J in National Bank of Kenya Limited –vs- James S. Kinyanjui, Milimani HCCC No. 201 of 2001, Onyango Otieno, J in Thande –vs- Housing Finance Company of Kenya Ltd [2001] KLR 608, and in Koinange –vs- Kipkoriri & Others [2001] KLR 307, and Kariuki GBM, J in Mohammed Olunga Oduor –vs- The Mumias Outgrowers Co. Ltd [2006] eKLR

[89] Civil Appeal (Eldoret) No. 98 of 2003

On appeal the issue was whether the Court of Appeal should affirm and uphold the long line of cases, both by itself and the High Court, which had enforced with strictness, compliance with procedural rules, or depart therefrom. Even without the benefit of a five-judge bench, the Court proceeded to reverse its earlier sentiments and holdings on procedural rules. In one breath, the Court recognised that there had been various conflicting decisions by the High Court on the issue, speculated as to the intention of the rules committee in passing the amendment embodied in rule 1 (2), acknowledged that no memorandum of objects had been published to give ``*some inkling as to the mischief the introduction of the sub-rule was intended to cure*" and ultimately found that the obvious non-compliance with rule 1 (2) was a mere irregularity which could be cured. In the words of the Court:-

> ``There are conflicting decisions of the superior court on this issue. We do not consider it necessary to go into them because of the view we have taken that the intention of the rules committee appears to us to have been to prevent plaintiffs from evasive and obscure pleadings, to prevent parties filing frivolous suits and also to obviate a multiplicity of suits. We think an omission to fully comply with the provision is a mere irregularity which, except in very clear cases, may be cured".

It is submitted that whilst the Court of Appeal's attempt at settling the much vexed issue of verifying affidavits under rule 1(2) is commendable, the same does leave a number of questions answered. Those questions include the basis for the speculative rationale advanced by the court as to why the amendment was introduced in the first place; whether judicial pronouncement should fill in gaps left by statute (the court itself having observed that the rule ``*raises fundamental and monumental issues, and we suggest that it should be looked at afresh");* and why, for the first time, English law (the White Book, 2003) was being applied and preferred to resolve an issue which was specifically and directly covered by a local statute.

The foregoing illustrates that whereas judicial consistency and predictability should be desired, the manner of achieving the same should be well coordinated and have due regard to existing laws and established practice.

As far as the contest between substantive justice and technical justice is concerned, the former has recently received a major boost from substantial statutory enactments, beginning with the Constitution itself which now binds and enjoins courts of law to apply the law and to dispense justice without undue regard to technicalities.[90] Reference has also been made to the newly introduced sections 1A and 1B of the Civil Procedure Act[91] which frown on any technical considerations standing in the way of achieving the overriding objective which is to deliver substantive justice in an expeditious, proportionate and affordable manner. Similar provisions were effected by amendment of the Appellate Jurisdiction Act,[92] which amendments brought in sections 3A and 3B which have virtually identical wording of the sections 1A and 1B of the Civil Procedure Rules. Similarly, the Court of Appeal Rules were similarly amended and the same are intended to be applied in such manner as shall reflect the ethos of the parent Act. Further the Supreme Court Rules, 2011,[93] have reinforced the same approach by providing as follows:-

> Rule 3 (2)``The overriding objective of these Rules is to ensure that the court is accessible, fair and efficient"
>
> Rule 3(4)``The court shall interpret and apply these Rules without undue regard to procedural technicalities"
>
> Rule 3(5) "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the court."

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[90] Article 159(2) of the Constitution, 2010

[91] Supra, Note No. 55

[92] Chapter 9, Laws of Kenya, as amended by Act No 6 of 2009.

[93] Promulgated pursuant to Article 163(8) of the Constitution, 2010 and the Supreme Court Act, No. 7 of 2011.

CONCLUSION

The picture that emerges from the foregoing discussion is that all too often there is an absence of consistency and uniformity in the various decisions handed down by the High Court and the Court of Appeal on diverse issues. It is submitted that the first and foremost consideration ought to be unstinting fidelity to the law as it stands, a keen sense of justice and fair play and an endeavour to observe the doctrine of *stare decisis* in relation to decisions handed down. It is submitted that if due regard is given to these critical factors, then the courts' decisions will be, by and large lawful, just and consistent with decisions handed down by other courts. In this regard, for example, the issue as to whether an advocate should sign the statutory demand under section 220 (a) of the Act or the winding up petition itself should not arise at all. The law generally recognizes certain persons as authorized agents of litigants, advocates being amongst them, and pleadings or documents should therefore never be challenged on the ground that the same are signed by an advocates on behalf of his client. Claims of lack of authority on the part of the Advocate are, of course, a separate issue which would be dealt with accordingly.

Similarly, the ``just and equitable" rule ought to be given fair, practical and commercially sensible consideration. The articles of association are part of the constitutive documents of any company and due regard must always be accorded to the same. They exist for a purpose and ordinarily the same should bind all the parties thereto. On the other hand, the court of equity will not be deaf or blind to allegations of fraud and other improprieties which would ordinarily warrant an order for the winding up of the Company. However, the Companies Act at section 222(2) is explicit that even if sufficient basis for the winding up of the company is established, the Court ought not to grant the same if there is an alternative remedy. Observance with these clear guidelines should render the law a user-friendly tool in the hands of business people whose commercial interests it is intended to serve; with the courts acting as fair, consistent and predictable arbiters of disputes as and when they arise.

Ultimately, if the overriding objective of all legal proceedings is recognised as the need to deliver substantive and meaningful justice to the citizenry, and to resolve their differences in a fair, consistent, conclusive and predictable manner, many of the conflicts and contradictions highlighted in this study can be easily avoided.

In the next chapter, the study will consider a number of best practices which the Kenyan judiciary ought to consider adopting in furtherance of the doctrine of judicial precedent. The countries selected for this purpose are the commonwealth countries of the United Kingdom, India and Australia. The study will consider some of those practices adopted by the respective judiciaries of those countries and recommend that the same be emulated by Kenyan courts.

CHAPTER FOUR

BEST PRACTICES IN *STARE DECISIS*

4.0 INTRODUCTION

A consideration of best practices in a number of selected commonwealth countries would provide useful guidelines as to how the doctrine of *stare decisis* might be better followed in Kenyan courts. In this regard, the study has selected three countries, namely, the United Kingdom, India and Australia. These countries are commonwealth jurisdictions which adhere to the common law legal systems.

4.1 THE UNITED KINGDOM

The legal system in the United Kingdom is common law based, with the Judiciary interpreting statutes passed by Parliament, and following its own precedents. The doctrine of precedent plays a crucial role in the English legal system because common law is an important source of law in the English legal system as opposed to the European legal system, which is based on legal models and theories.

A number of features of the English judicial system assist in enhancing the administration of justice and in some instances, in facilitating adherence to the doctrine of precedent. The first of these features is a comprehensive and established system of law reporting. The Incorporated Council of Law Reporting for England and Wales publishes the official law reports for England and Wales. In the same jurisdiction, a private commercial entity, LexisNexis Butterworths, commercially publishes the All England Law Reports covering cases from the court system in England and Wales and whose decisions advocates can cite in court if there is no official report in existence.

The second feature is that of judicial assistants. A law clerk or a judicial assistant is a person who provides assistance to a judge in researching issues before the court and

in writing opinions.[1] In 1997, Lord Justice Otton, with the strong backing of the then Master of the Rolls, Lord Woolf, set up the judicial assistant scheme, loosely based on the US system of law clerks, with the aim of reducing the backlog of litigant-in-person cases at the Court of Appeal.[2]

Judicial assistants play an important and valued role within a legal system. In researching legal topics and lending assistance in whatever way is necessary, they provide a much needed support facility for the judiciary[3]. Judicial assistants carry out extensive research for judges to ensure that judges' decisions are well informed. This is a good practice in enhancing the doctrine of *stare decisis* as judges are able to deliver precedent-setting judgments taking into consideration all matters that were researched on by the judicial assistants. Kenyan judges do not have judicial assistants and from the number of cases they deal with, it is of paramount importance that they should have the assistance of law clerks or judicial assistants so as to enhance and advance the course of justice.

The third feature and which, in effect, amounts to departure from the strict principles of the doctrine of precedent, is judicial activism. According, to *Merriam Webster's Dictionary of Law*, judicial activism is defined as ``the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent."[4] According to *Black's Law Dictionary*, judicial activism is "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion

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[1] Coonan, Genevieve, T*he Role of Judicial Assistants*, [2006] Judicial Institute Studies Journal, Judicial Studies Institute, Dublin 2006, 169

[2] Ibid page 180

[3]Ibid page 171

[4] Merriam-Webster, *Merriam-Webster's Dictionary of Law, Merriam Webster, Springfield,* MA 1996, page 270

that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."[5]

Whilst the positive attributes of *stare decisis* are easy to appreciate, the study observes that judicial activism on the part of the judges is not only healthy but necessary as and when the need arises. Members of legislative assemblies and the parliament are frequently swayed and driven by local issues, which may spell disaster for the rest of the nation, when seen from a dispassionate, detached perspective. Similarly, ministers, particularly when supported by a brute majority of the ruling caucus, may introduce legislation that purportedly protects national interests but covertly aims at curbing minority rights.

The judiciary's role is that of an ever-vigilant watchdog, not only to correct when an error is committed, but also to foresee and forestall potentially harmful developments. In such cases, as members of a committed judiciary as well as ordinary rightful citizens of a country, the Judges must proactively jump into the fray and warn parliament or the government not to proceed with a certain course of action.

In such situations, if the judiciary waits long until someone files a petition demanding judicial intervention and review, it may prove too late when rectification may become cumbersome and expensive. Instead, from a nationalistic point of view the judiciary should volunteer to let the lawmakers realise their dangerous course and its consequences and nip their attempts in the bud. Prevention is always better than cure.

There are at least two types of situations in which the Court takes on an activist posture and either assumes a legislative role or attempts to directly undertake governance.[6] The first is where gaps and ambiguities exist in the law or where the full protection of fundamental rights warrants enunciation of a new policy or extension of an

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[5] Bryan A. Garner, *Black's Law Dictionary, 8th Edition.* West Group, Eagan Minnesota 1999, page 862

[6] Chopra Pran (ed), *The Supreme Court versus the Constitution, A Challenge to Federalism:* Sage Publications, New Delhi, 2006, page 66

existing policy in conformity with the constitution scheme and the international obligations of the state.

In *Fitzpatrick v Sterling Housing Association Limited,*[7] the House of Lords, by majority, held that a same-sex partner was a member of the family of the deceased for the purposes of the Rents Act. This entailed an interpretation of parliament's language entitling the partner to succeed to his deceased partner's entitlements. Twenty years earlier a judge would have given a different meaning to "family". The case demonstrates the role that judges play in interpreting legislation justly, so as to avoid discrimination contrary to contemporary perceptions of human dignity and equality before the law. This is a proper example of judicial activism by the House of Lords.

The fourth feature is that the highest judicial organ in the United Kingdom, the House of Lords is not bound by its own decisions and it can depart from the same if the justice of the particular case so demands. This has not always been the case but over time, judicial influence has prevailed and freed the House of Lords from the fetters of its past decisions if the circumstances of a particular case so warrants. This flexibility, obviously a departure from the strict requirements of the doctrine of precedent, is deemed to be practical and sensible as it would be imprudent for the highest judicial organ in any country to fetter itself so much that it cannot rise to the occasion when new situations demand new approaches and new solutions.

In 1948 Lord Wright suggested that the House of Lords should have the same power of reviewing its own decisions as the Supreme Court of the United States.[8] Lord Wright's views could be accepted completely so that legislation could provide that House of Lords precedents are persuasive, not binding, in that House. Soon thereafter, this was accomplished in Israel, where legislation was enacted to provide that: "A precedent established by the Supreme Court binds every court, except the Supreme Court.[9] In England, the momentum picked up in succeeding years with several judges suggesting

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[7][1997] 4 All E.R. 991

[8] (1943) 8 Camb.L.J. 144. See also Lord Wright's remarks in (1950) 13 M.L.R. at page 23.

[9] Section 33 (b) of the Israeli Courts Law 5717 of 1957.

that it would be desirable for the House of Lords to be able to review its previous decisions.[10]

In *London Transport Executive v. Betts*[11] Lord Denning, in a dissenting judgment, refused to follow a previous decision of the House of Lords and stated:

> "It seems to me that when a particular precedent even of your Lordships' House comes into conflict with a fundamental principle, also of your Lordships' House, then the fundamental principle must prevail. This must at least be true when, on the one hand, the particular precedent leads to absurdity or injustice and, on the other hand, the fundamental principle leads to consistency and fairness. It would, I think, be a great mistake to cling too closely to particular precedents at the expense of fundamental principle."[12]

Finally, the position that the House of Lords was not bound by its own previous decision was settled by the practice statement published by Lord Justice Gardiner LC in 1966.[13] It is submitted that the non-binding nature of House of Lords decisions on that highest judicial body in the United Kingdom stands to reason and its rationale is easy to appreciate. There is merit in maintaining flexibility at the pinnacle of any country's judiciary so that should new situations demand new approaches and new perceptions, the highest court in the land can rise to the occasion and decide accordingly. There should not be such rigidity at that highest level of judicial interpretation as shuts out fresh thinking as dictated by changing trends and circumstances.

In Kenya, the position is the same, with the Supreme Court not being bound by its own decisions.[14] The rationale for this is all too clear by now, the challenge- to that highest

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[10] Dworkin, Gerald, *Stare Decisis in the House of Lords.* The Modern Law Review, Vol. 25, No. 2, Blackwell Publishing, Oxford March, 1962, pages 163-178
[11] [1958] 2 All E.R, pages 636-655
[12] Ibid, at page 655
[13] Supra, chapter 2, note No. 16
[14] Article 163(7) of the Constitution, 2010.

court in the land being to exhibit innovative, yet fair and sensible, ways of resolving new situations that present themselves as society develops and evolves.

4.2 INDIA

Law reporting is central to the Indian judicial system. India promotes the doctrine of *stare decisis* by having various private and public authorised law reports. The Supreme Court Reports (SCR) are the official reporter for Supreme Court decisions. In addition, some private reporters have been authorised to publish the Court's decisions. These include the Indian Supreme Court Law Reporter (ISCLR), All India Reporter (AIR), Supreme Court Cases (SCC), Indian Law Reports (ILR), Supreme Court Almanac (SCA) and Judgments Today (JT).

The practice of citing unreported decisions has led to the publication of a large number of private reports. The unusual delay in publication of official reports and the incompleteness of the official reports made the private reports thrive, resulting in a number of law reports in India being published by non-official agencies on a commercial basis. India took into consideration the competing needs of the general public and the legal profession. The general public has an interest in a system which provides access to the law in its broadest sense. The legal profession has an interest in a system which provides access to a selection of authoritative cases that have legal significance, and which enables legal research to be undertaken effectively and efficiently. Only a very limited selection of cases is included in the authorised reports. The selection is by lawyers which means that cases that do not fit the "legally-significant criteria", may nonetheless be of general interest to members of the public.

This is a practice that should be emulated in Kenya as it ensures that there are numerous decisions from which judges can draw, thus ensuring that their decisions are current, well informed and consistent with previous decisions.

Apart from a well established system of case reporting, India has made research for judges easier by ensuring that academic and legal journals are easily accessible. Research articles published in various law reports and academic journals contain valuable information as they are written after comprehensive research on the respective subjects with which they deal. SUPLIB is a database of legal articles published in about 200 foreign and Indian law reports subscribed to by the Indian Supreme Court library. Presently, this database consists of more than 12,000 articles. Immediately after receipt of a journal in the library, important articles are identified, indexed, and entered in this database under all possible subject headings. This database is very useful for the library staff for identifying the articles needed by the Judges on a particular subject and is one of the most used databases in the Supreme Court Judges library.[15] This is a good practice as it ensures that judges carry out extensive research from a number of sources before rendering their decisions, thereby enhancing justice.

The availability of statutory materials is another key feature of the Indian judicial system. Statutory materials such as Bills, Acts, joint committee reports, select committee reports, law commission reports, parliamentary and assembly debates, rules, by-laws and schemes are among the most important and sought-after materials in any law library. The Legislative Database is a database for central government Acts including amendments, rules, Bills, and all subordinate legislations relating to central as well as state Acts. This database is very useful for tracing the complete legislative history of any particular central or state Act. All the amendments in Acts, rules, schemes and by-laws framed under any particular enactment could be readily identified and retrieved with the help of their citations/sources given in this database.

As shown elsewhere in this study, there may be legitimate justification for departure from the strict dictates of the doctrine of precedent, particularly when the court is faced with novel issues of law or where the law on a particular point is indeterminate.

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[15] Dr. Rakesh Kumar Srivastasa, *A Guide to India's Legal Research and Legal System*, *http://www.nyulawglobal.org/globalex/India_Legal_Research*

The Indian courts provide good examples where there has been such departure whose ultimate objective is to secure logical and sensible solutions to the issues before the court.

Judicial activism in India has played a major role in protecting the rights and freedoms of individuals, as guaranteed under the constitution. After the landmark decision in the *Maneka Gandhi v Union of India and Anr*[16] the court extended the protection of Article 21 to legislative action, holding that any law laying down a procedure must be just, fair and reasonable, and effectively reading due process into Article 21. Article 21 of the Indian Constitution prevents the encroachment of life or personal liberty by the State except in accordance with the procedure established by law. In the same case, the Supreme Court also ruled that "life" under Article 21 meant more than a mere "animal existence"; it would include the right to live with human dignity and all other aspects which made life "meaningful, complete and worth living". Through decisions such as this, Indian courts have assumed an activist posture and come forward to the rescue of aggrieved citizens. After this landmark decision, the judiciary has in a number of cases interpreted the constitutional provision in its wider possible meaning to protect basic civil liberties and fundamental rights.

For instance, in *Kesavananda Bharati v The State of Kerala and Others*[17] all the judges of the bench opined that Parliament had the power to amend any or all provisions of the Constitution, including those relating to fundamental rights. The majority were of the view that the power of amendment under Article 368 of the Indian Constitution was subject to certain implied and inherent limitations. It was held that in the exercise of amending power, the Parliament cannot amend the basic structure or framework of the Constitution. It was also held that individual freedom secured to citizens was a basic feature of the Constitution, and could not be altered. The judgment also invalidated the second part of Article 31-C introduced by the twenty-fifth Amendment, which excluded jurisdiction of the courts to enquire whether law protected under that Article gave effect

[16] AIR 1978 SC 597
[17] AIR 1973 SC 1461

to the policy of securing directive principles mentioned therein. This was a path-breaking judgment which gave birth to the doctrine of basic structure. It was this judgment that saved the country when the then Prime Minister of India, Indira Gandhi sought to amend the Constitution so that the courts could not challenge the grounds of her election and to make sure that her election could not be termed void. Such judgments are few and far between and require members of the bench to be very strong-willed when faced with executive interference to ensure that justice is done. It is submitted that these are bold and positive decisions well worth emulation by Kenyan courts.

The importance of dissenting judgements was discussed in detail in the English case of *Smith v. Central Asbestos Company Limited*[18] (also called the Dodd's case), and later in the case of *In Re Harper v. NCB*[19]. In the Dodds case, Lord Denning stated that:-

> "We can only rely upon the reasoning which the majority relied upon to deliver the judgment. We cannot use the reasoning of the minority, because it must be wrong, as they have come to the wrong judgment".

The reason behind this is that, a dissenting judgment, valuable and important though it may be, cannot count as part of the ratio, for it played no part in the court's majority reaching their decision. This opinion of Lord Denning has been greatly criticised. India adopts a different principle regarding the importance of dissenting judgments. Article 145 of the Indian Constitution clearly gives judges the power to the power to differ from the majority and deliver their own judgment, while a number of cases through the years have established that although dissenting judgments are not binding upon the court, they have great persuasive value.

4.3 **AUSTRALIA**

The most significant formal change to the application of precedent over the past thirty years in Australia derives from the changing status of English judicial decisions in

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[18] (1973) AC 518
[19] (1974) 2 WLR 775

Australian courts.[20] Until the 1970s and 1980s the Judicial Committee of the Privy Council was the final court of appeal for Australia in most areas of the law. It operated at the apex of the Australian legal system.[21]As such, in respect of any legal principle essential to the case, the rules established by decisions of the Privy Council were binding upon all courts, federal, State and Territory, throughout Australia.

This position changed because of the severance of formal legal and constitutional ties with the Privy Council. The membership by the United Kingdom of the Council of Europe and the European Union, and the increasing influence of European law on the development of English law, are bound to diminish further the role of English precedent in the future development of Australian law. This process can already be seen in the diminished citation of English legal decisions in the High Court and other Australian courts. Australian law now depends, virtually exclusively,[22] upon the decisions of Australian lawmakers and courts and the expression, application and development of Australian precedent, with the High Court of Australia as the uncontested apex of the nation's judicial system and hence as the primary source of binding legal precedent applicable throughout the country.

Australia, in advancing the doctrine of precedent, has resorted to publication of law reports in various States. In each jurisdiction there is one series of authorised reports approved by the judiciary, the government and/or the official law reporting council for that jurisdiction. In some jurisdictions, and in some areas of law across jurisdictions, there are also unauthorised series of reports.[23] Authorised reports are reviewed rigorously prior to publication and in the main contain decisions which elucidate general principles or points of law. Unauthorised reports are generally faster to publish because they do not

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[20] As late as 1975, the High Court of Australia emphasised the desirability of following even non-binding English judicial authority. See *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 341

[21] Australian Constitution, s.74.

[22] T Blackshield, M Coper and G Williams (eds), The Oxford Companion to the High Court of Australia, Oxford University Press, Great Clarendon Street, 2001, at page 551

[23]See, for example, http://www.nswlr.com.au/nswlr-and-the-courts

go through the same process of review. If cases appear in both authorised and unauthorised series, the courts prefer - or in some jurisdictions require - citations from authorised reports.

The New South Wales Supreme Court has recently begun to provide electronic access to all of its judgments via the Internet using LawLink,[24] the Attorney General's Department web site, and AustLII,[25] which is funded by grants from the Australian Research Council, the Law Foundation of New South Wales, the Council for Aboriginal Reconciliation, the Department of Foreign Affairs and Trade and other bodies.

Australian courts and tribunals have now adopted a neutral citation standard for case law. The format provides a naming system that does not depend on the publication of the case in a law report. Most cases are now published on AustLII using neutral citation.[26] This new system, which was originally adopted by the New South Wales High Court, can be used to identify a judgment, regardless of whether it is in paper or electronic form. For those judgments to which it applies, the citation sources the judgment to the court from which it originated, rather than a series of reports. Having a neutral citation for all cases reported in the print and electronic format aids in the advancement of *stare decisis* as judges have a huge pool of precedent on which to base their judgments. This is clearly a good practice that Kenyan courts can adopt in an effort to advance the doctrine of *stare decisis.*

The Australian debate concerning the application of precedent takes place in the context of a broader debate about the judicial method. This is the debate between the merits of "strict and complete legalism" and "judicial restraint" as against what critics call "judicial activism" and defenders describe as proper "judicial creativity"[27] The doctrine of strict

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[24] www.**lawlink**.nsw.gov.au

[25] www.**austlii**.edu.au/

[26] Mowbray A, Greenleaf G and Chung P, "A Uniform Approach for Vendor and Media Neutral Citation – the Australian Experience" *Citations Workshop,* University of Edinburgh, Scotland, 2000.

[27] M D Kirby, "Judicial Activism: *Power Without Responsibility? No, Appropriate Activism Conforming to Duty" Melbourne University Law Review,* Melbourne, 2006, 30.

legalism was expressed by Sir Owen Dixon on the occasion of his swearing in as Chief Justice of Australia in well known words.

".....close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safer guide to judicial decisions in great conflict than a strict and complete legalism"[28]

However, the "judicial activist" or "judicial realist" accepts a wider role for judges in making the law. This approach acknowledges a greater ambit for judicial discretion and flexibility in a common law system by accepting that enduring community values and policy choices should be expressly acknowledged when judges are formulating legal rules. Examples of Australian decisions that have been criticized,[29]as the product of so-called "judicial activism", include the development of an implied constitutional right to freedom of political communication and the acceptance of the effective right of an indigent person to legal representation in a trial for a serious criminal offence as an essential element of the right to a fair trial.[30] In that case, the issue that arose for determination by the High Court of Australia was whether legal representation of a person accused of a serious offence is essential to a fair trial, the established position prior thereto being that the common law of Australia does not recognize the right of an accused person to be provided with counsel at public expense. Departing from the beaten path, the court, after a comprehensive analysis of the pertinent law and decided cases, ultimately found that the applicant was entitled to succeed because his trial miscarried by virtue of the trial judge's failure to stay or adjourn the trial until arrangements were made for counsel to appear at public expense for the applicant at the trial with the consequence that, in all the circumstances of the case, he was deprived of his right to a fair trial and of a real chance of acquittal.

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[28] .....Swearing in of Sir Owen Dixon as Chief Justice (1951) 85 CLR xi, per Dixon CJ at xiv

[29] .....J D Heydon, "Judicial Activism and the Death of the Rule of Law" 23 Australian Bar Review 110, Lexis nexis publishing , United Kingdom 2003, page 110.

[30] Dietrich v The Queen (1992) 177 CLR 292.

CONCLUSION

The best practices captured above provide useful hints as to the steps which Kenyan courts ought to take to enhance their adherence to the doctrine of *stare decis*, a corner-stone of the rule of law and a basic tool in the administration of justice. Similarly, there are practical hints as to when, and how, courts may depart from the beaten path of precedent when the justice of a particular case so demands. Law reports play a crucial role in placing before the courts all such relevant and current material as would assist the court in arriving at just and consistent decisions. Decisions made in ignorance or error of current law are a blemish on any judiciary and must be avoided at all costs. Judicial officers ordinarily have heavy case loads and it would therefore be useful to facilitate them by providing the necessary resources by way of personnel to assist them and those materials, be they statutes, subsidiary legislation, reported cases, journals and textbooks, as would enable them to make informed, current and consistent decisions. Judicial activism has its place in suitable circumstances and where the judiciary, upon due evaluation of all pertinent factors, decides that its intervention is necessary to safeguard fundamental values and principles, then it should not hesitate in so intervening. The Judiciary, however, must at such times proceed cautiously, bearing in mind that the primary role of enacting laws belongs to the legislature and that the judiciary's primary role is to interpret and enforce those laws.

In the best practices considered in the three selected commonwealth countries, the role of technology in aiding the course of justice has become apparent. We have seen the employment of technology in effective and efficient law reporting, making the latest decisions and new developments in law available to the judges, legal practitioners and the public at large. This is obviously a critical factor in the administration of justice and it is a practice that Kenya would be well advised to emulate. Fortunately, recent

developments in the Kenyan legal scene[31] point to a growing recognition of the role of technology in the administration of justice, a trend which should be encouraged and supported.

In the following final Chapter, the study will summarise the various conclusions reached in the study and also address possible solutions to the serious problem of judicial inconsistency and unpredictability. In addition, the Chapter will advance recommendations as to how the problem might be addressed and hopefully resolved.

[31] For example, Rule 3(3) of the Supreme Court Rules, 2011, section 1B(1) (C) of the Civil Procedure Act, Chapter 21 Laws of Kenya and section 3B (1) (d) of the Appellate Jurisdiction Act, chapter 9 Laws of Kenya.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 CONCLUSIONS

In the preceding chapters of this study, the meaning and rationale of the doctrine of *stare decisis* has been considered, underlining the desirability of abiding by precedent. The origins of the doctrine have been discussed and the development of the doctrine, in England and Kenya, respectively, has been traced. The importance of the doctrine, and the benefits to be derived from adherence thereto, have also been dealt with. It has been demonstrated how observance of the doctrine would ensure certainty in the law, promote uniformity and consistency in judicial decisions, and assist lawyers and their clients in predicting outcomes of the cases which go before the courts. This has a direct and significant effect on the national economy and in attracting direct foreign investment.

Further, the doctrine ensures impartiality and transparency in judicial decision-making, thereby avoiding judicial whim and arbitrariness. The doctrine has also been shown as offering opportunities for the development of the law and the evolution of jurisprudence in a much more practical and timely manner than Parliament.

Ultimately, it has been demonstrated that the doctrine of *stare decisis* enhances the respect and esteem with which the law is perceived by citizens, thus promoting acceptance and enforcement of court decision. The course of justice is much advanced in such circumstances and the rule of law is thereby strengthened.

The analysis carried out on selected decisions of the High Court and Court of Appeal of Kenya confirms that there is a considerable prevalence of inconsistent, often conflicting, decisions handed down on a diverse range of cases.

Until recently when the new Constitution was promulgated,[1] the Court of Appeal was the highest court in the land and as such, its decisions would have been expected to be consistent and uniform, if only to give guidance to the courts below. Regrettably, however, the desired consistency has not always been achieved, meaning that in turn, that court was not always predictable in its decisions.

The High Court has its own measure of inconsistent decisions, often-times attributable to the mixed signals sent to it by the Court of Appeal. But even on its own, the High Court has all too often made decisions which breach the doctrine of *stare decisis,* thereby undermining the credibility and predictability which those decisions should command.

Best practices adopted in three selected commonwealth countries, namely, the United Kingdom, India and Australia have been considered. The same include comprehensive systems of law reporting, assistance extended to judicial officer in research pertinent to relevant material and judicial activism in suitable cases. Technological advances should be exploited in the administration of justice and judicial capacity enhanced through continuous learning and training. Those best practices, if adopted, would certainly promote adherence to the doctrine of *stare decisis,* thereby advancing the course of justice and rule of law.

5.1 RECOMMENDATIONS

One of the remedies to the malaise highlighted in chapter 3 of this study is to develop a continuous monitoring, preservation and publication of judicial decisions. A comprehensive and well coordinated system of law reporting should therefore be a core feature of the Kenyan judicial system. It is no coincidence that the largest number of inconsistent, conflicting decisions were handed down at a time when law reporting in Kenya had become moribund and there was practically

[1] On 27th August, 2010

no means of collecting and disseminating decisions emanating from the various Courts.[2]

It is commendable, however, that by the National Council for Law Reporting Act, 1994 the National Council for Law Reporting [NCLR] was established and charged with the specific mandate of law reporting.[3] Section 21 of the Act stipulates that the Kenyan Law Reports are the official law reports of the Republic of Kenya which may be cited in proceedings in all courts of Kenya.

In material published in its official website,[4] the NCLR lists three benefits of law reporting, namely, firstly, that it offers opportunities for the development of the law and the evolution of jurisprudence which cannot be provided by parliament as courts can more quickly lay down new principles, or extend old ones, to meet novel circumstances. Secondly, law reporting ensures certainty in law, meaning that people are able to order their affairs and come to settlements with a certain measure of confidence when the outcome of litigation can be predicted by referring to previous decisions of the Courts. Finally, law reporting is a tool of impartiality and transparency for judicial officers.

The NCLR has come of age in the recent past, offering a wide range of law reporting services[5] which the legal fraternity continues to benefit from. However, this is only the beginning and sustained and determined efforts must continue to be

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[2] For the duration of the previous political regime, spanning over a period of over twenty years, there was no official, organized or coordinated system of law reporting. There were, however, scattered, uncoordinated private efforts at compilation of cases decided in particular subjects of the law but in the absence of a coherent and integrated approach, the process was largely haphazard and made little, if any impact in the harmonisation of judicial decision-making.

[3] According to Section 3 of the Act, the NCLR was given the exclusive mandate of "publication of the reports to be known as the Kenyan Law Reports which shall contain judgments, rulings and opinions of the superior Courts of record and also undertake such other publications as in the opinion of the Council are reasonably related to or connected with the preparation and publication of the Kenya Law Reports"

[4] http//www.kenyalaw.org/About NCLR

[5] Apart from the Kenya Law Reports, the NCLR also publishes the Kenya Law Review Journal and since its launch in October, 2004, the NCLR website (www.kenyalaw.org) has developed a range of diverse products which are available online free of cost including the entire set of the laws of Kenya, the Hansard i.e verbatim records of the proceedings of Parliament, Bills pending in Parliament, Legal and Gazette Notices, and the daily cause list for the High Court. Other services provided by the NCLR are the Bench Research Hotline, Case Track and Digital Recording and transcription of court proceedings, Wide Area Network to connect the NCLR in Nairobi with High Court stations in remote areas and publication of the complete Laws of Kenya on CD-ROM.

made to ensure that judicial decisions, as and when handed down from any court in the country, particularly by the High Court, the Court of Appeal and the Supreme Court are promptly reported and disseminated. The latter, dissemination and actual availability of reported material to the intended users is clearly a challenge. In a country such as Kenya where literacy levels are still relatively low, the penetration of information technology is low and poverty is rampant,[6] the practical difficulties of reaching the intended beneficiaries of the collected and published material can be well appreciated. Those users, however, particularly legal scholars, practitioners and judicial officers should aid the initiative by making efforts to source the reported material and to use it accordingly in the advancement of the country's jurisprudence.

Legal reforms which would facilitate due compliance with the doctrine of judicial precedent also ought to be undertaken. In this regard, the amendment of those statutory provisions, some of which are considered in chapter 3 of this study, which engender confusion, misunderstanding and inconsistency through unclear and unambiguous provisions ought to be streamlined. There would then be little room left for judicial latitude in interpreting statute in ways that naturally conflict and even contradict.

Amendment of the law so as to permit admission in court proceeding of copies of documents generated electronically would also be of great assistance. A great deal of research material, for example that put out by the NCLR is to be found online[7] and an express provision allowing production of such material in court proceedings, subject of course to such reasonable verification measures as may be stipulated, would aid substantially the process of researching, retrieving

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[6] As per an International Commission of Jurists (ICJ) study: An *evaluation of Status of Access* to *information in Kenya* ICJ, December, 2006, Chapter2 pages 21-28

[7] As per *The Bench Bulletin,* Issue II: January – March, 2010 pages 21-22 according to which Kenya Law Reports (KLR) joined the Free Access to Law Movement (FALM) in 2007 through which free online access to legal information such as case law and legislation is provided. KLR can also be found on social networking websites such as Facebook and Youtube.

and placing before the courts material that would assist the courts to arrive at well-informed and consistent decisions.

Reforms to the judiciary could also promote adherence to the *stare decisis* doctrine. A well qualified, experienced, competent, upright and honest judiciary which cherishes the ideals of fairness, impartiality, equality, certainty and predictability of the law would clearly be key to due observance of judicial precedent. This does imply undertaking a major overhaul of the Kenyan judicial system as we know it today so that key components thereof are reformed and brought to desired standards. The areas that would necessarily have to be addressed in this regard are several[8] and the same include the mode of appointment of judicial officers, their qualifications, judicial tenure, their removal, their terms of engagement and so on. The under-pinning of all this would be the overriding necessity for judicial independence as the bulwark against arbitrariness, vested interest and oppression both by the state and fellow citizens.

It is noted that the new Constitution contains far-reaching reforms to the judiciary. The same include radical changes to the Judicial Service Commission[9] and those provisions which relate to the appointment, remuneration and removal of Judges. Article 173 of the Constitution establishes the Judiciary Fund, a new provision which would enhance judicial independence as an independent source of judicial funding from the Consolidated Fund would free the judiciary from dependence on the executive arm of government. Special mention must be made of the vetting of Judges and Magistrates Act No. 2 of 2011 which established the vetting of Judges and Magistrates Board. The Board has undertaken the most radical and far-reaching vetting exercise aimed at ridding the judiciary of officials

[8] As per an ICJ study, *Best Practice Guide for Judicial Independence*, 2007, pages 1-12
[9] Articles 171 and 172 of the Constitution

deemed to be incompetent, corrupt and otherwise unfit to hold those sensitive positions as dispensers of justice.[10]

Inter-linked with judicial reforms is the need for continuous and comprehensive training of those persons who man the justice administration system. Beginning with judicial officers, it is critical that they be subjected to training so as to keep them updated on current trends and practices in the law. Their judicial tools must never be left to go rusty. As a former Chief Justice of the country has observed:-

> ``nothing depends on clearer principles than that those who judge over us should know of the trade, profession or discipline which governs the subject matter of our dispute much more than the man on the Kibera bus!".[11]

The need for judicial training is universal,[12] there being recognition that a current, up-to-date judiciary will better promote a more consistent, uniform and predictable body of case law.

The establishment of the Judicial Training Institute (JTI) in Nairobi effective September, 2008 is a critical step in this direction. The expectation is that the trainings to be extended to judicial officials will equip them to be better decision makers, with more and more of those decisions being characterized by consistency and certainty.

Lawyer, too, should not be left out. Their tool of trade, namely an up-to-date knowledge of the law, must not be left to go blunt. The Law Society of Kenya (LSK) is to be commended for the mandatory Continuing Legal Education

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[10] As at June, 2012, four out of the nine judges of the Court of Appeal had been found by the Board to be unfit to hold office and the Board had embarked on vetting the next level of judges, namely all the High Court Judges. Magistrates would be next before the Board winds up its mandate.

[11] Keynote address by the former Chief Justice, Hon. Mr. Justice Evan Gicheru at the official opening of the Judicial Training Institute on 16th September, 2008, as reported in JTI Bulletin, April, 2009, page ii)

[12] Prof Peter Russell of University of Toronto, cited in "Final Appeal, Decision making in Canadian Courts of Appeal" by Ian Greene, Carl Baar et al, 1998 observed: "Judges do sometimes have profound influence on public policy, and because such influence is unavoidable [there is need for] more democratic approaches to selection of judges, more effective training programs and better mechanisms for ensuring judicial accountability".

(CLE) programme through which lawyers are required to keep re-educating and updating themselves. A knowledgeable, up-to-date bar would assist greatly in drawing the court's attention to the relevant, current law and decisions on any particular issue, thus enhancing the doctrine of judicial precedent.

The public, too, should be interested in knowing what the current law is, the law being so pervasive in its application and effect that every person will interact with the law in one way or another at different times. The law is now widely available, even is social networking networks as shown herein-above and members of the public should take advantage and keep themselves apprised of the current law and court decisions arising therefrom. For the financially challenged citizens who may not afford to pay for legal consultations, there are now a number of institutions[13]which render legal notice free of cost.

Finally, it is submitted that the study has proved its stated hypothesis to the effect that unless judicial officers who hand down various decisions are current and up-to-date in their appreciation of the applicable law and cases decided previously by their judicial colleague, the doctrine of judicial precedent or *stare decisis* will continue to be breached and undermined.

The study has demonstrated that a body of case law characterized by intrinsic fairness and justice, in which consistency and uniformity is evident and whose hallmarks are certainty and predictability, is critical to the rule of law. Absent such a body of case law and the rule of law falls under siege and is seriously threatened; for then the populace loses respect for the law as a fair and impartial arbiter of their disputes and they result to undesirable options, including self-help measures. This can only lead to violence and a breakdown in law and orders, thus sounding the death knell for any rule of law or civilized and orderly conduct of human affairs.

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[13] Such as Kituo cha Sheria, the Federation of Women Lawyers Kenya (FIDA), the Children Rights Advisory Documentation and Legal Centre (CRADLE), the Centre for Law and Research International (CLARION), the Kenya Chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), Oscar Foundation Free Legal Aid Clinic Kenya (OFFLACK) and Refugee Consortium of Kenya (RCK)

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